



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

B
A
44





THE
PRACTICE
OF THE
COURTS OF KING'S BENCH,
AND
COMMON PLEAS,

IN PERSONAL ACTIONS, AND EJECTMENT.

TO WHICH ARE ADDED,
THE LAW AND PRACTICE OF EXTENTS,

AND THE
RULES OF COURT, AND MODERN DECISIONS,

IN THE
Exchequer of Pleas.

BY WILLIAM TIDD, ESQ.

IN TWO VOLUMES.
VOL. II.

THIRD AMERICAN, FROM THE NINTH LONDON EDITION,
WITH NOTES OF RECENT ENGLISH STATUTES AND DECISIONS,
BY FRANCIS J. TROUBAT.

FOURTH AMERICAN EDITION, WITH ADDITIONAL NOTES,
BY ASA I. FISH.

PHILADELPHIA:
ROBERT H. SMALL, LAW BOOKSELLER,
NO. 21 SOUTH SIXTH STREET.
1856.

Entered according to the act of Congress, in the year 1856, by

ROBERT H. SMALL,

In the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

* CHAPTER XXX.

Of MAKING UP, and ENTERING the ISSUE: and of the ROLLS of the COURTS; with the MANNER of BRINGING in, and DOCKETING them.

AN *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant; (a) but it more commonly signifies, the entry of the allegations or pleadings themselves: And it is either in *law*, upon a demurrer; or in *fact*, which is triable by the court, upon *nul tiel record*, or by a jury, upon pleadings concluding to the country.

An issue in fact triable by a jury, is either such as arises in the course of an adverse suit, or is directed by some court of law or equity, or framed under the authority of an act of parliament, for the trial of a disputed question; which latter is called a *feigned issue*. (b) Two or more issues are sometimes joined in the same cause; as where the defendant demurs and pleads to different counts of a declaration, or the plaintiff demurs and replies to different pleas, or where, in an action against two or more defendants, they appear by different attorneys, and sever in pleading. (c) In these cases there is only one trial of the issues in fact; and the jury who try them assess the damages for the whole cause of action, or against all the defendants, *absolutely*, if the other issues have already been determined in favour of the plaintiff, or otherwise *conditionally*, provided judgment shall be afterwards given for him.

The issue, as dependent on the pleadings, is *general* or *special*. In the King's Bench, in every action wherein the defendant pleads the general issue, or demurs generally to the declaration; on a plea of *plene administravit*, by an executor or administrator; in *debt*, when the defendant pleads a special *non est factum*, *comperuit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or recognizance; in *covenant*, when his plea concludes to the country; and in *trespass*, when he pleads *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment; the issue is made up by the attorneys; who likewise make up all issues and demurrers upon writs of error, *scire facias*, and *audita querela*, and repleaders, or other matters formerly entered of record. (d) And upon a *general demurrer to a plea of *nil debet*, in an action of debt on [*718] bond, the demurrer book is made up by the plaintiff's attorney, and not by the clerk of the papers. (aa) In all other cases, both by bill and original, in the King's Bench, the issue, or, as it is commonly termed, the *paper book*, or, upon an issue in law, the *demurrer book*, is made up by the clerk of the papers; (bb) who charges the plaintiff's attorney *eight pence*

(a) Co. Lit. 126, a.

(c) See further, as to *issues*, 1 Chit. Pl. 4 Ed. 565, &c.

(d) R. T. 12 W. III. a. K. B.

(aa) 5 Barn. & Cres. 766. 8 Dowl. & Ryl. 609, S. C.

(bb) Say. Rep. 97; but see, 2 Str. 1266.

(b) Append. Chap. XXX. § 57.

per folio for the whole book, and *four pence per folio* for all the pleadings subsequent to the declaration, of which the plaintiff's attorney furnishes him with a copy. In the Common Pleas, the issue is in all cases made up by the plaintiff's attorney, or, in country causes, by his agent.

Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue, in the King's Bench, could not have been made up, till a four-day rule had been given and expired, to rejoin, or join in demurrer; but the practice in this respect is now altered, it being a rule in that court, that "in all special pleadings, when the plaintiff take issue upon the defendant's pleading, or traverses the same, or demurs, so as the defendant is not let in to allege any new matter, the plaintiff may make up the paper-book, without giving a rule to rejoin;" (c) but otherwise a rule must be given for that purpose, unless the defendant be bound, by a judge's order, to rejoin *gratis*. If the plaintiff will not make up the paper-book, it may be made up by the defendant: and a rule may it seems be given thereon by the master for the plaintiff to enter the issue of record; or in default thereof, that it may be entered by the defendant: (d) But the more usual way is, for the defendant to rule the plaintiff to enter the issue; and, on his neglecting to do so, to sign a judgment of *non pros*.

In the Common Pleas, when the defendant's plea concludes to the country, the plaintiff may add the *similiter* forthwith, and make up and deliver the issue, with notice of trial; but when the plaintiff's replication concludes to the country, he cannot regularly make up the issue, without previously giving a four-day rule to rejoin, unless the defendant be under terms of rejoining *gratis*. It is not unusual, however, for the plaintiff's attorney, in such case, to make up the issue forthwith, and deliver it with notice of trial: And where he had added a *similiter* to the replication, and delivered the issue, with notice of trial, to the defendant's attorney, who accepted it, but did not pay the issue money, in consequence of which the plaintiff's attorney signed judgment, without giving a rule to rejoin, the court held the judgment to be regular, after consulting the prothonotary, who said that the practice was not to give a rule to rejoin, where the defendant had accepted the issue, with a *similiter* added by the plaintiff, and not struck it out. (e) In this case therefore, if the defendant's attorney be not under terms of rejoining *gratis*, and do not mean to accept the issue, he should [*719] immediately strike out the *similiter*, and return the issue, with a notice indorsed thereon that he has struck it out, and will file a demurrer in the office, or that he will accept it as a replication only, and insist on a four-day rule to rejoin. (a)

The issue contains an entry or transcript of the declaration, and other subsequent pleadings; (b) and, in actions by *bill* in the King's Bench, should be made up of the term in which it is joined. (cc) And it is prefaced in that court, with a *memorandum*, stating the exhibiting of the bill, and that there are pledges for the prosecution of it. (dd) The reason for a *memorandum* is, that proceedings by bill were formerly considered as the bye business of the court: (ee) And it varies in four cases; first, when the issue is of the same

(c) R. T. 1 Geo. II. a. K. B. And for the practice on the *crown* side, see 6 East, 586.

(d) R. E. 11 W. III. (a), K. B.

(e) 1 H. Blac. 254. But note, this was before the rule, by which judgment is not allowed to be signed for non-payment of the issue money.

(a) Append. Chap. XXX. § 39.

(b) *Id.* § 1, &c.

(cc) 3 East, 204.

(dd) Append. Chap. XXX. § 1, &c.

(ee) Gilb. C. P. 47.

term in which the cause of action accrued; secondly, when it is of a term subsequent to the cause of action; but of the same term with the declaration; thirdly, when it is of a term subsequent to the declaration, and within four terms after: fourthly, when it is more than four terms after the declaration. In the first case, the *memorandum* is special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued: In the second case, it states the bill to have been exhibited on the first day of the term in which the declaration was delivered: In the third and fourth cases, it pursues the fact, but with this difference, that in the third case, the term of exhibiting the bill is referred to as *last* part, and in the fourth, as in a certain year of the king's reign.(f)

When the proceedings are entered, in the King's Bench, with a general *memorandum*, which relates to the first day of term, and the cause of action appears in *evidence* to have arisen after the first day of term, the plaintiff may produce the writ in order to show that it was really sued out subsequent to the cause of action;(g) or his attorney may, it seems, produce the draft of the bill, and prove that it was in fact filed on a subsequent day.(h) And where, in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough; for the plaintiff need not give any evidence on this plea, unless to aggravate damages; and the court will not nonsuit him; because it is amenable by a new bill.(i) In like manner, when the defendant pleads *plene administravit*.(k) or a *tender*.(l) &c., he has a right to set up the fact against the fictitious relation, in order to support his plea.

*After verdict, a general *memorandum*, by which the cause of [*720] action appears to have arisen after the action brought, has been allowed to be rectified, by an examination of the real time of filing the bill,(a) or of the bail,(b) to which the bill relates; but the better and more usual way is to file a *new* bill, and amend by it:(c) and this may be done even in a *qui tam* action.(d) In a modern case,(e) the court gave the plaintiff leave to amend the bill filed, by inserting a special *memorandum* of the day of filing the same, and to carry in a new roll agreeable to the amended bill, and to make the transcript conformable to the new roll, even after a writ of error brought, on payment of costs: But such an amendment cannot we have seen,(ff) be made, after the proceedings are entered on record, without leave of the court. And, after obtaining the paper book from the clerk of the papers, with a *memorandum* of the term generally, corresponding with the declaration, neither party has a right to amend it, by making a special *memorandum* of the day of the delivery of the declaration, without an order for leave to amend.(gg) It is now settled, however, that to entitle the declara-

(f) 1 Wms. Saund. 5 Ed. 40, (1). 2 Wms. Saund. 5 Ed. 1, (1).

(g) 1 Blac. Rep. 312. 3 Bur. 1241, S. O. *Pugh v. Martin*, H. 24 Geo. III. K. B. 1 Bos. & Pul. 263. Forrest, 110. 5 Esp. Rep. 163. 2 Wms. Saund. 5 Ed. 1, (1). 2 Chit. Rep. 271. 5 Barn. & Ald. 847. 1 Dowl. & Ry. 488, S. O. (h) 3 Stark. Ni. Pri. 138.

(i) 2 Syr. 1271. 1 Wils. 171, S. O.

(k) 1 Sid. 432.

(l) Cowp. 456. 5 Barn. & Cres. 149. 7 Dowl. & Ry. 729, S. O. *Ante*, 146; but see 4 Esp. Rep. 72.

(a) 1 Sid. 373. 2 Keb. 368, S. O. 1 Vent. 135. 2 Lev. 13. 2 Keb. 790, S. O.; and see Carth. 114. 1 Show. 147, S. O.

(b) 1 Sid. 432. 2 Lev. 176. T. Jon. 87. 3 Keb. 693, S. O.; but see Carth. 113.

(c) 1 Str. 583. 2 Str. 1151, 1162. 1 Wils. 104; but see 6 Durnf. & East, 129.

(d) *Lloyd v. Skutt*, T. 23 Geo. III. K. B.

(e) 7 Durnf. & East, 474. 1 East, 135, S. O. cited.

(ff) *Ante*, 322.

(gg) 1 Chit. Rep. 336; and see 1 Maule & Sel. 232. 1 Chit. Rep. 45. 2 Barn. & Ald. 472. 1 Chit. Rep. 277, S. O. *Ante*, 715.

tion of a term generally is no error, though the cause of action be stated therein to have accrued after the first day of the term. *(hh)*

If the plea be of a term subsequent to the declaration, the issue by *bill*, in the King's Bench, contains the entry of an imparlance; *(i)* which we have seen, is general or special. When a special imparlance is necessary, to enable the defendant to plead any particular plea, it must be entered in the issue; but otherwise the entry of a general imparlance is sufficient: And it is not necessary to enter more than one imparlance, though several terms have intervened between the declaration and the plea. *(j)* When the replication is of a term subsequent to the plea, it is usual for the clerk of the papers to insert continuances in the paper-book; but this does not seem to be necessary. *(k)*

There is no *imparlance* roll in the King's Bench: But in the Common Pleas, when an *original* is actually issued in the first instance, (which however is seldom the case,) or the proceedings are by *bill* filed against an attorney, or member of the house of commons, if the defendant be entitled to an imparlance, it is entered on a roll, called the *imparlance* roll, which is made up of the term the original writ is returnable, or bill filed; and contains an entry of the declaration or bill, and of the defendant's appearance thereto, with the prayer and grant of an imparlance. *(l)* And

where the issue on a proceeding by *bill* of *Easter* term, was made [*721] up and *delivered of *Trinity* term, and the whole proceedings appeared thereby to be of that term, without any continuance from *Easter* to *Trinity*, or any *alias prout patet*, which was conceived to be irregular, the court overruled the objection; and thought the continuance, or *alias prout patet*, was not necessary in the issue paper, but might be entered at any time upon the roll. *(a)*

After the declaration, or imparlance, if there be one, the *pleadings* are next copied, in their proper order, beginning each with a new line; and under them, the clerk of the papers is directed to write the names of the counsel by whom they are signed, as well on the part of the plaintiff, as of the defendant. *(b)* Formerly, if there had been a plea in abatement, upon which a *respondeat ouster* was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement, and judgment of *respondeat ouster*, in making up the issue, as well as the plea in chief; *(c)* and where they were entered in the plea roll, but omitted in the record of *nisi prius*, the court on that ground arrested the judgment, the record of *nisi prius* not appearing to be in the same cause. *(d)* Afterwards a rule was made in the King's Bench, that for the future, a copy of the plea in chief only should be delivered and paid for; *(e)* and agreeable thereto, where the plea in abatement and judgment of *repondeat ouster* were omitted in the plea roll, the court held the omission to be immaterial; particularly, as the defendant had accepted and paid for the issue. *(f)*

An issue in fact by *bill*, in the King's Bench, when triable by the country, concludes with the award of the *venire facias*, or process to bring in

(hh) 10 Moore, 194. 2 Bing. 469. 1 M'Clel. & Y. 202, S. C. *Ante*, 426.

(i) Append. Chap. XXX. § 2.

(k) 1 Co. 75.

(j) See further as to the *imparlance* roll, Bac. Abr. tit. *Amendment*, D. 2 Gilb. C. P. 42, 3, 4. Boote's Suit at Law, last edition, p. 72, 91, &c. 1 Wils. 183.

(a) 2 Wils. 203; and see Append. Chap. XXX. § 53.

(b) R. E. 18 Car. II. K. B.

(c) 7 Mod. 51. 1 Salk. 5.

(d) 1 Ld. Raym. 329. Carth. 447. 5 Mod. 399. 12 Mod. 189, S. C.

(e) 7 Mod. 51. 1 Salk. 5.

(f) 3 Bar. 1682.

the jury, as follows: "*Therefore let a jury thereupon come, before our lord the king, at Westminster, on*" (the return of the writ, being a day certain,) "*by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.;*"(g) *the same day is given to the parties aforesaid, at the same place.*"(h) If there are several issues in fact, triable by the country, the conclusion is as follows: "*Therefore as well to try this issue, as the said other issue, or issues, above joined between the parties aforesaid, let a jury thereupon come, &c.*"(i) Or, if there are several defendants, who plead separately, the award of the *venire facias* states between whom the different issues are joined, thus: "*Therefore as well to try this issue, as the said other issue, or issues, above joined between the said A. B. and C. D. &c. let a jury thereupon come, &c.*"(k)

In an action of *debt* on bond, conditioned for the performance of covenants, when breaches are assigned in the declaration or replication, or suggested after an issue of *non est factum*, &c., on the statute 8 & 9 W. III. c. 11, § 8, the *venire* should be awarded specially, to try the issue; and *in case it be found for the plaintiff, to inquire of the truth of [*722] the breaches and assess the damages sustained thereby.(a) So, where the defendant in *trespass* pleads to part of the declaration, and lets judgment go by default as to the residue, or pleads to the declaration, and lets judgment go by default as to a new assignment, there is a special award of the *venire*, as well to try the issue, as to assess the damages on occasion of the residue of the trespass, or of the trespasses newly assigned.(b) And so, if there are several defendants, some of whom plead, and others let judgment go by default, the *venire* is awarded as well to try the issues, as to assess the damages against the latter defendants.(c) In these cases, as it is a rule that the jury who try the issues shall assess the whole of the damages,(d) there is an entry of an *unica taxatio*, as follows: "*And because it is convenient and necessary that there be but one taxation of damages in this suit, therefore let such taxation, and the giving of judgment in this behalf, be stayed, until the trial and determination of the said issue, or issues, above joined between the parties aforesaid; or (where one defendant lets judgment go by default,) between the said A. B. and the said E. F.*" (the other defendant).(e)

If there be several issues, in fact and in law,(f) or several issues in fact, one triable by the country, and another by the court on *nul tiel record*,(gg) the award of the *venire* is, as well to try the former, as to assess the damages upon the latter; *absolutely*, if the issues in law, or of fact triable by the court, have been already determined in favour of the plaintiff, or otherwise *conditionally*, in case judgment shall be thereupon given for him.(hh) In these cases, if the issues in law or of fact triable by the court are first determined, and the plaintiff is in consequence entitled to damages upon part of the declaration, or against one of several defendants, there is an entry of an *unica taxatio*, to postpone the assessment of such damages, until the trial of the issues in fact: But if the issues in fact are first tried,

(g) For the explanation of these *et ceteras*, see the writ of *venire facias*, *post*, Chap. XXXV.

(A) Append. Chap. XXX. § 1

(i) *Id.* § 8.

(k) *Id.* § 9.

(A) Append. Chap. XXX. § 10.

(b) *Id.* § 11.

(c) *Id.* § 12, 13; and see 2 Bos. & Pul. 163.

(d) 11 Co. 5, &c.

(e) Append. Chap. XXX. § 12.

(f) *Id.* § 16.

(gg) *Id.* § 14, 15.

(hh) 1 Wms. Saund. 5 Ed. 109, (1). 2 Wms. Saund. 5 Ed. 300, (3). *Id.* a. (4).

an *unica taxatio* is unnecessary; for in such case, the jury who try these issues, will of course assess the damages.⁽ⁱⁱ⁾

In actions by *original* in the King's Bench, the clerk of the papers makes up the issue or paper book, of the same term with the declaration;^(k) or it may be entitled to the term issue is joined, as in actions by *bill*:^(l) and it begins with a copy of the declaration, without a *memorandum*:^(m) And it is not necessary to enter imparlances, if the pleadings are of a subsequent term.⁽ⁿ⁾ This however is sometimes done; and imparlances are commonly entered by the clerk of the papers, between the plea and the replication,^(o)

where they are of different terms, in making up the issue by original, as well as by bill. The award of the *venire facias* by *original is as follows: "*Therefore it is commanded to the sheriff, that he cause to come before our lord the king, on (a general return day,) wheresoever he shall than be in England, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.*"^(a) But where the sheriff is a party, or interested in the cause, the *venire* is awarded to the coroner;^(b) or if there be two sheriffs, and one of them is interested, to the other;^(c) and if the coroner, as well as the sheriff, be interested, the *venire* is awarded to two persons, appointed by the master or prothonotaries, called *elisors*.^(d) When the venue is laid in a county *palatine*, instead of the common award of a *venire facias*, there is a special award of a *mittimus* to the justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back again to the court above.^(e) At what time the practice originated, of sending records by *mittimus* into counties palatine, is not quite clear; but so late as the 11 W. III. the court expressly said, they could not order a trial in the county palatine of *Lancaster*, and therefore they sent the record to be tried in *Yorkshire*, as being the next county.^(f) In the Common Pleas, the issue is entitled of the term in which it is joined;^(g) and made up in the same manner as in the King's Bench by original. In the Exchequer, the issue begins with the *placita*, or style of the court, of the term it is joined: And when the issue is of the same term with the declaration, it merely contains a transcript of the pleadings, after the *placita*, beginning each with a new line, without any *memorandum* or imparlance: but when the issue is of a subsequent term, a *memorandum* is prefixed to the declaration, and the entry of an imparlance to the plea.^(h)

When a fair and impartial, or at least a satisfactory trial cannot be had in the county where the action is laid, the court must be moved, on an affidavit of the circumstances, for leave to enter a suggestion on the roll, with a

(ii) 2 Wms. Saund. 5 Ed. 300, a. (4).

(k) Imp. K. B. 10 Ed. 530.

(l) *Id.* (a). 279.

(m) Append. Chap. XXX. § 3.

(n) *Id.* § 4.

(o) Append. Chap. XXX. § 3.

(a) 2 Lil. P. R. 124. Append. Chap. XXX. § 30, 31.

(b) 5 Maule & Sel. 144. Append. Chap. XXX. § 28, 9.

(c) 3 East, 141. Barnes, 466. Append. Chap. XXX. § 32.

(d) Append. Chap. XXX. § 17, &c.

(e) 12 Mod. 313; and see Say. Rep. 47. 1 Durnf. & East, 368. It is justly supposed by Mr. Manning, in his Practice of the Exchequer, p. 298, (z), that the practice of sending records, by *mittimus*, into counties palatine, was adopted in the King's Bench, from the ancient practice of the Exchequer: and he refers to Bro. Abr. tit. *Trialles*, pl. 39, 58, 130, 133, 146, from which it appears, that this mode of trial is much more ancient than the reign of William the Third.

(g) Imp. C. P. 7 Ed. 310. Append. Chap. XXX. § 5.

(h) Append. Chap. XXX. § 6.

nient desire, in order to have the trial in the next adjoining county: (i) And as the suggestion in such case is not traversable, the court will see that it is necessary, before they give leave to enter it. (k) The cause in that case must be tried in the next adjoining county, even though it be a county palatine. (l) And, by the statute 38 Geo. III. c. 52, § 1, it is enacted, that "in every action, whether the same be transitory or local, *which [*724] shall be prosecuted or depending in any of his majesty's courts of record at *Westminster*, and in every indictment removed into his majesty's court of King's Bench by writ of *certiorari*, and in every information filed by his majesty's attorney or solicitor-general, or by the leave of the court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of *mandamus*, if the venue in such action, indictment or information, be laid in the county of any city or town corporate in *England*, or if such writ of *mandamus* be directed to any person or persons, body politic or corporate, the court in which such action, indictment, information or other proceeding shall be depending, may, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, direct the issues joined in such action, indictment, information or other proceeding, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and award proper writs of *venire* and *distringas* accordingly, if the court shall think proper." (a) The cities of *London* and *Westminster*, *Bristol* and *Chester*, and the borough of *Southwark*, are excepted out of this statute. (b) When the venue is laid in a county different from that wherein the cause of action arose, the practice, on the above statute, is first to change the venue into the latter county, on the usual affidavit, and then to move for a writ of *venire facias*, to have the cause tried by the jury of the adjoining county. (c) But though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county, where the venue is laid. (d) On an indictment for a misdemeanor, the court of King's Bench will permit a suggestion to be entered on record, for the purpose of carrying the trial into an adjoining county, when there appears to be a reasonable ground on the affidavits, for believing that a fair and impartial trial cannot be had in the county where the venue is laid; and the suggestion need not state the facts from which such inference is to be drawn: (e) But a *certiorari* was refused, to remove an indictment for murder from *Yorkshire*, in order to have a trial at bar, or in another county, on the ground that the prisoners, who had pleaded to the indictment, could not have a fair and impartial trial in the former county. (f)

When the action is laid in a place where the king's writ of *venire* does not run, as in *Wales*, (g) or *Berwick-upon-Tweed*, (h) &c. it is awarded to

(i) Append. Chap. XXX. § 33.

(k) 3 Bur. 1333. By *Ld. Mansfield* and the court, *E. 23 Geo. III. K. B. Atkinson, qui tam v. Harrey* T. 28 Geo. III. K. B.

(l) 7 Durnf. & East, 735. 1 Durnf. & East, 363, *contra*.

(a) Append. Chap. XXX. § 34. The 12th section of this statute, providing that no indictment shall be removed into the next adjoining county except the person applying for such removal shall enter into a recognizance in 40*l.* for the extra cost, &c. does not not relate to indictments sent by the King's Bench to be tried in the next adjoining county, after a removal thither by *certiorari*. 4 East, 208.

(b) § 10.

(c) 7 Taunt. 385.

(d) 9 East, 296.

(e) 3 Barn. & Ald. 444. (f) 3 Dowl. & Ry. 301.

(g) Append. Chap. XXX. § 35.

(h) 2 Bur. 855. 2 Ken. 519, S. C. 2 Blac. Rep. 1036; and see Append. Chap. XXX. § 36.

the sheriff of the next *English* county, upon a suggestion that the [*725] issue ought *to be tried there. In *Sir Peter Delme's* case, (aa) it was settled, and has ever since been the practice of the court, that if either party would suggest any special matter, about awarding the *venire* out of the common course, he should give a copy of it to the adverse party, and allow him a reasonable time to consider it, before a *nient dedire* is entered. (b) And where there are several plaintiffs or defendants in a personal action, and one of them dies before issue joined, his death should be suggested, in making up the issue; but otherwise it need not be suggested, till the judgment roll is made up. (c)

An issue in *fact*, triable by the *record*, may conclude by praying an inspection of it, if the record be of the *same* court; (d) or, whether it be of the same or a *different* court, the issue may conclude by giving the party pleading a day to produce it. (e) And on an issue in *law*, the demurrer book concludes as follows: "*But because the court of our lord the king now here is not yet advised, what judgment to give of and upon the premises, a day is given to the parties aforesaid, before our said lord the king at Westminster, (if by bill, or, if by original, wheresoever, &c.) on (the day appointed for argument,) to hear judgment thereon, for that the court of our said lord the king now here is not yet advised thereof, &c.*" (f)

In the King's Bench, the *general* issue or *paper* book being made up, is delivered to the defendant's attorney or agent; and if there are several defendants, who appear by different attorneys, a copy should be delivered to each of them. In the margin of the paper book, a conditional rule is given by the clerk of the papers, signifying, that unless the defendant receive the paper book, and return it by a particular day, to be enrolled, a writ of inquiry will issue, or rule for judgment be entered. (g) And the clerk of the papers has no discretion to give a rule to return the paper book in less than *four* days, even though the defendant be under terms to take short notice of trial. (h) If a paper book be made up and delivered in term time, or within *four* days exclusive after term, with a rule given thereon, by the clerk of the papers, for bringing the same to be enrolled, and the defendant's attorney do not, within *four* days after the delivery thereof, bring it back and join with the plaintiff in the special issue or demurrer, or waive his special plea, and give the general issue, or demurrer to any special issue tendered, judgment may be entered and signed, as if no plea had been pleaded. And when a plea is not put in time, so that a paper book may be made up and delivered in term, or within *four* days after, yet if it be made up and delivered within *eight* days after the term, the defendant's attorney [*726] is obliged to receive it, and return it again in *four* *days after the delivery, or judgment may be signed. (a) But if a plea be pleaded in term, or in time after the term, and the paper book be not made up and delivered within *eight* days exclusive after term, if it be an issue to be tried in *London* or *Middlesex*, or a demurrer, the other party is not bound to deliver back the book, till within the first *four* days of the next term; but if it be an issue to be tried at the *assizes*, the defendant's attorney should

(aa) 10 Mod. 198.

(b) 1 Str. 235. Append. Chap. XXX. § 21, &c. And for the nature and effect of a *nient dedire*, see 1 Str. 183.

(c) 1 Bur. 363. Barnes, 469; and see Append. Chap. XXII. § 45. Chap. XXXIX. § 13.

(d) Append. Chap. XXXII. § 2, 4.

(e) *Id.* Chap. XXIX. § 3, 4.

(f) *Hale v. Smallwood*, E. 35 Geo. III. K. B.

(g) *Id.* § 3, 7.

(h) *Id.* Chap. XXX. § 37.

(a) R. T. 1 Geo. II. (a), K. B.

deliver back the book within *four days exclusive*(*bb*) after the delivery thereof, and join in the special issue, or give the general issue, and take notice of trial; or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded.(*c*) And when a paper book is not returned within the four days, the plaintiff's attorney may afterwards refuse to accept it, and sign judgment;(d) but judgment cannot be signed after the paper book is accepted, though it be not returned in due time.

Within the time limited for that purpose, the defendant's attorney or agent either returns the paper book or not; and if returned, he either returns it in the state it was delivered to him, or if he has not been ruled to abide by his plea, he may waive the special pleadings, and give the general issue;(e) or, if the *similiter* to the replication has been added by the plaintiff, he may strike out and demur.(f) In the latter case, the plaintiff having joined in demurrer, a demurrer book is made up by the clerk of the papers, and delivered over to the defendant's attorney; who must return it in twenty-four hours, unless the demurrer be special, and the defendant has not been ruled to abide by his plea, in which case he may still waive his special plea and demurrer, and give the general issue. If the paper book be returned with the general issue, the plaintiff's attorney makes up and delivers the issue afresh, in the common form. In the Common Pleas, there being no paper book, the issue, when made up, is delivered to the defendant's attorney, or, in country causes, to his agent in town.(g)

On the delivery of the issue,(h) or returning the paper book in the King's Bench,(i) the defendant was formerly obliged to pay for copies of the pleadings, except in actions by a pauper,(k) or against an attorney,(l) or prisoner;(m) and in a *qui tam* action, he paid double.(n) This was called issue money; on non-payment of which, the plaintiff might have signed *judgment.(a) But, by a rule of both courts,(b) "no judgment shall be signed for non-payment of issue money; but the same shall remain to be taxed, as part of the costs in the cause:" Which rule is constructed to extend, in the King's Bench, not only to general issues, but also to all special issues, and the paper and demurrer books made up thereon.(cc)

By accepting the issue, or returning the paper book, the defendant's attorney admits it to be properly made up:(dd) And therefore if there be any variance therein from the pleadings delivered, or other irregularity in

(bb) Imp. K. B. 10 Ed. 270, 71; but see R. T. 1 Geo. II. (a), where it is said, that if the paper book be of an issue in *fact*, the four days for keeping it are reckoned *exclusive*; if on a demurrer, or issue in *law*, they are *inclusive*.

(c) R. T. 1 Geo. II. (a), K. B.

(d) Doug. 197. 4 Durnf. & East, 195. 2 Chit. Rep. 242; but see Doug. 67. 1 Durnf. & East, 16, *semb. contra*.

(e) 2 Salk. 515.

(f) For the form of the notice of having struck out the rejoinder, &c., see Append. Chap. XXX. § 38, 9.

(g) Cas. Pr. C. P. 94, 109. Barnes, 251.

(h) R. T. 12 W. III. 7 Mod. 51. Say. Rep. 77. *Wenham v. Tristram*, H. 21 Geo. III. K. B.

(i) 5 Durnf. & East, 400.

(k) *Id.* 509.

(l) Say. Rep. 77.

(m) Cas. Pr. C. P. 35. 2 Wils. 11.

(n) But see 3 Durnf. & East, 137.

(a) Cas. Pr. C. P. 35, 90. Barnes, 239, 243, 263, 275. 2 Blac. Rep. 1098.

(b) R. H. 35 Geo. III. K. B. & C. P. 6 Durnf. & East, 218. 2 H. Blac. *oct. ed.* 551. 1 Bos. & Pul. 292, (b).

(cc) 6 Durnf. & East, 477. R. M. 36 Geo. III. K. B.; and see 1 Bos. & Pul. 292.

(dd) 2 Str. 1131, 1266. Say. Rep. 154. 3 Bur. 1682; and see Barnes, 475. 2 Wils. 160.

making it up, the defendant's attorney or agent, instead of accepting it, should take out a judge's summons, and obtain an order, for setting it right : as he cannot otherwise take advantage of the irregularity, on a motion in arrest of judgment, or for a new trial.(ee)

After issue joined, the plaintiff should enter it on record, and proceed to argument, if an issue in law, or to trial, if an issue in fact : And if he neglect to do so, the defendant in the King's Bench, may compel him by obtaining a rule from the master,(f) on the back of the issue, if delivered, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney. In the Common Pleas, the defendant's attorney should get a side-bar or treasury rule from the secondaries for the plaintiff's attorney to enter the issue on record, within *four* days after notice given,(g) and serve him with a copy thereof. But the defendant cannot give a rule to reply, and enter the issue, in the same term. In the King's Bench, if the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue the same term it is joined, unless notice of trial has been given.(h) In the Common Pleas, when the action is laid in *London* or *Middlesex*, the defendant can in no case give a rule to enter the issue, the same term it is joined, but must stay till the next term :(i) and, in a *country* cause, the plaintiff is no ways bound, in either court, to enter his issue the same term.(k) In the Exchequer, it is said, a defendant may give a rule for the plaintiff to enter his issue, the same term in which it is joined, whether notice of trial has been given or not.(l)

The plaintiff being ruled to enter the issue, in the King's Bench, must enter it, if in *London* or *Middlesex*, and bring the record into the office, within *four* days after notice of the rule : If in the country, before the *continuance* day of that term : otherwise, a *non pros* may be signed, and the defendant shall have his costs.(m) And where one of two defendants in *trespass*, after having pleaded, separately signed a *non pros* for not

[*728] *entering the issue, the court held the judgment to be regular.(a)

But a judgment of *non pros* cannot be regularly signed in that court, unless there be a rule to enter it of the same term in which judgment is signed ;(b) nor after the issue is entered, though it be not entered within the time allowed by the rule :(c) And where it appeared by affidavit, that the plaintiff's attorney had mislaid the papers, the court ordered the defendant's attorney to give him a copy of the issue, the better to enable him to enter it.(d) In the Common Pleas, the plaintiff's attorney must in all cases carry in the roll and docket it, within *four* days after service of the rule to enter the issue, or the defendant's attorney may sign a *non pros* : and the four days are reckoned exclusively of the day of serving the rule ; therefore, if it be served on *Friday*, the plaintiff has all the *Tuesday* following to enter the issue.(e)

It may not be improper in this place, to take a general view of the *rolls*

(ee) 2 Wils. 243; and see 1 Chit. Rep. 277, 8, (a).

(f) Append. Chap. XXX. § 40, 41.

(h) R. M. 4 Ann. (c), K. B.

(k) R. M. 4 Ann. (c), K. B., R. M. 1654, § 21, C. P.

(m) 2 Lil. P. R. 87. R. M. 4 Ann. (c), K. B. Append. Chap. XXX. § 43, 4.

(a) *Philpot v. Muller*, T. 23 Geo. III. K. B.

(c) 1 Durnf. & East, 16; but see 4 Durnf. & East, 195, *semb. contra*.

(d) 1 Str. 414.

(g) *Id.* § 42.

(i) Imp. C. P. 7 Ed. 315.

(l) Man. Ex. Pr. 320.

(b) 1 Maule & Sel. 478.

(e) Barnes, 318.

of the different courts, on which the *issue* and other matters of record are entered; with the *entries* thereon, and by whom, and in what manner they are made; and the time and mode of *bringing* in and *docketing* them.

In the King's Bench, the rolls of the court are divided into *crown* and *plea* rolls: The former contain entries of indictments and informations, with the proceedings thereon; the latter, the proceedings on the *plea* side of the court. There are also on the *crown* side, rolls of *estreats* of *finés* and *amerciements*, &c. The *plea* rolls are delivered out in blank to the attorneys, by a stationer appointed for that purpose by the chief justice; (f) who also provides a skin of parchment, called a *docket*, containing the *numbers* for the rolls of each term, which is kept by the clerk of the judgments till the *essoins* day of the following term, when it is delivered over to the clerk of the treasury: From this docket the numbers are delivered to the attorneys, by whom they are marked, in common figures, at the bottom of each roll.

In the Common Pleas, the rolls are *plea* or *common*: (g) The former relate to pleas of *land*, and contain the entries of proceedings in *real* actions, including common recoveries; the latter are confined to the entries in *personal* and *mixed* actions. These rolls are delivered out in blank, in *files* of *twenty* each, (h) by the clerk of the *essoins*, after having previously **numbered* them with numeral letters, in the old court hand: But [*729] there is this difference between the mode of numbering the rolls in the King's Bench and Common Pleas; that in the former court, there is only one number for each entry, though it be made on several rolls; but in the latter court, each roll is separately numbered. The *plea* rolls in the Common Pleas, are delivered by the clerk of the *essoins* to the clerk of the *recoveries*, the clerk of the *king's silver*, and the *prothonotaries*; the *common* rolls, to the *filacers* and *prothonotaries*. (a) And formerly, it appears that the latter were delivered by the prothonotaries to their clerks only: (b) who had access allowed them for their instruction to the records of the court: (c) but there is now no distinction in this respect between clerks and attorneys. And every attorney or clerk who receives any roll, either *plea* or *common*, from the prothonotaries, is required to sign and set his hand to their book, for the receipt of such roll. (d) Besides the rolls which have been mentioned, there are others delivered out *unnumbered*, in the Common Pleas, to the clerk of the *warrants*: On these are entered the *enrolment* of deeds, &c. which are filed in the bundle of *plea* rolls; and *warrants* of *attorney* in personal and mixed actions, which are filed in the bundle of

(f) N. T. 11 & 12 Geo. II. K. B.

(g) R. H. 8 Car. 1, § 8, R. M. 1654, § 7. R. E. 34 Car. II. reg. 3 R. E. 5 W. & M. reg. 2 R. M. 2 Geo. I. C. P. The term *plea* roll, it will be observed, has various significations: In the King's Bench, we have seen, it means the roll on which proceedings are entered on the *plea* side of the court: But in the Common Pleas, as stated above, it is confined to pleas of *land*, and contains the entries of proceedings in *real* actions; and it is sometimes used, in a more limited sense, to signify the roll on which the *pleadings* are entered, previous to the *issue*.

(h) As to these files, see R. E. 12 Jac. I. § 2. R. M. 1649, reg. 1. § 2, C. P.

(a) R. M. 1649, reg. 1, § 3, 4, C. P. And see R. E. 34 Car. II. reg. 3, C. P. by which the clerk of the *essoins* is not to deliver any *post* rolls, or other rolls of the Common Pleas, to any attorney or clerk of that court, but to the respective prothonotaries, and other officers who have a right to such rolls. But this rule, so far as it respects the *post* rolls, which are now delivered to the attorneys, has fallen into disuse.

(b) R. M. 6 & 7 Eliz. § 3. R. E. 12 Jac. I. R. H. 8 Car. I. R. M. 1649, reg. 1 R. M. 1654, § 5; and see R. T. 21 Car. II. reg. 1, 2. C. P.

(c) R. M. 1654, § 5, C. P.

(d) R. E. 34 Car. II. reg. 3, C. P.

common rolls of that court. There are so long slips or *presses* of parchment, delivered out unnumbered, to the clerk of the *errors* in the King's Bench and Common Pleas; on which are entered the transcript of judgments on writs of error.

In the Exchequer of Pleas, the court not having jurisdiction of *criminal* matters, or *real* actions, there are no *crown* rolls, as in the King's Bench, nor of pleas of *land*, as in the Common Pleas: but the rolls are denominated *plea* or *common*; and are delivered out by the master of the office of pleas, to the attorneys or clerks in court; but they are not numbered, as in the other courts.(e)

Of the *plea* rolls in the King's Bench, the first *twenty*, and of the *common* rolls in the Common Pleas, the first *three hundred*, are reserved for the *filacers*; and are thence called *filacers* rolls: On these are entered recognizances of bail, in actions by *original*, &c. In general, the rolls are denominated, according to the subject-matter of them, the *warrant of attorney* roll;(f) the *process* roll;(g) the *recognizance* roll;(h) the *imparlance* roll;(i) the *plea* roll;(k) the *issue* roll;(l) the *judgment* [*730] roll;(m) the *scire facias* roll;(a) and the roll of proceedings on writs of *error*,(b) and *false judgment*:(b) to which may be added, the rolls of deeds and awards,(c) &c.

The entries on the rolls were formerly made, in the King's Bench, by the clerks of the chief clerk;(d) as, in the Common Pleas, they were made by the clerks of the prothonotaries,(ee) who were called *entering* clerks: but they are now made in both courts by the *attorneys*; and ought to be written in a full fair hand, with a large margin of an inch at least, and a convenient distance at the top for binding up the same, and at the bottom, that the writing be not rubbed out.(ff) In this manner the proceedings may be entered on both sides of the roll, beginning on the back, over against the first line of the first warrant of attorney, and taking care, if possible, to leave a sufficient space at the end for the *committitur*, and entry of satisfaction, &c. If the space left be not sufficient for the subsequent entries, one or more rolls may be added, which are called *riders*, with references at the bottom of the preceding roll. In the Exchequer, the entries are made by the attorneys, or clerks in court.

The rule with regard to bringing in rolls in the King's Bench is, that "every attorney ought to bring them into the office of the clerk of the treasury, fairly engrossed, by the following times, that is to say, the rolls of *Trinity*, *Michaelmas*, and *Hilary* terms, before the *essoin* day of every subsequent term, and the rolls of *Easter*, before the *first* day of *Trinity* term."(gg) And formerly, no roll could have been brought in with a *post*

(e) 4 Inst. 109.

(h) *Ante*, 277, 8.

(l) *Post*, 734.

(a) *Post*, Chap. XLIII.

(c) For a particular account of these rolls, and their contents, see the *Introduction* to the *Practical Forms*.

(d) R. M. 1654, § 14. R. T. 1 Jac. II. R. M. 5 Ann. reg. 1, K. B. And for the times within which the clerks must anciently have accounted with the secondary, in the King's Bench; see R. E. 15. Car. II. reg. 3 R. H. 15 & 16 Car. II. reg. 1. R. T. 20 Car. II. K. B.

(ee) R. E. 12 Jac. I. R. H. 8 Car. I. R. M. 1649, reg. 1. R. M. 1654, § 5, C. P.

(ff) R. H. 1657, K. B. And for the manner of making entries on the rolls in the Common Pleas, see R. E. 12 Jac. I. § 2. R. M. 1649, reg. 1. § 1, 2. R. M. 1654, § 7. R. T. 29 Car. II. reg. 2, C. P.

(gg) R. E. 5 W. & M. reg. 1 M. 9 W. III. T. 10 W. III. M. 5 Ann. reg. 1, K. B.

(f) *Ante*, 96. *Post*, 734.

(i) *Ante*, 720, 21.

(m) *Post*, Chap. XXXIX.

(g) *Ante*, 162.

(k) *Ante*, 728, (g).

(b) *Post*, Chap. XLIV.

terminum, without leave of the court: (h) But this rule is merely directory: and, in a late case, (i) the court would not order a judgment roll to be taken off the file, although it was not carried in for *twenty-four* years after the judgment, which appeared to have been regularly docketed. In order to accommodate the attorneys, the *custos brevium* now usually attends the day but one before every term, to receive and file their rolls: (k) And a roll may be had of a preceding term, as a matter of course, by applying to the clerk of the treasury; or if a roll has not been brought into the treasury in time, it may afterwards be brought in, on paying some small additional fees to the officers of the court. (l)

*In the Common Pleas, by the ancient course and usage of the [*731] court, no attorney or prothonotary's clerk ought to carry the rolls into the country; (a) but ought duly and fairly to enter, and then bring in and docket their rolls in the prothonotary's office, from whence they received the same, in such convenient time as that they may be examined by the prothonotaries, and bound up by the clerk of the essoins, by the essoins day of every subsequent term, *Easter* only excepted. (b) And rules were from time to time made by the court, appointing particular times for the attorneys or clerks to bring their rolls into the prothonotary's office. (c) By the last of these rules, the rolls of *Easter* were to be brought into the prothonotary's office, on or before the first day of *Trinity* term; the rolls of *Trinity* term, on or before *Michaelmas* day; those of *Michaelmas* term, on or before the *sixth* day of *January*; and those of *Hilary* term, *four* days before the feast of *Easter*. (d) But now, by indulgence, the rolls of *Michaelmas* term are taken in and docketed in *Hilary* term, those of *Hilary* in *Easter*, of *Easter* in *Trinity*, and of *Trinity* in *Michaelmas* term; otherwise they must be filed with the clerk of the essoins. (e) And on bringing in their rolls to the prothonotaries, after judgment signed, the attorneys and clerks are ordered at the same time to produce the paper books, whereon such judgments are signed, that so the prothonotaries may better examine the days entered on the margin of the roll of each particular judgment, and see that they agree with the days signed by the prothonotaries in the paper books. (f)

The proceedings being entered on the roll, a *number* should be procured for it, in the King's Bench, from the clerk of the judgments, if it be a roll of the same term, or otherwise from the clerk of the treasury; and the roll being numbered, is *docketed* (g) with the clerk of the judgments, who takes for the entries, after which it is carried in to the clerk of the treasury, by whom it is bound up and kept in the treasury of the court. In the Common Pleas, the rolls are *docketed* with the prothonotaries, on the *docket* roll, or common *docket*: (hh) And when brought in, they are delivered by the pro-

(A) R. E. 9 W. III. K. B. 2 Ld. Raym. 850. 1 Salk. 87. 3 Salk. 116, S. C. 6 Mod. 191.

(i) 4 Barn. & Cres. 388. 6 Dowl. & Ryl. 386, S. C.

(k) R. M. 9 W. III. (a), K. B. 1 Sel. Pr. 2 Ed. 508.

(l) Imp. K. B. 10 Ed. 367; and see 2 Ken. 442. 1 East, 409. 4 Barn. & Cres. 388.

(A) R. E. 12 Jac. I. § 1. R. M. 1649, reg. 1, § 1. R. M. 1654, § 7. R. E. 34 Car. II. reg. 3, C. P.

(b) R. M. 1649, reg. 1, C. P. *in principio*.

(c) R. E. 12 Jac. I. § 2. R. M. 1649, reg. 1, § 2, 3. R. M. 1654, § 7. R. T. 29 Car. II. reg. 5. R. E. 34 Car. II. reg. 3, C. P.

(d) R. E. 34 Car. II. reg. 3, C. P.

(e) Imp. C. P. 7 Ed. 401.

(f) R. T. 29 Car. II. reg. 5, C. P.

(g) For the form of the docket paper, see Append. Chap. XXX. § 55.

(hh) It appears by the prothonotaries' return to a select committee of the House of Com-

thonotaries to the clerk of the essoins, who binds up the same;(i) and is the officer appointed to docket them *alphabetically* under [*732] *the statute 4 & 5 W. & M. c. 20, § 2. And by a rule of court made upon that statute,(a) "the several and respective officers of this court shall deliver in all their rolls of *Trinity*, *Michaelmas* and *Hilary* terms, to the clerk of the essoins, before the essoin day of the several terms following, and their rolls of *Easter* term, on or before the *first* day of *Trinity* term following; and the officer who shall not bring or send in all his rolls of the said several terms, at the times aforesaid, shall pay to the clerk of the essoins for every roll brought in after, twelve pence, according to the ancient practice of this court." By the same rule,(a) "the *plea* rolls of every term shall be brought into the clerk of the essoins, within three weeks after the end of the term following; and in default thereof, there shall be likewise paid to the clerk of the essoins, for every *plea* roll brought in after, twelve pence :"(b) and the prothonotaries, when they bring in their rolls, are to deliver to the clerk of the essoins, an account of the *carets* in writing, with the attorneys' names who took the said rolls out of their office.(c) After the rolls have been brought in, the clerk of the essoins must not part with them : (d) and no alteration or amendment can be made in any roll, or in any writing issuing out of any office of this court, by any attorney or his clerk, or any other person, but only by the officer or his clerk in whose office the same shall be made or entered.(e)

The rolls being docketed and carried in, are bound up in vellum covers, in one or more parts or bundles for each term, and filed numerically by the clerk of the treasury in the King's Bench, or treasury keeper in the Common Pleas; after which they are deposited in presses, or open stages, appropriated for that purpose, in the treasury of the court, or office of pleas in the Exchequer. In the King's Bench, the rolls are preserved in the treasury from the beginning of the reign of *Henry* the sixth: In the Common Pleas, from that of *Henry* the eighth: The earlier rolls, from the year 1195, to the end of the reign of *Henry* the fifth, in the former court, and in the latter from 1199 to the year 1509, are deposited in the Chapter house of *Westminster Abbey*.(f) The recovery rolls, and deeds inrolled, in the reigns of *Henry* the eighth, *Edward* the sixth, and *Philip* and *Mary*, and also from the 1st and 2d to the 24th and 25th of *Elizabeth* both inclusive, are bound up and intermixed with the common rolls in the Common Pleas; but since that time, the *plea* and *common* rolls are kept in distinct bundles. In the Exchequer of Pleas, the rolls are preserved as far back as the reign of *Edward* the first;(g) and are nearly complete from the beginning of the reign of Queen *Elizabeth*. The most ancient of these rolls were formerly

mons, on the public records, dated 26 Feb. 1800, that the *docket* rolls, or *docket* of records at *Westminster*, commence as follows: Those of the chief prothonotary, about the third of *Edward VI.*, those of the 2d prothonotary, in the first of *Henry VIII.*, and those of the 3d prothonotary, in the second of Queen *Elizabeth*.

(i) R. M. 1649, *reg.* 1, § 4. R. M. 1654, § 7, C. P. It seems from the former of these rules, that the rolls were formerly delivered by the prothonotaries to the clerk of the warrants, who delivered them to the clerk of the essoins: but this practice is now disused, at least as to the *common* rolls, which are taken directly from the prothonotaries to the clerk of the essoins.

(a) R. E. 5 W. & M. *reg.* 2, C. P.

(b) *Id. ibid*; and see R. M. 2 Geo. I. C. P.

(c) R. M. 2 Geo. I. C. P.; and see R. M. 1654, § 7. R. E. 34 *Car.* II. *reg.* 3, C. P.

(d) R. M. 1649, *reg.* 1, § 4, C. P.

(e) R. M. 6 & 7 *Eliz.* § 3, C. P.

(f) *Jones' Index to Records*, Pref. xxii.

(g) *Burt. Excheq. in pref.* And for a particular account of these rolls, see *Id.* p. 421, &c. 441, &c.

kept in a passage behind the court of Exchequer at *Westminster*; but they are now deposited in *Westminster* hall. The more modern ones, beginning with the reign of *Charles* *the first, are preserved in [*733] the office of the clerk of the pleas, in *Lincoln's Inn*.(a)

In the King's Bench and Common Pleas, the top or uppermost roll of every bundle is inscribed with the *placita*, or style of the court, of the term it is made up. In the King's Bench, the *placita* begins thus, "Pleas before our lord the king at *Westminster*, of — term," &c. adding to the *crown* rolls these words, "amongst the pleas of the king;" and is witnessed in the name of the chief justice: In the Common Pleas, the *placita* of *plea* rolls, begins as follows, "Pleas of *land* inrolled at *Westminster*, before — (the chief justice,) and his brethren, justices of his majesty's court of Common Bench, of — term," &c.: and the first *plea* roll usually contains an entry of the admission of the officers of the court. The *placita* of *common* rolls in that court begins thus, "Pleas, with the warrants of attorney thereof, enrolled," &c.: and there is, in each court, an inscription on the vellum cover which encloses the bundle, denoting its contents. In the rolls subsequent to that which contains the *placita*, the *term* is written at the top of each entry, in the King's Bench, thus, "As yet of — term," &c.; and is witnessed in the names of the chief justice, and chief clerk; but in the Common Pleas, the term is not mentioned at the top, but written by the prothonotary's clerk, at the bottom of each roll. Formerly it seems that, in the King's Bench, several entries might have been made on the same roll, in different actions, as is still done in the Common Pleas; but now there is a separate roll for each cause. In the Exchequer, the rolls not being numbered, there is a *placita* at the top of each entry, beginning as follows, "Pleas before the barons of the Exchequer at *Westminster*, among the pleas of — term," &c.

The *issue*, in the King's Bench, must always be entered on a roll of the term in which it is joined: Therefore, where the general issue is pleaded of one term, and the *similiter* is not added till the following term, the *issue* must be entered of the term in which the *similiter* is added; and if entered of the term in which the general issue was pleaded, the defendant may sign a judgment of *non pros*.(b) But where, in *assumpsit* on a promissory note, the defendant pleaded *non assumpsit*, and having made up the issue, ruled the plaintiff to enter it, who by mistake entered a plea of *not guilty*, and the defendant thereupon signed judgment of *non pros*; the court held, that the plea entered was substantially the same as the other, and set aside the judgment.(c) In the *Common Pleas, it is likewise [*734] a rule, that "all issues shall be entered of the term they are joined, and not of any other subsequent term; and that the prothonotaries shall not give any license or authority for the entry of any such issues, nor shall the clerk of the essoins deliver out any *post* rolls for the doing thereof, nor the clerk of the treasury permit any such issues to be entered in the trea-

(a) For a more particular account of the rolls and records of the different courts, see the report of a select committee to the House of Commons, on the state of the public records of the kingdom, ordered to be printed in July 1800, p. 112, &c. 119, &c. 233, 4.

(b) *Per Cur. M.* 43 Geo. III. K. B. T. 43 Geo. III. K. B. 3 East, 204.

(c) 2 Barn. & Cres. 562. 4 Dowl. & Ry. 41, S. C.

surey, upon any account whatsoever;"(a) and, by a subsequent rule, "every issue shall be so entered on record, notwithstanding any consent given by the attorneys or their agents on either side to the contrary."(bb)

In order to enter the issue, a roll must be obtained, of the term it is joined, from the stationer appointed to deliver out the rolls in the King's Bench,(cc) or prothonotaries in the Common Pleas; which is called the *issue roll*.(d) This roll is prefaced in the King's Bench, with an entry of the *warrants* of attorney for the plaintiff and defendant, which is said to have been introduced by *Wright* Chief Justice, in the reign of *James* the second;(e) previous to which time the warrants of attorney were entered on a separate roll.(f) In the Common Pleas, the warrants of attorney are made out, of the term issue is joined, on a plain piece of parchment, and filed with the clerk of the warrants;(g) by whom they are entered on distinct rolls, which are bound up in the bundle of *common* rolls in that court.

In practice, however, it is not usual to enter the issue at the full length, if triable by the country, until after the trial, unless the plaintiff be ruled to enter it; but only to make an *incipitur* on the roll,(h) at the time of passing the record of *Nisi Prius*. An *incipitur* however is necessary; it being declared, by rule of court in the King's Bench,(i) that "no record of *Nisi Prius* shall be sealed, or passed at the *Nisi Prius* office, before the issue is fairly entered on record, or an *incipitur* thereof; and such entry, with the record of *Nisi Prius*, first brought to and signed by the secondary." And in the Common Pleas it is a rule, that "the prothonotaries shall not sign any records of *Nisi Prius*, until the issue, or an *incipitur* thereof, shall be fairly entered upon record, and the fees first paid for the entry thereof."(k)

Hitherto we have spoken only of issues made up and entered by the plaintiff: But in actions of *replevin*, *prohibition*, and *quare impedit*, wherein the defendant is considered as an actor, the issue may be made up and entered by the defendant, as well as the plaintiff.(l) And there is a rule of court in the King's Bench,(m) that "if the plaintiff *demur* in law to the defendant's plea, rejoinder, or rebutter, and the defendant join in demurrer, the plaintiff's attorney shall enter the demurrer of record; [*735] *and in default thereof, upon a rule given by the secondary,(aa) it may be entered of record by the defendant's attorney."

Accordingly, if the plaintiff demur, or take issue on the defendant's plea, rejoinder or rebutter, and the defendant in case of a demurrer, join therein, and the plaintiff will not make up the book, and enter it on record, the defendant may, pursuant to this rule, make up the book, and deliver it to the plaintiff, who has a right to enter the issue, at any time before the expiration of the rule given by the secondary: which rule ought to be served on the plaintiff, at the same time the book is delivered to him. If the plaintiff do not enter the issue, the defendant may, at the expiration of the

(a) R. E. 5 W. & M. reg. 1, C. P. Barnes, 328.

(bb) R. H. 11 Geo. I. C. P.

(cc) N. T. 11 & 12 Geo. II. K. B. *Ante*, 728.

(d) Append. Chap. XXX. § 45, &c.

(e) R. E. 4 Jac. II. K. B. *Ante*, 95.

(f) 1 Ld. Raym. 509. 2 Ld. Raym. 895. Carth. 517. 1 Salk. 88.

(g) Append. Chap. XXX. § 50.

(h) *Id.* § 48.

(i) R. M. 5 Ann. reg. 1, K. B.

(k) R. E. 5 W. & M. reg. 1, C. P.; and see R. M. 1654, § 21, C. P.

(l) Append. Chap. XLV. § 80.

(m) R. E. 11 W. III. reg. 1, K. B.

(aa) Append. Chap. XXX. § 41.

rule:(b) and, on an issue triable by the country, give notice of trial by *proviso*:(b) Or, instead of entering the issue himself, the defendant may, it seems, give the plaintiff a four-day rule to enter it; and in default thereof, sign a judgment of *non pros*.(c)

*CHAPTER XXXI.

[*736]

Of ARGUING DEMURRERS.

WHEN the issue in law, upon a demurrer, has been entered on record; either party may move the court for a *concilium*, and proceed to argument.(a)

When there are several issues, in law and in fact, there has been great diversity of opinion upon the question, which of them should be first tried or determined. According to the earlier authorities, if a man demur to part, and take issue on other part, or if the declaration be against two defendants, and one demur, and the other take issue, the courts shall determine which they please first;(bb) though it was reckoned the more orderly way to give judgment first on the demurrer.(bb) In another book it is said, that the issue in fact ought to be first tried; because if this be found for the plaintiff, the jury who try it may assess conditional damages, as to the demurrer.(cc) And according to later cases, where there are several issues, in law and in fact, the determination of the issue in law may be either before or after the trial of the other, at the option of the plaintiff.(d)

But though the plaintiff, in ordinary cases, has a right to marshal his own proceedings, provided he conform to the rules and practice of the court, yet still if the court see that the ends of justice will be better promoted by first determining the question of law on the demurrer, they will postpone the trial of the issue in fact.(e) And accordingly, in a late case, where the plaintiff brought three actions of *trespass* against three several defendants, for different parts which they took in the same transaction; one against the speaker of the House of Commons, who justified under a warrant he had issued, by order of the house, for arresting and committing to the Tower the plaintiff, a member of the house, for a breach of privilege, in publishing a libel upon the house, to which plea the plaintiff demurred; another against the serjeant at arms, who pleaded not guilty, and also justified under the authority of the speaker's warrant, to which the plaintiff replied an excess in the manner of executing the warrant, by a military force, and with improper and unnecessary violence, on which issue was joined to the country; and the third against the constable of the Tower, who received and detained the plaintiff as a prisoner, and who also justified under a warrant from the speaker for that purpose, in which *issue was [*737] also taken to the country, on several facts stated in such justifica-

(b) R. E. 11 W. III. (a), K. B. *Ante*, 718.

(c) Rules and orders of K. B. Ed. 1795, p. 176, 7; and see Lee's Prac. Dic. 2 Ed. 460. *Ante*, 718.

(a) R. T. 1 Geo. II. (a), K. B. Barnes, 163, C. P.

(bb) Co. Lit. 72, a. Gilb. C. P. 57.

(cc) Say. Dam. 115, cites Lutw. 875.

(d) 2 Lil. P. R. 85. R. E. 23 Car. I. K. B. 2 Wms. Saund. 5 Ed. 300, (3).

(e) 13 East, 41, 47.

tion; and notice of trial was given by the plaintiff in the two last causes, which stood for trial at bar on a day fixed, but the plaintiff, though still within the time allowed by the general rules and practices of the court, had not set down his demurrer in the first cause for argument; the court of King's Bench, on motion by the attorney general, on behalf of the sergeant at arms and constable of the Tower, postponed the trial of the issues in those causes, until after the argument on the demurrer in the cause against the speaker: because the right, just and distinct consideration of the questions which arose on the issues of fact, and the true measure of damages in the causes against the serjeant at arms and constable of the Tower, depended in a great measure upon the decision of the issue in law joined in the other action against the speaker: and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer, which presented the question of law distinct from the questions of fact.(a)

In practice, however, it is usual and advisable, when there are several issues in law and in fact, and the course of proceeding rests with the parties, to determine the issue in law first, for the following reasons: first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact; secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact:(b) thirdly, that this mode of proceeding will prevent confusion and embarrassment at the trial, particularly when contingent damages are to be assessed: and lastly, that whether the demurrer go to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may amend as at common law; but after the cause has been carried down to trial, he cannot amend any further than is allowable by the statutes of amendments.(c)

The *concilium, dies concilii*, or day to hear the counsel of both parties,(d) was formerly moved for, in the King's Bench, upon reading the record in court;(e) but now it is a motion of course, which only requires a counsel's signature. Still, however, the record is taken, *pro formâ*, to the clerk of the papers, who marks it "*read*," and signs the initials of his name on the brief or motion paper; which being carried to the clerk of the rules, he draws up the rule for a *concilium* thereon,(f) which is a four-
[*738] day rule, *and then the cause is entered for argument with the clerk of the papers.(aa) It has been determined not to be necessary to serve the rule for a *concilium* upon demurrer, in the King's Bench, or to give notice of putting it in the paper; it being in strictness the defendant's duty to search, since he must expect the plaintiff will proceed:(bb) but in

(a) 13 East, 27.

(b) 2 Wms. Saund. 5 Ed. 300, (3); and see 2 Marsh. 364, 5.

(c) 2 Blac. Rep. 920. *See quare*; and *vide ante*, 697, 713, 14.

(d) R. E. 2 Jac. II. K. B.

(e) *Id.* 2 Lil. P. R. 421.

(f) Append. Chap. XXXI. § 1.

(aa) R. T. 1 Geo. II. (a), K. B.

(bb) 2 Str. 1242; and see 1 Chit. Rep. 718

practice it is usual to serve a copy of the rule on the defendant's attorney; and it seems that it ought to be served, when there is a *real* demurrer. (cc) Signing a *concilium* is considered, in that court, as a step in the cause, so as to make it unnecessary to give a term's notice. (dd)

Previously to the day appointed for argument, copies of the demurrer books should be delivered, in the King's Bench, by the plaintiff or his attorney, to the chief-justice and *senior* judge, and by the defendant or his attorney, to the two other judges; and if either party, or his attorney neglect to deliver the books, the other party, or his attorney, ought to deliver the same. (e) In all books to be delivered to the justices of this court, the names of the counsel who signed the pleadings, ought to be inserted: (f) and the exceptions intended to be insisted upon in argument, should be marked by the party who objects to the pleadings, in the margin of the books he delivers; (g) and he should leave a copy of such exceptions, with the two judges to whom he does not deliver books. (h) In causes entered for argument on *Tuesday*, the books, we have seen, are to be delivered to the chief-justice, and the rest of the judges, on the *Saturday* preceding; and in those entered for argument on *Friday*, they are to be delivered on the *Tuesday* preceding. (i) And formerly, when there was no argument on demurrer, and the cause had been struck out of the paper, when called on, no one appearing to pray judgment for the plaintiff, it must have been entered *de novo*: (k) but now, when counsel has had his brief in due time, and is accidentally or inadvertently absent at the time the paper is called over, the court will, on his moving for that purpose, allow him to take judgment as if he had been present. (l)

In the Common Pleas, the record is brought into court by the clerk of the dockets, on moving for a *concilium*; which is a motion of course, requiring only a serjeant's name: and the motion paper being handed to one of the secondaries, he will mark the roll as *read* in court; after which, the rule is drawn up with the secondary, and a copy of it served on the defendant's attorney; and at the time of drawing up the rule, the secondary will set down the cause for argument in the court book. This must be done *four* days exclusive before the day of argument. All special arguments on demurrers, and other special arguments, are by a late rule to *be [*739] heard in the Common Pleas, on the day next before the sitting day at *nisi prius* in *Middlesex*, and the day next after the sitting day at *nisi prius* in *London*, and on no other days; (a) and no argument is allowed in that court, on the *last* four and *first* four days of the term: (b) but it is said, that if a *sham* demurrer be put in towards the end of the term, the court, on its being mentioned by a serjeant, on moving for a *concilium*, will order it to be argued on the last day of term. (c) In a late case however, the court observed, that they could not assume that it was a *sham* demurrer, or filed for the mere purpose of delay, unless there was an *affi-*

(cc) Imp. K. B. 10 Ed. 273.

(dd) 3 Durnf. & East, 530.

(e) R. M. 17 Car. I. K. B.; and see R. M. 11 Geo. I. 1 Burt. 199. Man. Ex. Pr. 304. 11 Price, 161, Excheq.

(f) R. E. 18 Car. II., K. B.

(g) R. E. 2 Jac. II. K. B., revived by R. H. 38 Geo. III. K. B.

(h) 1 Smith R. 361, 2, per Lawrence, J.

(i) R. T. 40 Geo. III. K. B. 1 East, 131; and see R. E. 2 Jac. II. (a), K. B. *Ante*, 504.

(k) 2 Chit. Rep. 402.

(l) *Id.* (a).

(a) R. M. 47 Geo. III. C. P. *Ante*, 505.

(b) R. T. 12 Geo. I. (a), C. P.

(c) Imp. C. P. 7 Ed. 300, 303, 4.

avrit showing it to be so, or that it was not intended to be argued; Besides, the paper books must be delivered, *two* days before the cause is set down for argument; and the court are not to assume that it is a sham demurrer, on a mere statement of counsel.(d) It is a rule in the Common Pleas, that the plaintiff's attorney shall deliver all the demurrer books to the lord chief-justice, and the rest of the judges;(ee) which books, by a later rule,(ff) are to be delivered to the lord chief-justice, and the other judges, *two* days (exclusive of the day of such delivery,) before the day on which the cause shall have been set down for argument: and the names of the serjeants who signed the pleadings are to be inserted therein; and the number roll and day of argument set down on the outside of each book.(g) But, by a late rule of that court, "when there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer books; and if any other part shall be copied therein, the prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client."(gg) The exceptions intended to be insisted upon in argument should also, as in the King's Bench, be marked in the margin of the books;(h) and if each party takes objections to the pleadings of the other, it is said to be the duty of each to deliver books, with the points intended to be made on both sides, stated in the margin.(i) It was formerly a rule in both courts, that the party neglecting to deliver books could not be heard, until he had paid for two copies of them:(k) But a subsequent rule(l) having declared, that no judgment should be signed for non-payment of the issue money, the courts, in the construction of this latter rule, have held it to extend to the paper books on a demurrer;(m) and of course, if they are not paid for, the costs of them must remain to be taxed, like the issue money, as part of the costs in the cause.

In the Exchequer, the rule for a *concilium* is a *four* day rule: and where a demurrer is seriously intended to be argued, the court will not grant the rule(n) for, nor hear any argument on the demurrer,(o) on the last day of term; but where a sham plea is pleaded, and a demurrer to the replication appears to have been filed for delay, the court, when there are not *four* days remaining of the term, will grant a *concilium* for the last [*740] *day of it.(a) And where it appeared that the defendant had demurred to the plaintiff's replication for delay, the court refused to set aside an order for a *concilium*, although *four* days had not been given to the defendant to return the demurrer book.(b)

The courts having given their opinion on the demurrer, a peremptory rule is drawn up with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, that judgment be entered for the plaintiff or defendant, as the case may be. And after interlocutory judgment on demur-

(d) 7 Moore, 440.

(ee) R. M. 6 Geo. II. reg. 3 C. P.; and see R. E. 27 Car. II. C. P.

(ff) R. M. 49 Geo. III. C. P. 1 Taunt. 412. *Ante*, 505.

(g) Barnes, 164.

(gg) R. H. 8 & 9 Geo. IV. C. P. 1 Moore & P. 401. 4 Bing. 449, 50.

(h) R. H. 48 Geo. III. C. P. 1 Taunt. 203.

(i) 7 Taunt. 72, 3.

(k) R. M. 17 Car. I. K. B. R. M. 6 Geo. II. reg. 3, C. P.; and see R. E. 27 Car. II. C. P.

(l) R. H. 35 Geo. III. K. B. & C. P. *Ante*, 727.

(m) 6 Durnf. & East, 477. 1 Bos. & Pul. 292.

(n) Anstr. 499.

(o) M'Clel. 493.

(a) 13 Price, 247; and see 1 M'Clel. & Y. 246, *accord*.

(b) 11 Price, 337.

rer, the defendant shall not come to arrest the judgment, on return of the inquiry, for any exception that might have been taken on arguing the demurrer; for the parties cannot be said to come as *amici curiæ*, and the courts will not suffer any one to tell them, that the judgment they gave on mature deliberation is wrong: but it is otherwise in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arise on the writ of inquiry or verdict, for there the party could not allege it before.(c)

The judgment for the plaintiff, on demurrer to a plea or replication in abatement, is not final, but only a *respondeat ouster*:(d) In other cases, it is interlocutory or final, according to the nature of the action. If the action be for damages, in *assumpsit*, &c. it is interlocutory:(e) and the plaintiff, after giving a peremptory rule for judgment with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, should sign interlocutory judgment, on a judgment paper, with the clerk of the judgments in the former court,(f) or prothonotaries in the latter,(g) and proceed to execute a writ of inquiry for assessing the damages;(h) or, in an action on a bill of exchange or promissory note, &c. he may have them assessed by reference to the master.(i) And, on the execution of a writ of inquiry, after judgment on demurrer, the defendant is not allowed to controvert any thing, but the amount of sum in demand.(k) When the judgment is *final*,(l) as in *debt* for a sum certain, the plaintiff, in the King's Bench, after giving a peremptory rule for judgment, may immediately proceed to tax his costs; and the master, having the roll brought him by the clerk of the treasury will mark the amount of the costs thereon, as well as upon the rule.(m) In the Common Pleas, the plaintiff, after drawing up the rule with the secondaries, should enter an *incipitur* on a judgment paper, and get it marked by the clerk of the *warrants; and then take it to the protho- [*741] notaries, and their clerk will sign the judgment; upon which the prothonotaries will tax the cost.(a)

When the defendant's plea goes to bar the action, if the plaintiff demur to it, and the demurrer is determined in favour of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action. So, where several pleas are pleaded, since the statute 4 & 5 Ann. c. 16, § 4, all of them going to destroy the action, and one or more issues are joined on some of the pleas, and there are one or more demurrers to the rest; if the court determine the demurrers in favour of the defendant, *before* the issues are tried, they shall not be tried: and if *after* the trial, it will make no difference; for in each case, judgment of *nil capiat* shall be given against the plaintiff.(b)

(c) 1 Str. 425. 2 Marsh. 326.

(d) Gilb. C. P. 53. 1 Ld. Raym. 594. Say. Rep. 46. 2 Wils. 367. *Ante*, 641.

(e) Append. Chap. XXXI. § 2, 3, 6, 7, 8, 12.

(f) *Burton v. Henley*, M. 57 Geo. III. K. B. 1 Sel. Pr. 2 Ed. 336, 7, *accord*. Imp. K. B. 9 Ed. 357. 1 Crompt. 3 Ed. 178. Lee's Prac. Dic. 2 Ed. 459, *contra*.

(g) Barnes, 229.

(h) Append. Chap. XXXI. § 2, 3, 7, 8, 12.

(i) 1 H. Blac. 541. Append. Chap. XXII. § 30, &c.

(k) 1 Bos. & Pul. 368.

(l) Append. Chap. XXXI. § 4, 5, 9, 10, 11.

(m) Imp. K. B. 9 Ed. 357; and see 1 Crompt. 2 Ed. 183. Lee's Prac. Dic. 2 Ed. 1 V. 390. 2 Archb. K. B. 36.

(a) Imp. C. P. 7 Ed. 302.

(b) 1 Wms. Saund. 5 Ed. 80, (1); and see Append. Chap. XXXI. § 13, 14.

*CHAPTER XXXII.

Of the ISSUE, and TRIAL by the RECORD.

THE issue we are now treating of, arises upon a plea or replication of *nul tiel record*. The plea of *nul tiel record*, when pleaded to an action on a judgment, or other matter of record in this country, is always concluded with an averment, and prayer of judgment *si actio*, &c.(a) unless where an action of *debt* is brought here, on a judgment in *Ireland*, in which case the plea of *nul tiel record* must conclude to the country:(b) And if it deny the existence of a record of the *same* court, the replication thereto may conclude with a prayer *that it be viewed and inspected by the court*;(c) but when the record is of *another* court, the plaintiff shall have a day given him to bring it in.(d)[A]

When a judgment, or other matter of record, in the *same* court is pleaded,(e) and the plaintiff replies *nul tiel record*, the replication may conclude as follows—"and this he is ready to verify, &c. and because the court of our lord the king now here will advise themselves, upon inspection and examination of the record by the said (defendant) above alledged, a day is given to the parties aforesaid, before our said lord the king at Westminster, until, &c.;"(f) or, instead of replying, the plaintiff may crave *oyer* of the record, or at least a note in writing of the term and number roll;(g) and if it be not given him in convenient time, he may sign judgment. This practice was originally confined to pleas in abatement;(h) but was afterwards extended to pleas in bar:(i) and accordingly it is now settled, that wherever a judgment, or other matter of record, in the *same* court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number roll, whereon such judgment or matter of record is entered and filed, or in default thereof, the plea is not to be received.(k)

When the record is of *another* court, the plaintiff may either [*743] *conclude his replication of *nul tiel record*, by giving the defendant a day to bring it in,(aa) or with an averment and prayer of the

(a) 2 Wils. 114.

(b) 5 East, 473. 2 Smith R. 25, S. C.; and see 1 Barn. & Ald. 153. 9 Price, 3. 3 Barn. & Cres. 449. 5 Dowl. & Ryl. 295, S. C. 4 Barn. & Cres. 411. 6 Dowl. & Ryl. 471, S. C. *Ante*, 651. Append. Chap. XXXII. § 1.

(c) Herne, 278. 2 Lutw. 1514. Barnes, 336. Append. Chap. XXXII. § 2.

(d) 2 Salk. 566. 3 Blac. Com. 330, 31. Append. Chap. XXXII. § 3.

(e) For the form of a plea of judgment recovered in the *same* court, see Append. Chap. XXXII. § 4.

(f) Dyer, 227, 8. 2 Lutw. 1514. 2 Salk. 566. Carth. 517. 1 Ld. Raym. 550, S. C. 7 Taunt. 30. 2 Marsh. 354, S. C. Append. Chap. XXXII. § 6.

(g) Append. Chap. XXXII. § 5.

(h) Keilw. 95, 6. Carth. 453, 517. 1 Ld. Raym. 347, 550. 2 Ld. Raym. 1179.

(i) 2 Str. 823.

(k) R. T. 5 & 6 Geo. II. (b), K: B. Imp. C. P. 7 Ed. 292, 3. *Ante*, 587.

(aa) Append. Chap. XXXII. § 7.

[A] An issue, on a plea of *nul tiel record*, is properly triable by the court. *Carson v. Pearl*, 4 J. J. Marsh. 92. And as this plea is to be tried by the court, it ought not to conclude to the country. *Eppes v. Smith*, 4 Munf. 466. On this issue, day should be given to the party to produce the record, and it is erroneous to try the issue by a jury. *Brady v. Commonwealth*, 1 Bibb, 517. And therefore this plea should not conclude to the country. *Broucher v. Williamson*, 1 Dana, 227. But should there also be an issue to be tried by a jury in the case, the issue to the court should be first tried. *Gray v. Pinguey*, 17 Verm. 419.

debt and damages: *(bb)* In the former case, the issue is complete upon the replication; *(cc)* but in the latter, there ought to be a rejoinder, that there is such a record, *(dd)* &c. And in the Common Pleas, the replication of *nul tiel record* to a plea of judgment recovered, need not it seems have a serjeant's hand. *(ee)* A judicial writ, issuing out of the court of King's Bench, is a matter of record: and therefore where, in an action of *debt* on bail bond, the defendant pleaded that no bill of *Middlesex* issued against the defendant in the original action, and the plaintiff replied that it did issue, as appears by the record of the file of writs, &c. concluding his replication with a verification by the record, the court held that the replication was proper. *(ff)* But a recognizance is not a record, until it be enrolled; and therefore where the defendant, in *assumpsit* on bills of exchange, &c., pleaded that "the plaintiff was indebted to him, by virtue of a recognizance taken in the court of Exchequer, which was still in force, as by the said recognizance remaining in the said court before the barons will appear," without stating that it was inrolled; a replication, that the plaintiff was not so indebted, concluding to the country, was holden good on special demurrer, inasmuch as the plea did not state a debt due by recognizance, which was matter of record. *(g)*

The issue we are now treating of is triable by the record itself, if it be of the same court; or, by the *tenor* of the record, if it be of a different court. *(h)* When the record is of the *same* court, and the plaintiff avers its existence, *notice* is given, in the King's Bench, to the defendant's attorney, that he will produce it on a particular day: *(i)* But where the existence of the record is averred by the defendant, the plaintiff's attorney gives him a four-day *rule* to produce it, *(k)* which he obtains from the master on the paper-book; and having entered it with the clerk of the rules, serves a copy on the defendant's attorney. This rule may, it seems, be given, where the defendant has pleaded a judgment recovered, to which there is a replication of *nul tiel record*, concluding with a verification and prayer of damages, and a rejoinder entered for the defendant, that there is such a record, and a day given for its production; and the defendant cannot afterwards strike out the rejoinder, and return the paper-book, with notice that he will rejoin in due time. *(l)*

In the Common Pleas, when the *plaintiff* avers the existence of the record, a day is given him by the roll, to bring it into court. And where the plaintiff delivered the book, and gave himself a day to bring in the **record*, but did not bring it in on that day, and the plaintiff [*744] afterwards offered the record, and moved it might be read, the motion was refused by the court, it not being brought in on the day the plaintiff had given himself to produce it: *(a)* but the plaintiff in this case was afterwards allowed to continue the day for bringing in the record. *(b)*

(bb) Barnes, 161. 2 Wils. 113.

(cc) Cas. Pr. C. P. 56. Pr. Reg. 227, 8. Barnes, 161, 335, 6. Com. Rep. 533. 2 Bos. & Pul. 302. Append. Chap. XXXII. § 7.

(dd) 1 Ld. Raym. 550. Append. Chap. XXXII. § 8; and see 1 Chit. Pl. 4 Ed. 519, 20. 2 Chit. Rep. 241, *(a)*.

(ee) 2 Blac. Rep. 816. *Ante*, 672; but see 2 Wils. 74, *contra*.

(ff) 1 Ken. 345. Say. Rep. 299, S. C.

(g) 1 Barn. & Ald. 153.

(h) Bul. Ni. Pri. 230. Gilb. Evid. 26. 2 Bur. 1034.

(i) Append. Chap. XXXII. § 9.

(k) *Id.* § 10.

(l) 2 Chit. Rep. 241. *Id.* 401, S. C.

(a) Barnes, 343, 4.

(b) *Id.* 84, 5.

When the *defendant* avers the existence of the record, the plaintiff is allowed in the Common Pleas, to give him a day to bring it into court, so as it be *four* days after the delivery of the issue: And when the proceedings are by *original*, and a general return day is given to bring in the record, the defendant ought to be called to bring it in, at the rising of the court on that day; and if he fail, the rule for judgment should be, unless cause be shown on the appearance day of that general return, and the record may be brought in on that or any intervening day: But when the proceedings are by *bill* against an attorney, and the day given to bring in the record is a day certain, it cannot be brought in after that day; but on that day, at the rising of the court, the defendant ought to be called to bring it in; and if he fail, the court will appoint the day to be inserted in the rule for judgment *nisi causa*.(c) This rule is drawn up, on producing the issue roll in court, without any motion.

On the day appointed for producing the record, the issue, being previously entered, is brought into court by the clerk of the treasury in the King's Bench, or clerk of the dockets in the Common Pleas; and proclamation being made by the crier, for producing the record, it is or is not produced. If produced, the party producing it is entitled to judgment, that he hath *perfected* the record; but otherwise judgment is given for the adverse party, that he hath *failed* in producing it.(d) When the defendant pleads *nul tiel record* of a judgment, &c. the record is commonly produced by the plaintiff; and in that case, the master in the King's Bench, who reads the issue and compares it with the record, will mark on the draft of the issue, that the plaintiff hath produced the record; upon which the clerk of the rules will give a rule for judgment,(e) which is stated to be on an issue of *nul tiel record*, and expires in four days.(f) In the Common Pleas, the rule for judgment(g) is given with the secondaries, who read the issue, and compare it with the record on which the action is founded; and, on the expiration of the rule, the plaintiff may sign final judgment.(h) When the defendant pleads a judgment recovered, and the plaintiff replies *nul tiel record*, the defendant, on being called in court, commonly fails to produce the record; and in that case, the roll being marked by the master, the plaintiff in the King's Bench may immediately sign interlocutory judgment, and proceed to execute a writ of inquiry; or, in an action on a bill of exchange or promissory note, to have the damages assessed by reference [*745] ence to the officer of the court. In the Common Pleas, *there is a rule given by the secondaries, before interlocutory judgment is signed; which rule is *peremptory*, in actions for damages, and the plaintiff may thereupon immediately sign interlocutory judgment, and proceed as before directed: But in *debt* for a sum certain, there is a rule for judgment given in both courts, on the defendant's not producing the record, which is only a rule *nisi*, unless cause be shown in *four* days;(a) at the expiration of which, if no cause be shown, the plaintiff may sign final judgment, with the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas.

If the defendant plead in abatement, another action depending for the

(c) Barnes, 264, 5.

(d) 3 Saik. 151; and see 7 Durnf. & East, 447, (d).

(e) Append. Chap. XXXII. § 12.

(g) Append. Chap. XXXII. § 13.

(a) Append. Chap. XXXII. § 14.

(f) Imp. K. B. 10 Ed. 277.

(h) Imp. C. P. 7 Ed. 292.

same cause, and the plaintiff afterwards *discontinue* such action, the issue on *nul tiel record* must be found against him; because the plea was true at the time of pleading it: but if a recovery be pleaded in bar, and the judgment afterwards *reversed*, before the day given to bring in the record, there, upon *nul tiel record*, the issue must be found for the plaintiff; because, by the reversal, the record is avoided *ab initio*.(b) To a plea of justification in *trespass*, under a *distringas*, the plaintiff replied, that before the *distringas* issued, he appeared to the previous writ sued out by the defendant, to wit, a *clausum fregit* issued out of the *Common Pleas*, *prout patet*, &c.; and on a rejoinder of *nul tiel record*, the court held, that the record of an appearance to a *clausum fregit* issued out of *Chancery*, did not support the replication; and that the words which followed the *scilicet*, being material, could not be rejected.(c)

When the record is of a *different* court, the mode of proceeding for bringing in the tenor of it, is by *certiorari*:(dd) which, we have seen,(ee) is a writ issuing sometimes out of *Chancery*, and sometimes out of the King's Bench. And when *nul tiel record* is pleaded to the record of a *superior* court, or court of equal jurisdiction, there is no way to have it, but by *certiorari* and *mittimus* out of *Chancery*;(f) for one court is not bounded by the other, in point of jurisdiction, nor can they write to each other, to certify their records: But the *Chancery* may, by its original constitution, award a *certiorari*, for bringing up the tenor of a record of a superior court, and afterwards send it by *mittimus* to another; and the certifying such tenor does not hinder the court where the record is, from proceeding upon it: And this method was contrived, to communicate evidence of the record, from one superior court to another, without the actual removal of the record itself.(g) If a recovery in an *inferior* court be declared on, or pleaded in a superior one, and denied, the *certiorari* may be issued out of the superior court,(h) as well as from the court of *Chancery*.(i) And on this writ, when the superior court doth not send for the record of an inferior *one, to see whether they keep within the limits of their jurisdiction, [746] but merely, on *nul tiel record*, to know whether there be such a record or not, it is sufficient to certify the *tenor* of the record;(a)[A]

(b) 1 Ld. Raym. 274. 2 Ld. Raym. 1014. 1 Salk. 329, S. C.

(c) 2 New Rep. C. P. 463.

(dd) Append. Chap. XXXII. § 15.

(ee) *Ante*, 397.

(f) 2 Bur. 1034; and see Cro. Car. 297. Append. Chap. XXXII. § 16.

(g) Gilb. Exec. 145, 163, 169; and see Gilb. Evid. 15.

(h) Cro. Eliz. 821. Append. Chap. XXXII. § 17, 18.

(i) Gilb. Exec. 148, 9, 170.

(a) Gilb. Exec. 143. Dyer, 186, 7. 3 Salk. 296. 2 Atk. 317, 18.

[A] *Nul tiel record* and *nil debet* cannot be joined in one plea. *Le Conte v. Pendleton*, 1 Johns. Cas. 104. Nor can *nul tiel record* be pleaded with any other defence, e. g. payment. *Carnes v. Duncan*, Colman, 35. *Le Conte v. Pendleton*, *Id.* 72. Neither can notice of special matter of defence be given with the plea of *nul tiel record*. *Barheydt v. Haverly*, 1 Wend. 70. *Raymond v. Smith*, 13 Johns. 329.

Nul tiel record is the only plea that can effect the record of a judgment from another state, and its effect is to be determined by the court. *Carter v. Wilson*, 1 Dev. & Bat. 362. A variance between the record declared on and the one produced as evidence, can be taken advantage of by the plea of *nul tiel record*. *Giles v. Shaw*, Breese, 169.

In New Hampshire, to an action of debt on a judgment, the defendant pleaded, first, *nul tiel record*; secondly, payment; third, a release. It was held, that they were all admissible under their practice as to double pleading. *Nelson v. Sloan*, 2 New Hamp. 464.

In Vermont, notice of special matter cannot be received under a plea of *nul tiel record*. *Card v. Sargeant*, 15 Verm. 393.

and in Chancery they seldom certify any thing^{*} more, for that court does not in general send for the record of the inferior one, to bound their jurisdiction, but to send it to other courts by *mittimus* : (b) But when the record is to be proceeded upon in a superior court, the record itself must be returned. (c)

On a replication of *nul tiel record* to a plea in abatement, the judgment for the plaintiff is not final, but only a *respondeat ouster* ; (d) [A] for failure of record in this case is not *péremptory*. (e) In other cases, the judgment is interlocutory or final, (ff) as upon demurrer. (gg) When the judgment is *final*, the rule in the Common Pleas, as well as in the King's Bench, is only *nisi*, unless cause be shown within *four* days, in order that the defendant may have that time to move in arrest of judgment : But when the judgment is *interlocutory*, that reason fails, and there is no occasion for a *four* day rule ; because the defendant may move in arrest of judgment, after the inquiry is executed. (hh) And as the defendant, we have seen, (ii) may bring in the record in the Common Pleas, or any intervening day between the giving of the rule and the appearance day, the secondaries in that court certify upon the rule, that no cause hath been shown : which certificate is produced to the prothonotary's clerk, at the time of signing final judgment.

[*747]

* CHAPTER XXXIII.

Of TRIALS by the COUNTRY, at BAR or NISI PRIUS ; and of the STEPS PREPARATORY to the latter, and CONSEQUENCES of NOT PROCEEDING to TRIAL, &c.

TRIALS by the country are at bar or *nisi prius*. Before the statute *Westm.* 2, (13 Edw. I.) c. 30, civil causes were tried either at the bar, before all the judges of the court, in term time ; or when of no great moment, before the justices in *Eyre* ; a practice having very early obtained, of continuing the cause from term to term, in the court above, provided the justices in *Eyre* did not previously come into the county where the cause of action arose ; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at *Westminster*, to that of the justices in *Eyre*. (a) Afterwards, when the justices in *Eyre* were superseded, by the modern justices of assize, it was enacted, by the above statute, that "inquisitions to be taken of trespasses, pleaded before the justices of either *bench*, shall be determined before the justices of assize, unless the trespass be so heinous, that it requires great examination ;

(b) Gilb. Exec. 145.

(d) Append. Chap. XXVI. § 9, 10.

(e) Carth. 517. 1 Ld. Raym. 550. *Ante*, 641, 740.

(ff) Append. Chap. XXXII. § 19, &c.

(hh) Barnes, 264 ; and see Imp. K. B. 10 Ed. 277, 417.

(a) 3 Blac. Com. 352.

(c) 2 Atk. 317. *Ante*, 403.(gg) *Ante*, 740.(ii) *Ante*, 744.

[A] Where the plaintiff replies *nul tiel record* to a plea of the pendency of a prior suit, and the issue is found for him, the judgment is that the defendant answer over. *Neal v. Mills*, 5 Blackf. 208.

and that inquisitions of other pleas, pleaded in either bench, wherein the examination is easy, shall be also determined before them; as when the entry or seisin of any one is denied, or in case a single point is to be inquired into: But inquisitions of many and weighty matters, which require great examination, shall be taken before the justices of the benches, *(b)* &c.; and when such inquests are taken, they shall be returned into the benches, and there judgment shall be given, and they shall be inrolled." Since the making of this statute, causes in general are tried at *nisi prius*: trials at bar being only allowed in causes which require great examination. *(b)* The king, however, by his prerogative, may try his cause, either at bar or *nisi prius*: *(c)* And as the above statute extends only to the courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer of Pleas, to be tried in the country, there is a particular commission, authorizing the judges of assize to try it. *(d)*

A writ of right may be tried at *nisi prius*: *(e)* And in a late case, *(f)* the court refused a trial at bar in a writ of right, as they had before done in **ejectment*, *(aa)* on the mere allegation of length, and probable questions of difficulty, in a cause respecting a pedigree. But if the *mise* be joined on a writ of right, it must be tried by the grand assize; and the court will not permit it to be tried by a jury, instead of the grand assize, though both parties desire it. *(bb)* It is settled, that the *nisi prius* clause should properly be inserted in the writ of summons, for electing the grand assize: *(cc)* and if such clause be omitted therein, and the knights come from a distant county, and appear at bar, the court of Common Pleas will not compel them to be sworn, unless the demandant will undertake to pay their expenses. *(cc)* In a writ of right, the sheriff having returned to the writ of summons, that he had summoned four lawful knights, to wit, A. B. esquire, C. D. esquire, E. F. esquire, and G. H. esquire, the court held, on demurrer to a challenge by the tenant, on the ground that they were not true *knights*, but only *esquires*, that this return could not be traversed. *(d)* On the trial at bar of a writ of right, the *four* knights who return the grand assize, must themselves attend, and sit with *twelve* of the jurors whom they return; a jury of *sixteen*, so constituted, being by law required for the trial; and any sixteen of the assize are not sufficient. But where it appeared, on the day appointed for the trial, that one of the four knights was so ill that he not only could not then attend, but was not likely to be able to attend on a future day, the court ordered the sheriff to summon another knight to act in his stead; and were of opinion, that it was not necessary that any fresh selection of a grand assize should be made by the knights. *(e)* And accordingly, where only *three* of the knights appeared, on a subsequent day, and the sheriff returned that the *fourth* was too ill to appear in that or the ensuing term, which return was confirmed by the affidavit of a medical man, the court granted a summons for another knight. *(f)* The *demi* mark having been tendered, on a trial at bar of a writ of right, it has been holden that the tenant must begin. *(g)*

(b) 2 Salk. 648.

(c) Sav. 2 Cro. Car. 348. 9.

(d) Bnl. Ni. Pri. 304. Append. Chap. XXXIV. § 8.

(e) 2 Wms. Saund. 6 Ed. 45, k. l. 1 Taunt. 415.

(f) 3 Bing. 397.

(aa) Doe ex dem. Angell v. Angell, T. 36 Geo. III. K. B. 3 Bing. 399, 400, S. C. cited.

(bb) 1 Bos. & Pul. 192.

(cc) 1 Taunt. 415.

(g) 2 Car. & P. 187.

(f) 3 Bing. 373.

(d) 3 Bing. 393.

(g) Id. 446.

When the crown is immediately concerned, the attorney-general has a right to demand a trial at bar.(h) In all other cases, it is entirely in the discretion of the court,(i) governed by the circumstances of the case:(k) Even if the parties consent, such a mode of trial cannot be had without leave of the court.(l) The grounds on which this trial ought to be granted, are the great value of the subject matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it.(m) In the Common Pleas, a trial at bar has been granted upon terms, in an action for criminal conversation.(n) And if one [*749] of the justices of *either bench, or a master in Chancery, be concerned, it is a good cause for a trial at bar, be the value what it may;(a) And it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar.(b) The plaintiff may have a trial of this nature, by the favour of the court, though he sue in *formâ pauperis*:(cc) but when the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take *nisi prius* costs, if he succeed, and if he fail, to pay bar costs.(dd) In *London*, it is said, a cause cannot be tried at bar, by reason of the charter of the citizens, which exempts them from serving upon juries out of the city.(ee) And when the cause of action arises in the county *palatine*, it has been doubted whether the court can compel the inhabitants of the palatinate to attend as jurors.(f)

A trial at bar is never granted before issue joined,(g) except in *ejectment*; in which, as issue is very seldom joined till the term is over, it would afterwards be too late to make the application.(hh) This sort of trial should regularly be moved for, in the term preceding that in which it is intended to be had, as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* term;(ii) except where lands lie in *Middlesex*:(kk) and it is never allowed in an issuable term,(ll) unless the crown be concerned in interest,(mm) or under very particular and pressing circumstances.(nn) But on an affidavit of particular circumstances, such as the great age and expected death of witnesses, the court will depart from their general rule, not to try a writ of right in an issuable term.(o) In *Easter* term, the court of King's Bench did not for-

(h) 1 Str. 52, 644. 2 Str. 816. 1 Barnard. K. B. 88, S. C.

(i) Say. Rep. 79.

(k) 1 Durnf. & East, 367.

(l) 2 Lil. P. R. 608. 1 Str. 696.

(m) *Per Kenyon arg.* Doug. 437; and see 1 Durnf. & East, 363.

(n) Barnes, 438. Cas. Pr. C. P. 103. Pr. Reg. 411, S. C.

(a) 1 Sid. 407.

(b) 2 Salk. 651. 6 Mod. 123, S. C.; but see 2 Lil. P. R. 608.

(cc) 12 Mod. 318.

(dd) 2 Salk. 648. Doug. 437; but see 2 Barnard. K. B. 146.

(ee) 2 Lil. P. R. 607. 2 Salk. 644. But note, the great cause of *Lockyer* against the *East India Company* was tried at bar, (M. 2 Geo. III.) by a special jury of merchants of *London*. 2 Salk. 644. 1 Durnf. & East, 368. In that case, however, the jury consented to be sworn, and waive their privilege. 2 Wils. 136.

(f) Say. Rep. 47; and see 1 Durnf. & East, 363.

(g) 2 Lil. P. R. 238, 608. 12 Mod. 331. 1 Str. 696. 2 Barnard. K. B. 125. 1 Durnf. & East, 364, *in notis*.

(hh) Say. Rep. 155. Barnes, 455.

(ii) 2 Lil. P. R. 603, 611. Cas. Pr. C. P. 66.

(kk) 2 Salk. 649.

(ll) Fitzgib. 267. *Per Buller, J.* in *Coleman v. City of London*, M. 21 Geo. III. K. B. Barnes, 447. 1 H. Blac. 211, C. P. But the case of *Goodtitle ex dim. Revett v. Braham*, (4 Durnf. & East, 497,) was tried at bar, in *Hilary* term, 32 Geo. III. K. B.

(mm) 2 Lil. P. R. 603. R. M. 4 Ann. (c), K. B. 1 Str. 52. *Re v. Keene and others*, H. 26 Geo. III. K. B.

(nn) 2 Lil. P. R. 615. 1 Str. 52. 1 Barnard. K. B. 370.

(o) 2 Car. & P. 187.

merly allow more than *ten* trials at bar;(*p*) and they must have been brought on a fortnight at least before the end of it,(*q*) to allow sufficient time for the other business of the court.

From what has been said it will be seen, that the courts are extremely unwilling to grant a trial at bar, except in cases where it appears to be absolutely necessary. And even where it is fit that a trial at bar should *be granted, as it is a favour asked by the party applying [*750] for it, they will lay him under reasonable terms: And therefore, where the defendant in *ejectment* applied for a trial at bar, and it appeared that the lessor of the plaintiff was in such indigent circumstances as not to be able to bear the expense, and that one of his witnesses was a woman above eighty years of age, who might die before a trial at bar could be had, the court of King's Bench required the defendant to consent, that if he succeeded, he should only have *nisi prius* costs; but that if the lessor of the plaintiff were to succeed, *he* should have bar costs: and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial:(*a*) It was also, by consent, made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.(*b*)

Formerly, there was no other notice given of such trial, in the King's Bench, than the rule in the office:(*c*) but now, it is said, there must be *fifteen* days' notice.(*d*) The plaintiff, however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to trial again, unless some new day be appointed by the court.(*e*) And it is said, that a second rule cannot be made for a trial at bar, between the same parties in the same term.(*ff*) Previously to giving notice, the day appointed for the trial must be entered with the clerk of the papers in the King's Bench,(*g*) and before the trial, a copy of the issue must be left with him, in order that he may take four copies of it, which he delivers to the judges:(*h*) and in that court a trial at bar could not formerly have been on a *Saturday*,(*i*) or the last paper-day in term, except in the king's case.(*k*) In the Common Pleas, it is a rule, that the plaintiff's attorney must, before the *essoin*-day of the term in which the cause is appointed to be tried, give notice to the chief prothonotary, or his secondary, of the day of trial, that the same may be put down in the court book provided for that purpose; and in case of neglect, the cause shall not be tried that term, without motion, and the special direction of the court.(*l*) And, in that court, the chief-justice and rest of the judges shall respectively have copies of the issue in the cause delivered to them, *four* days before the time appointed for trial.(*m*)

A trial at bar is had upon the *distingas* or *habeas corpora*, as at common law, without any clause of *nisi prius*: and it is mostly by a *special* jury of the county where the action is laid.(*n*) *Six* days' notice at least

(*p*) 2 Lil. P. R. 607.

(*q*) *Id.* 609.

(*c*) Doug. 437.

(*b*) *Id. ibid*; and see Ad. Eject. 2 Ed. 286, &c.

(*d*) Append. Chap. XXXIII. § 1.

(*e*) Append. Chap. XXXIII. § 6. 2 Salk. 649; but see Imp. K. B. 10 Ed. 308, where it is said, that now there must be the same notice of trials at bar as in other cases.

(*f*) R. M. 4 Ann. (*c*) K. B. Imp, C. P. 7 Ed. 345.

(*ff*) Fitzgib. 267.

(*g*) 2 Lil. P. R. 608.

(*h*) Imp. K. 10 Ed. 308, 9.

(*i*) 2 Lil. P. R. 602.

(*k*) 2 Salk. 625.

(*l*) R. H. H. 9 Ann. reg. 1 C. P.

(*m*) R. M. 3 Geo. II. reg. 1, C. P.

(*n*) 2 Lil. P. R. 123. 1 Salk. 405. R. T. 8 W. III. reg. 2 K. B. 1 Bar. 292; but see Doug.

[*751] ought to be given to the jurors before the *trial ;(a) and if a sufficient number do not attend to make a jury, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law ;(b) for the parties in this case cannot pray a *tales* upon the statutes.(c) And no writ of *alias* or *pluries distringas*, with a *tales*, for the trial of an issue at bar, shall be sued out, before the precedent writ of *distringas*, with a panel of the names of the jurors annexed, shall be delivered to the secondary,(e) to the intent that the issues forfeited by the jurors, for not appearing upon the precedent writ, may be duly estreated.(d) On a trial at bar, in the King's Bench, it is the secondary's duty to call over and swear the jury, and record the verdict, whether taken in court, or in private after the court is adjourned ; of the clerk of the rules, to mark all deeds and papers given in evidence, and to have the custody of them after the trial, till called for ; and of the clerk of the papers, to read the record and the written evidence.(e) In the Common Pleas, we have seen,(f) it is the duty of the secondaries to copy the issues for the judges, and deliver four copies thereof ; to call the jury, and defendant ; to read the record and all written evidence, and to record the verdict.(gg) After a trial at bar, if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases.(hh)

Trials at *nisi prius* are always had in the county where the venue is laid, and where the fact was, or is supposed to have been committed ;(ii) except in the king's case,(k) or where the venue is laid in *Wales*, or *Berwick-upon-Tweed*,(l) &c. or in a county where an impartial trial cannot be had, in which cases the cause is tried in *Middlesex*, or in the next *English* or *adjoining* county : (m) and *Herefordshire* is considered as the next *English* county to *South Wales*, and *Shropshire* to *North Wales*.(n)

Anciently, it seems, all causes in *Middlesex* were tried at bar : But this, from the increase of business, having been found extremely inconvenient, it was enacted by the statute 18 Eliz. c. 12, that "the chief-justice of *England*, the chief-justice of the Common Pleas, and the chief baron of the Exchequer, or in their absence two puisne judges of their respective courts, within term-time or *four days* next after the end of every [*752] *term, might try in *Westminster hall*, all manner of issues which ought to be tried in any of the said courts, by an inquest of the said county of *Middlesex* : and that commissions and writs of *nisi prius* should be awarded in such cases, as had been used in any other shire

438, where the trial was had, by *consent*, by a jury of a different county ; and in *Wales*, or *Berwick upon Tweed*, &c., or where an impartial trial cannot be had, the jury must come from the next *English* or adjoining county.

(a) Say. Rep. 30.

(b) 5 Durnf. & East, 457, 8 ; 462.

(c) 35 Hen. VIII. c. 6, § 6, 7, 8. 4 & 5 Ph. & M. c. 7. 5 El. c. 25. 14 El. c. 9. 7 & 8 W. III. c. 32, § 3. 6 Geo. IV. c. 50, § 37.

(d) R. H. 14 & 15 Car. II. reg. 2 K. B. 2 Lil. P. R. 123.

(e) From a MS. note, in the late Mr. Card's book at the Rule Office.

(f) *Ante*, 48.

(gg) For the form of the entry of a verdict, on a trial at bar, in K. B. ; see Append. Chap. XXXVII. § 7.

(hh) Sty. Rep. 462, 466. 1 P. Wms. 212. 2 Ld. Raym. 1358. 1 Str. 584, S. O. 2 Str. 1105. 2 Atk. 320. 1 Bur. 395, S. P.

(i) 3 Bur. 1334.

(j) 2 Bur. 859. 2 Ken. 519, S. C.

(k) 2 Maule & Sel. 270 ; and see 11 East. 370.

(l) *Post*, 753.

(m) *Ante*, 723, 4, 5.

of the realm." Two puisne judges were required to sit at *nisi prius* in *Middlesex*, in the absence of the chief justices or chief baron, till the statute 12 Geo. I. c. 31, by which it was provided, that any *one* judge of the several courts of record in *Westminster hall*, might try causes in the manner prescribed by 18 Eliz. c. 12, and the time was extended to the space of *eight* days after the end of every term. By a subsequent statute, (a) this time was still further extended to *fourteen* days. And, by the statute 1 Geo. IV. c. 55, § 1, causes may be tried in *Middlesex*, at any time during the vacation. Trials may also be had in that county, either in *Westminster hall*, or, with the consent of his majesty, signified under his sign manual, in any other fit place in the city of *Westminster* : (b) and while the courts were rebuilding, causes at *nisi prius*, in the King's Bench, were tried at the *Guildhall, Westminster*; but they are now tried, as before, in *Westminster hall*.

In *London*, trials at *nisi prius* take place by immemorial custom; and the judges sit at *Guildhall*, when and as long as the exigency of business requires. (c) And, by the statute 1 Geo. IV. c. 55, § 2, for giving further facilities to the proceedings in the court of King's Bench, "any one of the judges of that court is authorized, at the request of the chief-justice, to sit for the trial of causes at *nisi prius*, in *Westminster* and *London*, on the same days on which the said chief-justice, or any other judge of the same court, in the absence of the said chief-justice, shall be sitting for the trial of causes at those places respectively, so that the trial of two causes may be proceeded in at the same time: and all jurors, witnesses, and other persons, who may have been summoned or required to attend, and who ought to attend, at or for the trial of any cause before the said chief-justice, during the time aforesaid, shall give their attendance at and for the trial thereof, before such other judge as may be sitting for the trial thereof, by virtue of that act; and it shall and may be lawful to and for the marshal, and other officers of the said chief-justice, to appoint from time to time fit and proper persons, to be approved by the said chief-justice, to attend for them and on their behalf respectively, before such judge: Provided always, that all causes intended to be tried at any sittings at *nisi prius*, in *Middlesex* or *London*, shall be entered for trial with the marshal of the said chief justice, and all process and other proceedings, for or relating to the trial thereof, shall be made and issued according to the practice and forms now in use; but, nevertheless, the trial of every cause which shall be tried in virtue of that act, shall be *entered of record, as having been had [*758] and made before the judge before whom such cause shall happen to have been actually tried." This statute, however, has fallen into disuse.

In the King's Bench and Common Pleas, particular days are appointed by the chief justices, for the trial of causes in *London* and *Middlesex*, at the sittings in and after each term. In the Exchequer of Pleas, it is a rule, that "the sitting in *London* shall be holden at the *Guildhall* of the said city, on the second day next preceding the end of the term; and that the sitting for the county of *Middlesex* shall be holden in the court of Exchequer

(a) 24 Geo. II. c. 18, § 5.

(b) Stat. 1 Geo. IV. c. 21. And see the statute 3 Geo. IV. c. 87, for enabling his majesty's court of Exchequer to sit, and the lord chief baron or any other baron of the said court to try *Middlesex* issues, elsewhere than in the place where the court of Exchequer is commonly held in that county, during the period of rebuilding the said court.

(c) 3 Campb. 42, n.

in *Westminster hall*, on the day next preceding the end of the term: and that the sitting in *London* after each term, shall be holden on the second day next after the end of the term: and the sitting after each term in *Middlesex*, shall be holden on the sixth day of the sitting next after the end of the term." (a) By a late notice, (b) the chief baron sits at *two o'clock*, instead of *six*, in *London* and *Middlesex*: In other respects, he sits at *ni prius* as usual. The king, by his prerogative, may try his cause in what county he pleases: (c) In practice, however, it is usually tried in the court of Exchequer, in *Middlesex*. (c) And, in that court, the first *seven* days of the sittings after the end of each term in *Middlesex*, are said to be appropriated to the trial of crown causes. (d) Issues directed by the court of Chancery are tried in the King's Bench or Common Pleas; and issues from the equity side of the Exchequer, on the law side of the same court. (e)

Previously to the sittings or assizes, at which the cause is intended to be tried, the plaintiff should give due notice of trial; and if he proceed to trial, without giving such notice, the verdict may be set aside for irregularity. Every notice of trial ought to be in writing; (f) and given to the defendant, if he appear in person, or otherwise to his attorney, if his place of abode be known; (g) but if the attorney's place of abode be unknown, the notice may be given to the defendant himself: (g) [A] And when the defendant is a prisoner, notice of trial may be given to the turnkey. (h) In country causes, the notice of trial, in the King's Bench should be given to the agent in town; (i) but in the Common Pleas, it seems that it may be given either to the agent in town, or to the attorney in the country, (k) except where it is given on the back of the issue, in which case, [*754] as *the issue must be delivered, (aa) so the notice of trial must

(a) R. E. 49 Geo. III. in *Scac. Man. Ex. Append.* 226. 8 Price, 507.

(b) N. M. 54 Geo. III. in *Scac. Man. Ex. Append.* 227.

(c) West, on *Extents*, 216.

(d) Edm. Excheq. 302. And for the business done at the sittings of the *outer* Court of Exchequer in term, see Notice of 28 April, 1817. 4 Price, 21, 2. Man. Ex. Append. 298. 2 Chit. Rep. 382, 3.

(e) 2 Anstr. 493, 601. 1 Madd. Chan. 106.

(f) R. M. 4 Ann. (c), K. B. Cas. Pr. C. P. 3.

(g) Say. Rep. 133, K. B. Cas. Pr. C. P. 62. Pr. Reg. 276, 396, 442, S. C. Barnes, 306, S. P.

(h) 1 Str. 248. *Ante*, 363.

(i) 3 East, 568.

(k) Barnes, 306; but see *id.* 298. Cas. Pr. C. P. 120, S. C. *semb. contra.*

(aa) Cas. Pr. C. P. 94.

[A] In New York, on serving replications, the plaintiff may deliver a notice of trial, but the proceeding is subject to be defeated or modified by the subsequent delivery of a bona fide demurrer, and the decision thereon if, after the notice, and before the trial, the defendant demur to some of the replications, and issues of fact be joined in others of the pleas, the plaintiff may proceed and take a verdict, although he has not joined in demurrer; but he holds the verdict dependent upon the event of the demurrer. *Miller v. Stocking*, 22 Wend. 623. And under peculiar circumstances, a notice of trial may be served as late as eleven o'clock, P. M. *Id.* In that State, the notice must be fourteen days before court, exclusive of the day of service. *Small v. Edrick*, 5 Wend. 137. Even a trial by record must be noticed four days. *Knapp v. Mead*, Coleman, 122.

Proof of placing in the post-office, a letter, containing a notice of trial, directed to the defendant's attorney, residing in a post-town, in due season to be received the legal period before the day of trial, will, if made in the presence of the defendant's attorney, raise the presumption, and stand for the proof of the service of notice. *M'Curry v. Doremus*, 5 Halst. 245. But such presumption may be repelled by the affidavit of the attorney to whom notice was directed, stating that it was not received. *Id.* Service of this notice may be proved by plaintiff himself. *Darlings v. Corey*, Coxe, 200.

of necessity be given to the agent in town. In the Exchequer, all notices of trial given by the attorneys or side clerks of the office of pleas, in causes instituted there, are required to be entered in the book of orders kept in such office, and a written notice of such entries left at the seat in the said office, of the attorney or clerk in court concerned for the defendant, or at his chambers or place of residence.(b)

In the King's Bench, upon the delivery of a paper-book, wherein issue is joined, and notice of trial given, (as it may be, on the back of the book,) if the special pleadings be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of trial upon the general issue.(c) And, in the Common Pleas, in all cases where the plaintiff's pleading concludes to the country, the defendant's attorney shall be bound to accept of notice of trial upon the back of such pleading, whether the same be delivered or left in the office; and such notice of trial shall be as good and effectual, as if issue had been actually joined.(d) So, in the Exchequer, it is a rule, that "in all cases where the plaintiff concludes to the country, his attorney or clerk in court may give notice of trial, at the time of delivering his replication or other subsequent pleading, in case issue shall be joined thereon, or of executing a writ of inquiry, in default of joining issue; which shall be deemed good notice of trial, from the time of the delivery of such replication or other subsequent pleading, in case issue shall be joined."(e)

Notice of trial may be, and is usually given on the back of the issue or paper-book, in the King's Bench; or it may be given on a separate paper.(f) In the former case, it need not be so particular as in the latter: and therefore, where the issue was indorsed as follows, "Take notice of trial at the next assizes," this was holden to be a sufficient notice, without any mention of the date, county, or attorney's name; though it would have been otherwise, if given on a separate paper.(g) And, in the Common Pleas, the continuance of a void notice of trial may operate as a new notice, if given in regular time.(h) When there are several defendants, and one of them pleads, and the other lets judgment go by default, the notice should express that the issue joined with the former will be tried, and that the jury will at the same time assess the damages against the latter.(i)

If the venue be laid in *London* or *Middlesex*, and the defendant live within forty computed(kk) miles of *London*, there must be *eight* days' notice of trial, exclusive of the day it is given, but inclusive of that on which the trial is to be had; and if the defendant live above forty computed *miles from *London*, then *fourteen* days' notice must be given.(aa) [*755] And it is a rule in both courts, that "in every notice of trial to be given for the sittings after any term, to be holden at the *Guildhall* of the city of *London*, it shall be specified whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice *eight* days before the first day of the sittings after term, if the defendant or defend-

(b) R. H. 39 Geo. III. in *Seac. Man. Ex. Append.* 223, 4. 8 Price, 503. *Ante*, 500.

(c) R. H. 8 Geo. I. (a), K. B.

(d) R. T. 2 Geo. I. C. P.

(e) R. T. 26 & 27 Geo. II. § 4, in *Seac. Man. Ex. Append.* 211.

(f) *Append. Chap. XXXIII. § 2, &c.*

(g) 2 Str. 1237.

(h) 2 Blac. Rep. 1298; and see Barnes, 292. Pr. Reg. 396, S. C.

(i) *Append. Chap. XXXIII. § 5.*

(kk) 2 St. 954, 1216.

(aa) R. M. 4 Ann. (c), K. B. R. M. 1654, § 21, C. P.

ants reside above *forty* miles from the said city of *London*, and *four* days before the said first day, if the defendant or defendants reside within that distance.”(b) In the Exchequer, by a late rule,(c) “all notices of trial, in causes on the plea side of this court for the sittings after term in *London* and *Middlesex*, shall, in case the defendant or defendants reside at a less distance from the cities of *London* or *Westminster* than *forty* miles, be given *eight* days before the day appointed by the lord chief baron, for the trial of the same causes; and in case the defendant or defendants reside *forty* miles or upwards therefrom, then such notices of trial shall be given *fourteen* days before such day appointed by the lord chief baron as aforesaid; one day being considered inclusive, and the other exclusive.”

In *country* causes, *eight* days' notice of trial seems to have been formerly sufficient;(d) but now, by statute 14 Geo. II. c. 17, § 4, “where the defendant resides above *forty* miles from town, no cause shall be tried at *nisi prius*, either at the assizes or sittings in *London* or *Westminster*, unless notice of trial in writing has been given, at least *ten* days before such intended trial:”(e) and hence *ten* days' notice of trial is required, in all cases, at the *assizes*. But as this statute has no negative words, it is still necessary to give *fourteen* days' notice of trial for the sittings in *London* or *Westminster*, where the defendant lives above *forty* computed miles from *London*.(f) And when a defendant, residing in town at the issuing of the writ, changes his residence permanently to the country, at the distance of above *forty* miles from town, before the delivery of the issue, he is entitled to *fourteen* days' notice of trial.(g) And the like notice is required, when the defendant usually resides *abroad*, and has no settled habitation in this country;(h) or where his place of abode is above *forty* miles from *London*, though he may happen to be there at the time of the arrest, or notice of trial.(i) But when the defendant, being a practising attorney, has chambers in one of the inns of court, and a house above *forty* miles from [*756] *London*,(j) or when he has a permanent residence in *town, from which his absence is merely occasional or temporary,(a) *eight* days' notice of trial is sufficient: which also seems to be the case, when there are several defendants, and one of them resides within *forty* miles of *London*.(bb) So, in the Exchequer, it is a rule,(cc) that “in all cases where the venue is laid in the country, and a term's notice is not necessary, *ten* days' notice of trial, exclusive of the day it is given, shall be deemed sufficient notice; but if the venue be laid in *London* or *Middlesex*, and the defendant reside above *forty* miles from *London*, then the plaintiff shall give *fourteen* days' notice of trial, exclusive of the day it is given, unless a baron shall think fit to order otherwise.”

Upon an *old* issue, or, in other words, when there have been no proceedings for *four* terms exclusive,(dd) or, as it seems, (in the King's Bench,) for

(b) R. E. 51 Geo. III. K. B. 13 East, 593. 2 Camp. *Introd.* XXII. R. H. 32 Geo. III. C. P.

(c) R. E. 56 Geo. III. in *Scac. Man. Ex. Append.* 227. 4 Price, 4.

(d) R. M. 1654, § 21, C. P.

(e) Notice of trial on the 9th, for the 19th has been deemed sufficient, under the statute. *Legge v. Williams*, M. 23 Geo. III. K. B.

(f) *Barnes*, 305; and see Pr. Reg. 388. 2 Blac. Rep. 1205.

(g) 1 East, 688.

(h) Pr. Reg. 388. 2 Blac. Rep. 1205. 4 Durnf. & East, 562.

(i) 1 Pr. Reg. 387.

(a) 2 Price, 279; and see 2 Blac. Rep. 992.

(bb) *Per Ashhurst*, J. 4 Durnf. & East, 520.

(cc) R. H. 16 Geo. III. in *Scac. Man. Ex. Append.* 220.

(dd) 2 Salk. 457, 645, 653. R. M. 4 Ann. (c), K. B. R. E. 13 Geo. II. C. P. R. T. 26 & 27 Geo. II. § 5, in *Scac. Man. Ex. Append.* 211, 12; and see *Append. Chap. XXXIII.* § 7.

a year,(e) after issue joined, a term's notice of the plaintiff's intention to proceed, is requisite; which notice must be given before the essoin day of the fifth, or other subsequent term;(f) And a judge's or baron's summons, if no order has been made upon it, is not a proceeding within the meaning of this rule;(g) nor the suing out of a *venire facias* or *distringas*, in the vacation of the fourth term, though it be tested and entered as of that term.(h) But a judge's order, or notice of trial, though countermanded,(i) or notice that the plaintiff will proceed in the cause, which has not been acted under, is such a proceeding as will prevent the necessity of giving a term's notice.(k) The rule requiring a term's notice does not extend to a trial by *proviso*,(l) or a motion for judgment, as in case of a nonsuit;(m) and being confined to *voluntary* delays, it does not apply, when the cause has been stayed by *injunction* or *privilege*;(n) or when there has been an agreement to stay proceedings for a limited time, to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed.(o) But where the plaintiff had obtained a rule for a new trial, but neglected to carry down the cause for more than four terms, the court of Common Pleas would not discharge the rule on motion, unless a term's notice of such motion had been previously given.(p) Short notice of trial, in country causes, must be given four days at least before the *commission [*757] day, one exclusive and the other inclusive:(a) In town causes, two days' notice seems to be sufficient;(b) but it is usual to give as much more as the time will admit of: and if the defendant be under terms to take short notice of trial for the last sittings in term, and no notice be given for those sittings, he is not obliged to take short notice for the sittings after term.(c) So, in the Common Pleas, an undertaking to accept short notice of trial for the sittings after term, given when there is not time for short notice of trial at the sittings, does not compel the defendant to accept short notice of trial at the adjourned sittings.(dd) Sunday is to be accounted a day in these notices, unless it be the day on which the notice is given.(ee)

If the plaintiff be not ready to proceed to trial pursuant to notice, he may countermand, or in some cases *continue* it. Notice of countermand, like notice of trial, ought to be in writing;(ff) and may be given to the attorney in the country, as well as the agent in town.(gg) Before the statute 14 Geo. II. c. 17, two days' notice of countermand appears to have been sufficient in all cases, unless it was for a trial at the assizes, and the countermand was

(e) 2 Salk. 645. 1 Str. 531. Imp. K. B. 10 Ed. 291; and see R. M. 1654, § 21, C. P. 3 Maule & Sel. 500. 1 Chit. Rep. 669, (a).

(f) 1 Str. 211. 2 Str. 1164, K. B. Pr. Reg. 391. Barnes, 291, S. C. R. E. 13 Geo. II. C. P. R. T. 26 & 27 Geo. II. § 5, in *Seac. Man. Ex. Append.* 211, 12.

(g) R. E. 13 Geo. II. C. P. (h) 2 Salk. 457, 650.

(i) Pr. Reg. 391, 2. Barnes, 304, S. C. R. E. 13 Geo. II. C. P. 1 Str. 531. R. T. 26 & 27 Geo. II. § 5, in *Seac. Man. Ex. Append.* 211, 12.

(k) 3 East, 1.

(l) 2 Barn. & Ald. 594. 1 Chit. Rep. 317, S. C.

(m) *Id. ibid.* 5 Durnf. & East, 634. Barnes, 308. 2 Blac. Rep. 1223.

(n) 1 Sid. 92. R. M. 4 Ann. (c), K. B. Doug. 71. 2 Blac. Rep. 784.

(o) 2 Bur. 660. 2 Blac. Rep. 762. (p) 8 Moore, 579.

(a) R. E. 30 Geo. III. K. B. 3 Durnf. & East, 660.

(b) Pr. Reg. 390, 444. Barnes, 301, S. C.

(c) *Isaacs v. Windsor*, T. 24 Geo. III. K. B. (dd) 7 Taunt. 452. 1 Moore, 160, S. C.

(e) R. M. 4 Ann. (c), K. B. 8 Mod. 21; and see R. M. 3 Geo. I. C. P. Cas. Pr. C. P. 15.

(ff) *Id. ibid.* Cas. Pr. C. P. 3.

(gg) 2 Str. 1073. Cas. Pr. C. P. 48, 9; 120. Pr. Reg. 393. Barnes, 298, S. C. *Id.* 306; and see *Append. Chap. XXXIII.* § 10.

given to the agent in town; in which case it was required to be given *four* days before the commission day.^(h) But now, by that statute, § 5, the countermand of notice of trial at the assizes, or in a town cause where the defendant lives above *forty* miles from *London*, must be given *six* days at least before the intended trial; In other cases, *two* days' notice of countermand is still sufficient, the day of countermand being one, exclusive of the commission day, or day of sittings. In the Common Pleas, notice of trial cannot be given or countermanded on a *Sunday*:⁽ⁱ⁾ but it seems that before the statute, where the commission day was on *Monday*, notice of trial might have been countermanded on the *Saturday* preceding:^(k) and in that court notice of trial may be countermanded, though the record be made a *remanet*.^(l) In the Exchequer, *six* days' notice of countermand, exclusive of the day it is given, is deemed sufficient notice in all cases, where the venue is laid in the country, unless where a defendant is obliged to take short notice of trial.^(m)

If the plaintiff give notice of trial, and do not proceed accordingly, he cannot in general take the cause down to trial again, without new notice.⁽ⁿ⁾ to be given as before, unless by consent or rule of court.^(o) But [*758] if notice of *trial be given for a day certain in *London* or *Middlesex*, and the plaintiff be not ready to proceed, the cause may be tried at the next sitting,^(a) upon giving *two* days' previous notice, one inclusive and the other exclusive; which is called a notice of trial by *continuance*.^(b) So, if the defendant enter a *ne recipiatur*, and by that means hinder the plaintiff from trying his cause at one sitting, the plaintiff may proceed to trial at the next, upon notice given before the rising of the court at the first sitting.^(c) But the plaintiff cannot continue his notice of trial, more than once in a term:^(d) and, in the Common Pleas, the plaintiff cannot *countermand* and *continue* in the same notice.^(e) If the cause be not tried, after it is continued, at the next sitting, notice is to be given as at first, unless it be made a *remanet*; and then new notice of trial is never given in *London* or *Middlesex*, for the defendant is bound to attend till the cause be tried:^(f) And where a cause is made a *remanet* to the next sittings, by an order of *nisi prius*, no fresh notice of trial is requisite.^(g) But if the trial be put off by rule of court, there must be a fresh notice of trial;^(hh) which also seems to be requisite, after the cause has been made a *remanet* at the assizes.⁽ⁱⁱ⁾ And even where the plaintiff gives a peremptory undertaking, to try at the next sittings or assizes, there also a new notice of trial must be given; because, notwithstanding such undertaking, the plaintiff

(A) R. M. 4 Ann. (c) K. B. 2 Str. 849, 1073; and see R. M. 1654, § 21, (a), R. M. 3 Geo. C. I. P. Barnes, 298, 305.

(i) R. M. 3 Geo. I. C. P. Cas. Pr. C. P. 15.

(k) Barnes, 305. Pr. Reg. 395, S. C.

(l) Pr. Reg. 393.

(m) R. H. 16 Geo. III. in Scac. Man. Ex. Append. 220.

(n) Append. Chap. XXXIII. § 8.

(o) R. M. 1654, § 18, K. B. R. M. 1654, § 21, C. P. Append. Chap. XXXIII. § 12.

(a) R. M. 4 Ann. (c), K. B. R. M. 1654, § 21. Barnes, 301, C. P.

(b) Append. Chap. XXXIII. § 9.

(c) R. M. 4 Ann. K. B. 2 Salk. 353.

(d) 2 Str. 1119. Barnes, 292, Pr. Reg. 396, S. C.

(e) Barnes, 301. Pr. Reg. 394, S. C.

(f) R. M. 4 Ann. (c), K. B. 8 Durnf. & East, 245, 6. 6 Barn. & Cres. 1 5, 6. 9 Dowl. & Ryl. 126, S. C.; but see the case of *Hicks v. Strutt*, E. 27 Geo. III. K. B. *semb. contra*.

(g) 1 Dowl. & Ryl. 15.

(hh) 8 Durnf. & East, 245, 6. 1 Dowl. & Ryl. 15, 16, K. B. 2 Blac. Rep. 798, C. P. 1 Man. & Ryl. 111, (a), S. C.

(ii) 6 Barn. & Cres. 125, 6. 9 Dowl. & Ryl. 126, S. C. 1 Moore & P. 87. 4 Bing. 414, S. C.

may decline trying his cause.(k) When a cause is made *remanet*, the costs of the first sittings or assizes abide the event of the trial.(l)

If the plaintiff do not proceed to trial pursuant to notice, or countermand in time, the defendant, on a proper affidavit,(m) shall be allowed his costs of the day ;(n) and if they are not paid, he may, on an affidavit of demand and refusal,(o) have an attachment ; or, after the issue is entered, he may proceed to trial by *proviso*, as at common law, or move the court for judgment as in case of a nonsuit, upon the statute 14 Geo. II. c. 17. In the King's Bench, the practice of allowing costs extends to *criminal*, as well as *civil* cases : Therefore, upon an indictment for perjury, removed into that court by *certiorari*, if the prosecutor give notice of trial to the defendant, and withdraw the record, without countermanding his notice in time, he shall pay costs to the defendant :(p) And the prosecutor of an *information in nature of a *quo warranto* shall pay costs, for not [*759] proceeding to trial pursuant to notice.(a) In the Common Pleas, costs were allowed for not going on to trial, though the defendant had entered a *ne recipiatur* :(b) and they are payable in that court, as well as in the King's Bench, where the cause goes off for want of jurors, neither side having prayed a *tales*.(c) A *pauper* must pay costs, in the Common Pleas, for not proceeding to trial pursuant to notice :(d) but in the King's Bench, we have seen,(e) they will not make any rule about costs, until he be dispaupered : And an *executor* is not liable to pay costs, for not proceeding to trial, unless he has been guilty of a wilful default.(f)

In the King's Bench, the motion for costs, for not proceeding to trial, is a motion of course, requiring only counsel's signature ; and, in that court, the defendant may move for costs for not proceeding to trial, and afterwards for judgment as in case of a nonsuit ; for it is a rule of that court, not to give costs, unless a separate motion be made for them :(g) But he cannot move for judgment as in case of a nonsuit, and costs for not proceeding to trial, at the same time ;(h) nor, after moving for the former, is he in general allowed to apply for the latter ;(i) though a rule for costs for not proceeding to trial may be obtained, after a rule for judgment as in case of a nonsuit has been discharged, on a peremptory undertaking.(kk) In the Common Pleas, it is said, the prothonotary may tax costs for not going on to trial, at his discretion.(ll) For this purpose, a side-bar or treasury rule may be obtained : and where both the plaintiff and defendant gave notice, but neither of them went on to trial, it was holden that they were both entitled to costs.(mm) But, in

(k) 8 Durnf. & East, 245, 6. *Monk v. Wade*, T. 29 Geo. III. K. B. 2 Blac. Rep. 798. 1 H. Blac. 222, C. P.

(l) Say. Rep. 272. 1 Ken. 338, S. C. *Id.* 341. 4 Bur. 1988.

(m) Append. Chap. XXXIII. § 11, 12.

(n) R. M. 1654, § 18. R. M. 4 Ann. (c), K. B. R. M. 1654, § 21, C. P.

(o) Append. Chap. XL. § 8. In the Common Pleas, the demand of Costs must be made at the same time the rule is served. Barnes, 120.

(p) 8 East, 269.

(a) 1 Str. 33. Say. Rep. 130.

(b) Pr. Reg. 406. Cas. Pr. C. P. 60, S. C.

(c) 2 Wils. 366.

(d) Pr. Reg. 405. Cas. Pr. C. P. 47, S. C.

(e) *Ante*, 98.

(f) Barnes, 133 ; and see Cas. Pr. C. P. 157, 8. Pr. Reg. 119, S. C.

(g) *Triands v. Goldsmith & another*, 1 Bos. & Pul. 39, (a) ; and see 1 Price, 61, 2. 7 Taunt. 476. 1 Moore, 251, S. C.

(h) *Earl of Leicester v. Wooden*, M. 21 Geo. II. K. B.

(i) Hallock on Costs, 2 Ed. 406. *Cooke & others, executors, v. Lucas*, T. 42 Geo. III. K. B. *contra*.

(kk) 4 Barn. & Cres. 260. 6 Dowl. & Ryl. 217, S. C. *per Bayley, J.*

(ll) Pr. Reg. 404.

(mm) *Id.* 405.

that court, a defendant who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit, for the same default, either in the same or a subsequent term; (*n*) though it seems he may have such judgment, after the issue is entered, for a subsequent default: (*o*) and, after moving for judgment as in case of a nonsuit, he is not allowed to move for costs for not proceeding to trial. (*p*) The defendant therefore, in that court must make his election, either to move for costs for not proceeding to trial, or for judgment as in case of a nonsuit: and in practice it is usual for him to move for the latter; upon which, if the court, on showing cause, grant further time to the plaintiff, it is generally on the condition of his paying costs for not proceeding to trial. (*a*) In the Exchequer, as in [*760] the King's Bench, the defendant may move for costs for not proceeding to trial, and afterwards for judgment as in case of a nonsuit: (*b*) But the application for costs for not proceeding to trial, and for deducting the amount of them when taxed from the damages ultimately recovered by the plaintiff, cannot in that court be made by one motion. (*c*) The rule in this court, is for the payment of costs, to be taxed by the deputy clerk of the pleas, unless cause be shown to the contrary, on a particular day; and it is necessary to give the opposite party notice of an application intended to be made, to discharge the rule. (*d*) On the taxation of costs, for not proceeding to trial pursuant to notice, the court held that the master ought to have allowed the expenses of a witness brought up from *Newcastle-upon-Tyne* to *London*, to give evidence by comparison of hand-writing, in a cause where the defence was forgery; without agitating the question, whether the evidence were or were not admissible. (*e*)

The trial by *proviso* is so called, from a clause in the *distringas*, which provides, that "if two writs come to the sheriff, he shall only execute and return one of them: (*f*) And if both the plaintiff and defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he do not enter it, the defendant may proceed on *his* record. (*g*) This rule, however, applies only to cases where both the plaintiff's and defendant's records are carried down in a triable shape: Therefore, where the plaintiff, having omitted to give due notice of trial, entered his record in the marshal's book, subsequent to the entry of the defendant's record by *proviso*, upon which due notice of trial had been given; it was holden, that the defendant had a right to go to trial on his record, and that the plaintiff, not having then appeared, was properly nonsuited. (*h*) The trial by *proviso* cannot be had in civil actions, till there has been some laches or default in the plaintiff in not proceeding to trial, after issue joined; except in cases where the defendant is considered as an actor, as in *replevin*, *prohibition*, and *quare impedit*, which are to have a return, consultation, and writ to the bishop: (*i*) And

(*n*) Barnes, 316. 4 Taunt. 591, *accord*. 2 New Rep. C. P. 247, *contra*; and see 2 Price, 90, 91.

(*o*) 4 Taunt. 591.

(*p*) *Id. ibid.* 7 Taunt. 476. 1 Moore, 251, S. C.

(*a*) 2 H. Blac. 280. 1 Bos. & Pul. 38. 4 Taunt. 592, (*a*); but see 5 Taunt. 88. 7 Taunt. 476. 1 Moore, 251, S. C.

(*b*) Wightw. 65. 1 Price, 61. 2 Price, 90.

(*c*) 1 Price, 375.

(*d*) 11 Price, 512.

(*e*) 1 Dowl. & Ryl. 165.

(*f*) 2 Lil. P. R. 612, 617. 2 East, 206, (*a*).

(*g*) R. M. 4 Ann. (*c*), K. B.; and see Ry. & Mo. 22, (*a*).

(*h*) 1 Barn. & Ald. 253.

(*i*) 2 Salk. 652. R. M. 4 Ann. (*c*), K. B. R. M. 1654, § 21, C. P. 5 Taunt. 577. 1 Marsh. 218, S. C. 1 Chit. Rep. 226. Ry. & Mo. 22, (*a*); but see 4 Durnf. & East, 767, where the

the rule applies equally to cases where there has been a former trial, as to other cases.(k) In the King's Bench, no trial can be had by *provisio* in *London* or *Middlesex*, till default made by the plaintiff, after the issue is entered on record; nor, in country causes, till the plaintiff hath made default in trying his issue the next assizes after it is *entered.(a)

In the Common Pleas, if no notice of trial be given, the defendant [*761] cannot try the cause by *provisio* the same term, in *London* or *Middlesex*; but afterwards he may take it by *provisio*, according to law:(b) and where notice of trial has been given, it is not necessary that a whole term should intervene before the cause is tried by *provisio*; but it may be so tried in the next term after the notice of trial.(c) In criminal cases, the defendant is not allowed to carry down the record to trial by *provisio*; because no laches can be imputed to the king.(d) But, on indictments of treason or felony, if the attorney-general will delay, the court of King's Bench may give the defendant leave to bring on the trial, as they see fit.(e) So, on indictments for misdemeanors, the defendant may, in the first instance, by consent of the prosecutor, and leave of the attorney-general, carry down the cause to trial: but it shall not be allowed by surprise on the attorney-general, nor without consent of the prosecutor, or some default in him:(e) And it is a rule, that when an indictment is removed into the King's Bench by the prosecutor, the defendant shall not carry it down to trial, without leave of the court on motion.(f) On an information in the Exchequer, though the defendant cannot have a trial by *provisio*, yet it seems the recognizance of bail may be vacated, where the attorney-general has not taken any effectual proceeding for three successive terms.(g)

Before the defendant can have a trial by *provisio*, the issue must be entered on record: and therefore, unless this be done, the defendant should obtain a rule from the master, which is entered with the clerk of the rules in the King's Bench, or a side-bar or treasury rule from the secondaries in the Common Pleas, for the plaintiff to enter the issue: and if it be not entered, he may sign a *non pros*:(h) If it be, and the plaintiff has been guilty of laches, the defendant, in the King's Bench, may procure a rule from the master, for a trial by *provisio*:(i) which must be entered with the clerk of the rules; and may be had, after giving notice of trial:(kk) In the Common Pleas, a rule for this purpose is not necessary.(l) The defendant must give the like notice to the plaintiff of a trial by *provisio*, as the plaintiff would have been obliged to give to him:(m) except that a term's notice is not re-

court permitted a defendant to carry the record of an issue, directed by the court of Chancery, down to trial at the next assizes, on a suggestion that the plaintiff intended to delay it; and see 5 Moore, 473.

(k) 5 Taunt. 577. 1 Marsh. 218, S. C. 1 Chit. Rep. 226.

(a) R. M. 4 Ann. (c), K. B. 1 Chit. Rep. 226.

(b) R. M. 1654. § 21, C. P.

(c) Barnes, 295. Cas. Pr. C. P. 101. Pr. Reg. 397. S. C.

(d) 2 Salk. 652. 6 Mod. 247. Willes. 535. 7 Durnf. & East, 661. 2 East, 202.

(e) 2 Salk. 652. And see Ry. & Mo. 22, (a), as to the trial of indictments removed by *certiorari*, at the instance of the defendant; or returned into the King's Bench, by a grand jury of the county of *Middlesex*.

(f) 2 Salk. 653; and see 5 Barn. & Ald. 728.

(g) 7 Price, 557.

(h) 2 Lil. P. R. 84, 87, 612, 615, 617. 3 Salk. 362, 3. R. M. 4 Ann. (c), K. B. Barnes, 313, C. P.

(i) 2 Str. 1055. Append. Chap. XXXIII. § 13.

(kk) 1 Durnf. & East, 695.

(l) Imp. C. P. 6 Ed. 333. (a).

(m) R. M. 1651. R. M. 4 Ann. (c), K. B. R. M. 1654, § 21, C. P. Barnes, 299. Cas. Pr. C. P. 124, 5. Pr. Reg. 388, S. C. Append. Chap. XXXIII. § 15.

quired, after the lapse of four terms: (n) and if he do not proceed to trial according to notice, or countermand in time, the plaintiff shall [*762] *have his costs. (aa) When the record is carried down by the defendant, and the issue happens to be upon the plaintiff, who is therefore to begin first, but he does not appear, the defendant must not enter upon his proof, and take a verdict; but the proper course is to call the plaintiff, and nonsuit him. (b) [A]

(n) 2 Barn. & Ald. 594. 1 Chit. Rep. 317, S. C. *Ante*, 756.

(aa) R. M. 4 Ann. (c), K. B. 2 Str. 797. Pr. Reg. 405, 6. And see further, as to trial by *provisio*, 2 Wms. Saund. 5 Ed. 336, (5).

(b) 2 Wms. Saund. 5 Ed. 336, b.

[A] Where there is no evidence to support the plaintiff's case, the defendant is entitled to a nonsuit; and if the justice, in such case, refuses to nonsuit, and lets the case go to the jury, the judgment will be reversed. *Mead v. Crane*, 2 South. 852. *Stuart v. Simpson*, 1 Wend. 376. *Sanford v. Emery*, 2 Greenl. 5. But if the plaintiff offer legal and competent evidence to maintain the issue on his part, however insufficient it may be for that purpose in the opinion of the court, it is proper for the consideration of the jury; and if the judge direct a nonsuit in such case, a new trial will be granted. *Wilkinson v. Scott*, 17 Mass. 249. But the court will not set aside a nonsuit, and grant a new trial where it appears that a verdict, in favour of the plaintiff, would be against the evidence produced at the trial, if it do not appear that other evidence exists. *Hoyt v. Gilman*, 8 Mass. 336. *Salem Bank v. Gloucester Bank*, 17 Ib. 1. *Monfort v. Hogland*, 1 Penn. 144.

A nonsuit cannot be ordered by the court without the consent and acquiescence of the plaintiff. *De Wolfe v. Rabaud*, 1 Pet. 417. *Crane v. Morris*, 6, Ib. 598. *Pratt v. Hull*, 13 Johns. 334. *Mitchell v. New England Marine Insurance Co.*, 6 Pick. 117. *Irving v. Sargent*, 1 S. & R. 360. *French v. Smith*, 4 Verm. 363. *Doe v. Grymes*, 1 Pet. 469. *Rogers v. Madden*, 2 Bailey, 321. He has always a right, if he chooses to go to the jury with his case. *Cahill v. Kalamazoo Mutual Insurance Co.*, 2 Doug. 124. *Wiley v. Shoemaker*, 2 Greene, (Iowa) Rep. 205. *Girard v. Gettley*, 2 Binn. 234. *Widdifield v. Widdifield*, Ib. 248. *Hays v. Greer*, 4 Ib. 84. *Irving v. Taggart*, 1 Serg. & R. 860. *Lyon v. Davis*, 2 Harris, 197. If a judge, before whom an action is on trial, is of opinion that the plaintiff, upon his whole evidence, is not entitled to recover, he may recommend a nonsuit on that ground; if he does so, and a nonsuit takes place, the plaintiff may allege exceptions; but if the judge is of opinion that there is evidence to be considered by the jury and declines to order a nonsuit, this decision is no ground for exception. *Wentworth v. Leonard*, 4 Cush. 414. Or where the evidence on the trial of a cause shows that, as a matter of law, the plaintiff cannot recover, it is the duty of the judge to nonsuit him instead of submitting the case to the jury; and it is error to refuse to do so. *Carpenter v. Smith*, 10 Barb. Sup. Ct. 663.

In cases at law, as in chancery or admiralty, the prosecuting party could of right become nonsuit in the original court, on payment of costs, at any time before the case was ready and opened for trial, and some pertinent evidence offered, so that the merits could be ascertained and decided; but after that, he could not become nonsuit so as not to be barred, unless the opposite party consented, or the court, for sufficient reason, gave leave. Such reason might be surprise, or unexpected absence either of witness or counsel. *Folger v. The Robert G. Shaw*, 2 W. & M. 531. Formerly, a nonsuit could be of right by the plaintiff at any time before judgment, and now, in some States, at any time before verdict. But the first gave undue advantage to plaintiffs over defendants, and is not the law now in England. Nor can the circuit court order a nonsuit, unless as a penalty for not obeying some rule. If the plaintiff object, and has offered any evidence proper to be weighed by the jury the corresponding test is in each the same. *Ib.* A nonsuit cannot be granted on the assumption by the judge that the plaintiff's witness is not to be believed, the credibility of the witness being a question for the jury. *Merritt v. Lyon*, 3 Barb. Sup. Ct. R. 110. If the evidence will not authorize a jury to find a verdict for the plaintiff, or if the court would set it aside if so found, as being contrary to the evidence, the plaintiff will be nonsuited though against his consent. *Ringgold v. Haven*, 1 Cal. 108. *Dalrymple v. Hanson*, 1 Cal. 125. *Mateer v. Brown*, 1 Cal. 221. *Scott v. Simpson*, 1 Sandf. S. C. Rep. 601. *Smith v. Sanger*, 3 Barber, S. C. 360. Where there is evidence tending to prove all the allegations of the complaint, its sufficiency is to be determined by the jury; but if there is no evidence upon a point necessary to be proved to support the action, it is the duty of the court, on motion, to order a nonsuit. *Ringgold v. Haven*, 1 Cal. 108. In Maine, where the evidence for the plaintiff will not justify the jury in finding a verdict in his favour, the court may order a nonsuit. *Head v. Sleeper*, 7 Shep. 314. *Pray v. Garcelon*, 5 Shep. 145. *Cole v. Bodfish*, 5 Shep. 310. So in New York. *Van Wormer v. Mayor of Albany*, 18 Wend. 169.

The delay and expense attending the trial by *provisio*, gave rise to the statute 14 Geo. II. c. 17, by which it is enacted, that "where any issue is

But after evidence by both parties he cannot. *Lyon v. Sibley*, 2 Red. (Maine) R. 576. Where the evidence offered tends to show facts sufficient to support the action, although remotely, a nonsuit ought not to be ordered, but the case should be submitted to the jury. *Foster v. Dixfield*, 6 Shep. 380. *Coze v. Field*, 1 Greene, 215. *Barton v. Brands*, 3 Greene, 248. *Taylor v. White*, 2 Monr. 94. *Davis v. Hoxey*, 1 Scam. 406. The court of common pleas, in South Carolina, has power to order a nonsuit, where the plaintiff will agree or refuse to suffer it, in cases where there is no evidence which ought to be taken into consideration by the jury as proper evidence to maintain the issue, or where there is a total defect of evidence in relation to material points, without which the verdict cannot be supported. *Clason v. Bird*, 2 Brevard, 370. In Alabama, the court cannot order the plaintiff to become nonsuit against his consent and, when he goes to the jury he must be considered to insist upon a verdict. *Hunt v. Stewart*, 7 Ala. 525. So in Arkansas. *Martin v. Webb*, 5 Pike, 70. So in Missouri. *St. Louis Floating Dock Ins. Co. v. Souland*, 8 Mis. 665. *Wells v. Gaty*, 8 Mis. 681. So in Indiana. *Booe v. Davis*, 5 Blackf. 115. *Smith v. Crane*, 12 Verm. 487. In Tennessee it has been held that the court cannot order a nonsuit to be entered for misconception of the action, or for want of testimony. The party alone has the right to decide whether he will take a nonsuit or have a trial. *Scruggs v. Brackin*, 4 Yerg. 528. Before opening his case to the jury, a plaintiff may become nonsuit, as a matter of right. After the case is opened, and before the return of a verdict, the court, in the exercise of its discretion, may permit him to become nonsuit. But this cannot be done after the verdict is returned. *Judge of Probate v. Abbot*, 13 N. H. 21. A nonsuit may be ordered at the trial, after evidence has been given on both sides, if a verdict for the plaintiff would be against the clear weight and effect of the evidence. *Rudd v. Davis*, 7 Hill, 529. But it was held in this case that after it has been submitted to the jury, and they have retired, the defendant cannot retract his submission and demand a compulsory nonsuit. *Id. Johnston v. Acker*, 23 Wend. 481. *Partlow v. Elliott*, 1 Meigs, 547.

A jury, after the charge of the court, retired to deliberate, and returned into court to give their verdict. After they had entered the jury box, and nine of them had been called, the plaintiff requested to take a nonsuit. Held, that he was entitled so to do. *Easton Bank v. Coryell*, 9 Watts & Serg. 153. So where the jury come in, unable to agree, and the court withdraw instructions before given, and give new ones, the plaintiff has the right to become nonsuit. *Hensley v. Peck*, 13 Mis. 587. And the plaintiff's right to submit to a nonsuit is not taken away until the whole case is given to the jury on which they are to pass. *Berry v. Savage*, 2 Scam. 261. But he has no right to a nonsuit after verdict, either at common law or by statute. *Ross v. City of Chicago*, 12 Ill. 366. *M'Cann v. Boyers*, 8 B. Mon. 285.

Where the defendant had given notice of a discount, and at the trial substantiated it to an amount exceeding the plaintiff's demand, and the plaintiff thereupon suffered a nonsuit, it was adjudged that he was entitled so to do, though it appeared that the jury had agreed upon their verdict, which was ready to be declared in court, and that the verdict was known to the plaintiff. *Usher v. Sibley*, 2 Brevard, 32. Even where a defendant has a set-off, the plaintiff may suffer a nonsuit any time before verdict. *M'Credy v. Fey*, 7 Watts, 496. *Dove v. Hanks*, 3 M'Cord, 559. *M'Loughan v. Bevard*, 4 Watts, 308. *Wooster v. Burr*, 2 Wend. 395. And he of course may become nonsuit as of right, at any time before trial. *Haskell v. Whitney*, 12 Mass. 47. But after verdict returned, though not recorded, he cannot become nonsuit but by leave of court. *Locks v. Wood*, 16, *Id.* 317. Or, in some of the States, after the cause is opened to the jury. *Haskell v. Whitney*, 12 *Id.* 47. *Locke v. Wood*, 16 *Id.* 317. Leave to enter a nonsuit will not be granted after the verdict is recorded. *Taylor v. Alexander*, 6 Ham. 144. *Hendrick v. Stewart*, 1 Overt. 476. And a nonsuit is to be ordered only for the deficiency of the evidence on the part of the plaintiff, and not on evidence produced by the defendant. *Rose v. Learned*, 14 Mass. 154. Whether a nonsuit properly entered shall be taken off on motion of the plaintiff founded on evidence discovered after the nonsuit, is within the discretion of the presiding judge, and not subject to the revision of the whole court by way of exceptions to the ruling. *Leighton v. Manson*, 2 Shep. 208. Thus, where a nonsuit, in a writ of right, was suffered, under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction given at the trial, it was held, that the court might, in the exercise of a sound discretion, on the motion of the demandants, have set aside the nonsuit. *Walkers v. Boas*, 2 Robinson, 485. And it has been held that the refusal to order a nonsuit on account of the insufficiency of the plaintiff's evidence, affords no grounds of exception, it being a matter merely of discretion. *French v. Stanley*, 8 Shep. 512. So too, where a nonsuit is ordered for want of evidence, and the plaintiff afterwards offers to introduce the necessary evidence before judgment is entered, and moves to have the nonsuit set aside, it is within the discretion of the court to grant or refuse the motion. *Robinson v. Abell*, 17 Ohio, 36. *Ranken v. Curtin*, 12 Ill. 384. But if the plaintiff submit to a nonsuit, he cannot, by writ of error or appeal, procure reversal thereof,

or shall be joined, in any action or suit at law, in any of his majesty's courts of record at *Westminster*, &c. and the plaintiff or plaintiffs in any such action or suit hath or have neglected, or shall neglect, to bring such issue on to be tried, *according to the course and practice of the said courts respectively*, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court, (due notice having been given thereof,) to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit; unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue: And if the plaintiff or plaintiffs shall neglect to try such issue, within the time so allowed, then, and in every such case, the said judge or judges shall proceed to give such judgment as aforesaid: Provided always, that all judgments given by virtue of this act, shall be of the like force and effect, as judgments upon nonsuit, and of no other force or effect: Provided also, that the defendant or defendants shall, upon such judgment, be awarded his, her or their costs, in any action or suit, where he, she or they would upon nonsuit be entitled to the same, and in no other action or suit whatsoever."

This statute has been holden to extend to actions brought by *executors or administrators*; (c) and to *qui tam* actions, (d) as well as others; and also to the traverse of the return to a *mandamus*; (e) And, in the Common Pleas, judgment as in case of a nonsuit may be entered up against the de-

(c) Willes, 316. Barnes, 130, S. C. 4 Dowl. & Ryl. 833. But they are not subject to costs; *Id. ibid.* 2 H. Blac. 277. *Post*, 769.

(d) Barnes, 315. 1 Wils. 325. Say. Rep. 22, S. C. 7 Durnf. & East, 178. 1 East, 554.

(e) Say. Rep. 110. Say. Costs, 166, S. C. 4 Durnf. & East, 689.

on account of any erroneous opinion delivered in the progress of the trial. *Watson v. Anderson*, Hardin, 58. *Wallace v. Cooper*, 2 Watts, 108. *Beall v. Breckenridge*, 3 J. J. Marsh. 695. Nor can he have a bill of exceptions. *Thornton v. Jett*, 1 Wash. 138. Because where a party voluntarily suffers a nonsuit, he is out of court and cannot be reinstated. *Mussey v. M'Dougall*, 2 Penn. 958. *Thornton v. Demoss*, 5 Smedes & Marsh. 609. *Earwig v. Glidwell*, 3 How. (Miss.) 332. *Coopland v. Mears*, 5 Smedes & Marsh. 519. *Moore v. Hernden*, 5 Blackf. 168. *Van Wormer v. Albany*, 18 Wend. 169. If a plaintiff voluntarily suffers a nonsuit, he waves all objection to any opinion of the court which may have induced it. *Whiting v. Walker*, 2 B. Monroe, 262. But it is otherwise where a nonsuit is granted without his consent, and he may tender a bill of exceptions, and sue out a writ of error. *Van Wormer v. Mayor of Albany*, 18 Wend. 169.

Under the Pennsylvania Nisi Prius Act, of July 26, 1842, where the judge directs a nonsuit on the trial of a case, it comes up to the supreme court by certificate, in the same manner as it does by writ of error from the district court, under the 7th section of the act of 11th March, 1836; and therefore it is to be considered as if it were a demurrer to evidence, except that the judge is not at liberty to give judgment for the plaintiff should he think the case made out, but should refuse the nonsuit. *Bevan v. Ins. Co.*, 9 Watts & Serg. 187. If, therefore, there is some evidence, though slight, from which a jury might draw an inference unfavorable to the plaintiff, the case should be left to the jury. *Id.* A prayer of nonsuit, in the District Court, under the Pennsylvania statute of 1836, it has been held, amounts to a demurrer to evidence, except that the judge cannot give judgment for the plaintiff if he think the nonsuit not grantable, but the case must go to the jury. *Smyth v. Craig*, 3 Watts & Serg. 14. A compulsory nonsuit is no bar to another proceeding for the same cause. *Bourmonville v. Goodall*, 10 Barr, 133. Neither is a nonsuit ordered to be entered, on motion of the defendant, by the judge presiding at the trial of a cause, in the district for the city and county of Philadelphia, under the 7th section of the act of 11th March, 1836, a bar to a subsequent action brought against the same defendant, by the same plaintiff, for the same cause. *Fleming v. Ins. Co.*, Bright R. 102. S. C. 2 Jones, 391. And it has been held that a decision of the court in favour of the defendant, upon an agreed statement of facts, and a nonsuit of the plaintiff entered, and judgment thereon for the defendant for his costs, pursuant to such agreement, constitute no bar to a subsequent action for the same cause. *Knox v. Waldborough*, 5 Greenl. 185. *Snowhill v. Hillyer*, 4 Halst. 38. *McEwen v. Mazyeh*, 3 Rich. 210.

mandant in a writ of right: nor will the court relieve him, if he has conducted himself unfairly towards the tenant, in the course of the proceedings.(f) But the statute does not extend to actions of *replevin*,(g) &c. in which the defendant is considered as an actor, and may therefore enter the issue, and carry down the cause to trial himself. When there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a nonsuit:(h) But one of several joint

*defendants may obtain a rule for judgment, as in case of a non- [*763] suit, which will authorize a general judgment to be entered against the plaintiff.(a) When the plaintiff withdraws his record, after entering the cause for trial, the defendant, in the King's Bench, may have judgment as in case of a nonsuit:(bb) And where a cause was set down for the sittings in term, and made a *remanet* to the sittings after term by consent, the defendant may move for judgment as in case of a nonsuit, if the plaintiff afterwards withdraw the record,(c) or make default in proceeding to trial.(d) But when a plaintiff in several causes perceives, by the event of one verdict, that he cannot have a fair trial in the others, he may withdraw his records in the other causes, without subjecting himself to judgment as in case of a nonsuit, or to the defendant's costs of the day of trial, upon the rule for such judgment being discharged:(e) So, where a special jury cause had been set down for trial, and standing in the paper for *three* years, without any appointment being applied for to have it tried, the court refused to give the defendant judgment as in case of a nonsuit:(f) The proper course would have been, for the defendant to have applied to the chief-justice, to have the cause appointed for trial.(f) And when the cause has been once carried down to trial, and made a *remanet* at the assizes,(g) or referred to arbitration,(h) or the plaintiff has been nonsuited,(i) or obtained a verdict,(k) after which a new trial has been granted, the defendant cannot have judgment as in case of a nonsuit, for not carrying down the cause again; but must try the cause by *proviso*. Where the judge had refused to try an action upon a wager, depending on an abstract question of law, or judicial practice, the court of King's Bench would not afterwards grant a rule for judgment as in case of a nonsuit; there having been no default of the plaintiff, in not proceeding to trial.(l) And where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action; the court held, that it thereby abated, and that the defendant could not afterwards have judgment as in case of a nonsuit.(m) The court of Common Pleas will not entertain a motion for such judgment, pending a demurrer.(n) But after judgment for the de-

(f) 1 Bos. & Pul. 103; but see 3 Bing. 499.

(g) 1 Blac. Rep. 375. Say. Costs. 168, S. C. 3 Durnf. & East, 662. 5 Durnf. & East, 400. Per Cur. M. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 341; but see Barnes, 317, *semb. contra*.

(h) Say. Rep. 22. Say. Costs, 163. 1 Wils. 325, S. C. Say. Rep. 103. Say. Costs, 164. S. C. 1 Bur. 358. Say. Costs, 168, S. C. Cowp. 483. 3 Durnf. & East, 662. *Gosse v. Maccusley & others*, T. 42 Geo. III. K. B.

(a) 5 Barn. & Cres. 768. 8 Dowl. & Ryl. 592, S. C.; and see 5 Barn. & Cres. 178. 7 Dowl. & Ryl. 619, S. C.

(bb) *Read v. Stone*, E. 36 Geo. III. K. B. 1 East, 346. 1 H. Blac. 280.

(c) 2 Barn. & Ald. 709.

(d) 6 Barn. & Cres. 125. 9 Dowl. & Ryl. 125, S. C.

(e) 2 Chit. Rep. 243.

(f) 6 Moore, 488.

(k) *Hartley v. Thomson*, F. 22 Geo. III. K. B. 1 H. Blac. 101.

(l) 12 East, 247.

(n) 2 Marsh. 264; and see 6 Moore. 488.

(e) 5 Taunt. 88.

(g) 3 Durnf. & East, 1. 3 Bing. 499.

(i) 1 Durnf. & East, 492. 1 Chit. Rep. 310.

(m) 6 Barn. & Cres. 253.

defendant, on demurrer to certain special pleas, there may be judgment as in case of a nonsuit against the plaintiff, for not proceeding to trial upon other general pleas, on which issues were joined.(o)

[*764] *The *course* and *practice* of the court, referred to by the statute, is that which before regulated the trial by *proviso*; and as the defendant could not have had such trial, until after the issue was entered of record,(a) and the plaintiff had been guilty of laches,(b) so neither till then is he entitled to judgment as in case of a nonsuit.(cc) If the action be laid in *London* or *Middlesex*, the defendant, we have seen,(dd) ought not to give a rule for the plaintiff to enter his issue the same term in which it is joined, unless notice of trial hath been given: And accordingly it is holden, that in *town* causes, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit, the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after the preceding term;(e) the plaintiff, in such case, having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after: And, in the King's Bench, where issue was joined in *Easter* term, and notice of trial given for the first sittings in *Trinity*, and the plaintiff having *continued* it till the sittings after that term, the defendant in the same term moved for judgment as in case of a nonsuit, it was refused by the court.(f) But if notice of trial has been given in a *town* cause, for a sitting in or after term, the defendant, in either court, may move for judgment as in case of a nonsuit the next term, being the term after that in which the issue ought to have been entered.(g) To support a rule for judgment as in case of a nonsuit, in the next term after that in which issue was joined, the affidavit must state that notice of trial was given for a sitting in or after the preceding term:(h) but in the third or other subsequent term, a general affidavit, stating the term when issue was joined, is deemed sufficient.(i) In a *country* cause, where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term:(k) But the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined;(l) and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the following assizes.(m)

[*765] In *an *issuable* term, the rule for judgment as in case of a nonsuit, in a *country* cause, should be applied for early in the term, in order that the plaintiff may have sufficient time to show cause in the same

(o) 10 East, 380.

(a) *Ante*, 760.

(b) *Ante*, 760, 1. For the time within which issues must have been formerly tried, see R. H. 15, 16, *Car. II. reg. 2.* R. H. 20, 21. *Car. II. R. M.* 4 Ann. (c), K. B. R. M. 1654, § 21, C. P. Barnes, 295. *Cas. Pr. C. P.* 101. *Pr. Reg.* 397, S. C.

(cc) Barnes, 313.

(dd) *Ante*, 727.

(e) *Per Buller*, J. H. 30 Geo. III. K. B. 4 Durnf. & East, 557. R. M. 1654, § 21, C. P.

(f) *Fitzgerald v. Smith*, T. 36 Geo. III. K. B.

(g) 2 Chit. Rep. 244, K. B. *Harman v. Gilbert*, M. 36 Geo. III. C. P. 2 New Rep. C. P. 397; and see Barnes, 295. *Cas. Pr. C. P.* 101. *Pr. Reg.* 397, S. C.

(h) *Append. Chap. XXXIII.* § 17.

(i) *Id. ibid.*; and see 1 H. Blac. 282. 2 H. Blac. 558.

(k) *Imp. K. B.* 10 Ed. 303, 4. *Imp. C. P.* 6 Ed. 338, 9.

(l) 2 Durnf. & East, 734.

(m) *Id. ibid.* 9 Moore, 687. 2 Bing. 360, S. C. *Sed quare*, whether judgment, as in case of a nonsuit cannot be moved for the next term after the *first* assizes, where issue is entered the same term in which it is joined, though notice of trial has not been given; as it seems from a note on R. M. 4 Ann. K. B., that the defendant in such case may proceed to trial by *proviso*, at the *second* assizes.

term; or the court, we have seen, (a) will enlarge the rule till the next term, and not permit the parties to discuss it at chambers.

In the Common Pleas, it was decided in one case, (b) that the defendant in a *town* cause was entitled to judgment as in case of a nonsuit, the next term after that in which issue was joined, if there was time enough to give notice of trial, though it was not actually given, for the sittings in or after the preceding term: But this decision seems to have been overruled by subsequent cases, in one of which it was determined, that the plaintiff has the whole of the term next after that in which issue is joined, to try his cause; (c) and in another, the court said that the practice was now settled, that the defendant could not apply for judgment as in case of a nonsuit, before the *third* term: (d) and though the plaintiff in that case was too late to try in the term in which the application was made, they would not punish a default before it was actually committed. In the Exchequer, the defendant might formerly have moved for judgment as in case of a nonsuit, the next term after that in which issue was joined, if joined early enough to enable the plaintiff to give notice of trial for the sitting in or after the preceding term: a plaintiff, in that court, being in all cases bound to proceed to trial at the next sitting or assizes after issue joined, provided there was time for giving notice of trial. (e) But now, by a late rule of court, (f) "no rule for judgment as in case of a nonsuit, shall be granted in the next term after issue joined; unless it appear, on the face of the affidavit on which the motion is founded, that the plaintiff had given notice of trial, and had neglected to proceed to trial."

When the plaintiff has neglected to try his cause, according to the course and practice of the court, the defendant is at liberty to move for judgment as in case of a nonsuit, the same term in which the issue is entered, in the King's Bench, (g) as well as in the Common Pleas. (h) The rule for judgment in such case, is a rule to show cause, (i) founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial: (k) which rule, in the King's Bench, has been holden to be sufficient notice of motion within the act: (l) but, in the Common Pleas, it is otherwise; (m) and in that court, although notice has been given of a motion for judgment as in case of a nonsuit, on which the plaintiff entered into a peremptory undertaking to try, yet notice must also be *given [*766] of the like motion, for not proceeding to trial in pursuance of the undertaking: (aa) but the rule requiring a term's notice does not, we have seen, (bb) extend to a motion for judgment as in case of a nonsuit. To move for such judgment, the roll must be in court at the time the motion is made; (cc) and if no cause be shown, the rule is made absolute of course, on an affidavit of service. If the plaintiff mean to resist the application, he should obtain an office copy of the rule, and of the affidavit on which it was

(a) *Ante*, 502.

(c) *Id.* 123.

(e) *Man. Ex. Pr.* 320; and see 5 Price, 187. 7 Price, 531.

(f) *R. E.* 5 Geo. IV. Excheq. *M'Clel.* 708. 13 Price, 454. *Id.* 453, *accord.* And see further, as to judgment as in case of a nonsuit, 2 Wms. Saund. 5 Ed. 336, *b.*

(g) 1 Chit. Rep. 672.

(i) *Append. Chap. XXXIII.* § 18.

(j) *Lofft.* 265.

(bb) *Ante*, 756.

(cc) *Imp. K. B.* 10 Ed. 304. *Barnes*, 313. 1 *Bos. & Pul.* 388.

(b) 1 *H. Blac.* 65.

(d) 2 *H. Blac.* 558.

(h) 1 *Bos. & Pul.* 387.

(k) *Id.* § 17.

(m) 1 *H. Blac.* 527. *Ante*, 491.

(aa) *Append. Chap. XXXIII.* § 16.

granted ;(d) and the court, on showing cause, will make the rule absolute or discharge it, according to circumstances ; and if discharged, it is either with or without a peremptory undertaking to try the cause at the next sittings or assizes.

The causes ordinarily assigned, and which are allowed by the court as sufficient excuses for not proceeding to trial, are the plaintiff's own illness, and inability to instruct his attorney,(ee) the insolvency of the defendant,(ff) the absence of a material witness,(gg) or want of documentary evidence,(hh) &c. ;[A] and a slight cause is in general deemed sufficient on the first application, if the plaintiff will undertake peremptorily to try the cause at the next sittings or assizes ;(ii) and there is no difference in this respect, between *qui tam* and other actions.(kk) But some reason must be assigned for not proceeding to trial ; or the court will not compel the defendant to accept a peremptory undertaking.(ll) And, in an action for penalties for usury, a defendant is entitled to judgment as in case of a nonsuit, if it appear that a witness to the corrupt contract, who is abroad, could not be compelled to

(d) *Ante*, 501. Imp. C. P. 7 Ed. 338.

(ff) 1 Ken. 349. Doug. 671. 7 Taunt. 180.

(hh) 6 Taunt. 150 ; and see Hullock on Costs, 2 Ed. 409. 10. Imp. K. B. 10 Ed. 304, 5. Imp. C. P. 7 Ed. 338. 1 Chit. Rep. 279, (a).

(ii) 1 Ken. 349.

(ll) 2 Chit. Rep. 244.

(ee) Barnes, 313.

(gg) Barnes, 316. 2 Price, 16, 90.

(kk) 7 Durnf. & East, 178. 1 East, 554.

[A] "The rules for bringing on causes must be influenced by a legal discretion applicable to the peculiar circumstances of every case, by exercising which, care will be taken by the courts that injustice is not done either by precipitate trials or wanton delays. Our courts, sitting to do substantial justice, are fully disposed to bring on causes as early as it may be done, yet this must necessarily be in those cases where the parties are prepared, or have not been guilty of manifest negligence. Therefore, the discovery of a material witness, in another state, will, when there is no affectation of delay, be a ground to put off the trial.

"It is the duty of a party, if he knows that a witness is about to leave the country, to take his deposition. If he has failed to do so, and knows to what place the witness has gone, he ought to obtain a commission without loss of time, and endeavor to get it executed ; and if the witness has departed without the knowledge of the party, of his intention to do so, or of the place to which he has gone, the party is entitled to a reasonable indulgence." An affidavit by a defendant that A., (the affirmit's brother) was a material witness, that he had sailed for a foreign port, "upon a sudden determination known to the affirmit only three or four days before his departure, and that the affirmit did not advert, at the time, to the circumstance of his testimony being material," is not a sufficient ground for postponing the trial. In order to put off the trial, the court must be satisfied that injustice would be done, if the application were refused, and it will not be granted if the defendant has conducted himself unfairly ; or if the testimony of the witness be intended to support an odious defence. And a postponement was denied where the witness went out of town, after notice of trial given, when he might have been subpoenaed. But where an attorney of the court is a material witness, and promised to attend, a subpoena is not necessary to entitle a party to a postponement of the trial. A motion for a postponement was granted, the defendant, as soon as he had notice of trial, having taken out a subpoena for a witness at a great distance, neither the witness nor the person employed to serve the subpoena having attended. A cause which had been continued (on account of the absence of material witnesses residing in another county, to whom a subpoena had issued) from a term to which the subpoena was returnable to that term, and again continued at the next term because an attachment had been issued, which could not be served, was, notwithstanding a rule to try, or non pros., continued a third time, subject to the same rule, the defendant having refused to have the depositions taken. The trial of a cause shall not be postponed for the non-attendance of a witness whose deposition has been taken, where the adverse party agrees it may be read in evidence.

The affidavit in support of the motion, generally states that the person absent is a material witness, as the party is advised and verily believes, without whose testimony he cannot safely proceed to trial ; that he had endeavored to find the witness, and have him subpoenaed, but without effect, and that he expects to be able to procure his attendance hereafter. 1 Troubat & Haley's Pr. 482.

give evidence, even if he were in this country. (mm) An affidavit is usually required, of the facts constituting the excuse for not proceeding to trial; and, in the Common Pleas and Exchequer, of the service of notice of motion: And if the plaintiff defer proceeding, in order to await the decision of the court on a similar question in another cause, the nature of the question, and of the cause in which it arises, should be stated in the affidavit, to enable the court to judge of the sufficiency of the excuse. (n) But when the rule is opposed on the ground of the absence of a material witness, the name of the witness need not be stated in the affidavit. (o) And in opposing the rule for want of documentary evidence, it is not necessary to state what the evidence is: (p) And no great precision is required in an affidavit of this nature: Therefore, where the affidavit merely stated that the reason for not proceeding to trial was, *that it was not convenient [*767] for a material witness to come to town in time for the trial, after it was sworn that an attempt had been made to *subpœna* him, the court said, that although the affidavit was loose, yet as this was the plaintiff's first default, the defendant ought to be content with a peremptory undertaking. (a) Where the rule to show cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one: (b) though if it had been suggested at the time, that the answer was false in fact, the court would have suspended their judgment till the matter was examined. (c)

When a sufficient excuse is assigned for not trying the cause, the court will discharge the rule for judgment as in case of a nonsuit, without requiring a peremptory undertaking from the plaintiff, to try it at the next sittings or assizes: And where the plaintiff had become insolvent after issue joined, this was allowed to be a good cause against judgment as in case of a nonsuit; and the court would not bind him down to a peremptory undertaking, it being alledged that his creditors were about to decide, whether they would prosecute or abandon the cause. (d) So, where the plaintiff in a *qui tam* action, on the statute 7 Geo. II. c. 8, withdrew his record, because the broker who negotiated the illegal bargain for stock, refused to give evidence, lest he should subject himself to a penalty on the same statute; the court of King's Bench held this to be a sufficient reason to discharge a rule for judgment as in case of a nonsuit, for not proceeding to trial; although the witness's liability to be sued would not be removed, till after the end of three succeeding terms. (e) And where the defendant had procured the cause to be stayed by injunction, that court would not compel the plaintiff to give a peremptory undertaking. (f)

In general, however, a peremptory undertaking is required by the court, on discharging the rule for judgment as in case of a nonsuit; (g) and it must be given, in the King's Bench, although the trial be deferred on account

(mm) 1 Dowl. & Ryl. 448.

(n) 6 Taunt. 122. 1 Chit. Rep. 280, *in notis*: and see 5 Taunt. 88.

(o) 8 Taunt. 104; but see 6 Taunt. 150, *contra*.

(p) 6 Taunt. 150; and see 1 Dowl. & Ryl. 159.

(a) *Wheeler v. Stephens*, H. 59 Geo. III. K. B. 1 Chit. Rep. 280, *in notis*.

(b) 3 Durnf. & East, 405. (c) *Id.* 406.

(d) *Fisher v. Hancock*, H. 36 Geo. III. K. B.; and see stat. 7 Geo. IV. c. 57. § 15.

(e) 7 Durnf. & East, 178.

(f) *Per Cur.* E. 56 Geo. III. K. B. 1 Chit. Rep. 280, 81, *in notis*.

(g) Append. Chap. XXXIII. § 19.

of the absence of a material witness, and it is doubtful whether the witness will return in time to try the cause at the next sittings or assizes: (h) but further time may be obtained, if necessary, on application to the court. (h) When the defendant is insolvent, the court will bind the plaintiff down to a peremptory undertaking to try the cause, unless he will consent to stay all further proceedings in the action, and to enter a *stet processus*. (i) So, where the plaintiff had held out to the defendant, that he would settle the cause, the court discharged the rule for judgment as in case of a [*768] nonsuit, on the plaintiff's undertaking in the alternative, *either to pay costs, or to enter a *stet processus*: (a) And the plaintiff was allowed to enter a *stet processus*, on paying the costs of the application, on the ground of the defendant's having taken the benefit of an insolvent debtor's act; although the rule for judgment as in case of a nonsuit had been discharged, on the plaintiff's giving a peremptory undertaking, and the debt sought to be recovered was not included in the defendant's schedule, and notice of discharge under the act. (b) So, where the defendant had obtained judgment against the plaintiff in the Common Pleas for twelve pounds, the latter having suffered judgment to go by default, although he had a claim against the defendant for ten pounds, which he neglected to set off in that action, and afterwards the plaintiff brought an action to recover the latter sum in the King's Bench; the court held, that as the defendant had offered to allow the plaintiff the ten pounds, he might obtain a rule for judgment as in case of a nonsuit, unless the plaintiff would either give a peremptory undertaking to try at the next sittings, or discontinue the action and pay costs. (c)

In the Common Pleas, it has been determined, that a peremptory undertaking to try, is alone sufficient cause to show against judgment in case of a nonsuit, for not proceeding to trial, if it be the first default: (d) But in practice it is usual, and said to be necessary, (e) to show some reasonable cause by affidavit, for not proceeding to trial, such as the plaintiff's own illness, (f) or the absence of a material witness, (g) &c.: though, as has been already observed, (h) a slight cause is in general deemed sufficient on the first application: And if witnesses are absent, and their return is not immediately expected, this court will not require of the plaintiff a peremptory undertaking to proceed to trial, as the condition of discharging a rule for judgment as in case of a nonsuit. (ii) In general, however, a peremptory undertaking is required in the Common Pleas, as well as in the King's Bench: And where notice of trial has been given, and not countermanded, the court will order the plaintiff to pay costs for not proceeding to trial, as well as to give a peremptory undertaking to try the cause at the next sittings or assizes. (k) In the Exchequer, the court, on discharging a rule for judgment as in case of a nonsuit, will order the plaintiff to pay the defendant his costs, give a peremptory undertaking, and, if the venue has been changed to a county where no assizes are holden in the spring, consent that

(h) *Hatcher & another v. Hardy*, T. 54 Geo. III. K. B. 1 Chit. Rep. 280, *in notis*. *Aliter*, in C. P. *Post*, 768.

(i) 7 Taunt. 180.

(a) *Per Cur.* H. 54 Geo. III. K. B. 1 Chit. Rep. 738, (a).

(b) 1 Chit. Rep. 738.

(c) *Id.* 178.

(d) 2 H. Blac. 119.

(e) Imp. C. P. 7 Ed. 338.

(f) *Id.* 316. 6 Taunt. 150.

(g) 1 Taunt. 118. *Aliter* in K. B. *Ante*, 767.

(h) *Id.* 178. *Mallet v. Hilton*, M. 33 Geo. III. C. P. Imp. C. P. 4 Ed. 388, *accord*.

(f) Barnes, 313.

(h) *Ante*, 766.

(k) Barnes, 464.

the venue shall be brought back to the original county, that the trial may be brought on without further delay.(l)

If the rule be made absolute, the defendant having drawn it up with the clerk of the rules in the King's Bench, or secondaries in the Common *Pleas, may sign judgment as in case of a nonsuit,(aa) [*769] and tax his costs, &c. But if further time be given on a peremptory undertaking, the plaintiff must draw up the rule,(b) and serve a copy of it on the defendant's attorney; after which, if he do not proceed to trial pursuant to his undertaking, the defendant having obtained an office copy of the rule, should move the court for judgment, on an affidavit of the circumstances:(c) And a mistake in the declaration is not a good excuse for not proceeding to trial, pursuant to an undertaking.(d) But where the plaintiff, having given a peremptory undertaking to try at a given sittings, had set down his cause in the paper for those sittings, there being no prospect of the cause being then tried, but omitted to carry the record into the marshal's office, the court held, that the defendant was not entitled to judgment as in case of a nonsuit, for the plaintiff's not proceeding to trial pursuant to such undertaking; as the latter was not bound to carry in the record.(e) So, where the plaintiff, in a special jury *tithe* cause, was under a peremptory undertaking to try at the next assizes, the court held the absence of *eleven* special jurymen to be a sufficient reason for his declining to proceed to trial, though a *tales* had been prayed, and some of the talesmen sworn; and discharged a rule *nisi* for judgment as in case of a nonsuit, on a fresh peremptory undertaking to try at the next assizes.(f) A peremptory undertaking does not preclude the court from a further enlargement of the time, if they think it reasonable:(g) Accordingly, when the plaintiff is not prepared to try the cause pursuant to his undertaking, it is usual for him to apply to the court to discharge it, and for liberty to try at a future sitting or assizes, on an affidavit of the facts; which the court will grant, if they see cause, on payment of costs.

In the King's Bench, we have seen,(h) the court will not give costs for not proceeding to trial, unless a separate motion be made for them: But, in the Common Pleas, the costs are in the discretion of the court;(i) though they are in general allowed, on discharging the rule for judgment as in case of a nonsuit, on a peremptory undertaking:(k) and the same practice prevails in the Exchequer.(ll) The costs on such judgment depend on the statute 14 Geo. II. c. 17.; which only gives costs to the defendant, where he would have been entitled to them upon a nonsuit: and therefore the tenant is not entitled to costs in a writ of right;(mm) nor are they allowed as

(l) 2 Price, 16.

(aa) For the form of the judgment, see Append. Chap. XXXIII. § 22.

(b) Append. Chap. XXXIII. § 19.

(c) *Id.* § 20. In the Exchequer, the rule for judgment is absolute in the first instance, 9 Price, 389.

(d) Say. Rep. 74. Say. Costs, 166, S. C.

(e) 1 Dowl. & Ryl. 180.

(f) 1 Bing. 70. 7 Moore, 367, S. C.

(g) Barnes, 313, 315. 1 Chit. Rep. 281, *in notis.* 9 Price, 389.

(h) *Ante*, 759.

(i) 7 Taunt. 476. 1 Moore, 251, S. C.

(k) 2 H. Blac. 280. 1 Bos. & Pul. 38. 4 Taunt. 592, (a); but see 5 Taunt. 88. 7 Taunt. 476. 1 Moore, 251, S. C. *Ante*, 759, 60.

(ll) 1 Price, 61. (c). 2 Price, 16, 90, 92, n. 7 Price, 709.

(mm) 2 Blac. Rep. 1093, 1110.

against an *executor*, who merely sues *en auter droit*.⁽ⁿ⁾ The [*770] costs *of the application for judgment as in case of a nonsuit, are governed by the event of it: If the rule be made absolute, they are considered as costs in the cause, to which the defendant is of course entitled, by the statute 14 Geo. II. c. 17; but if the rule be discharged, the costs of the application are in the discretion of the court. It is not usual, however, to make the *plaintiff* pay such costs, on discharging the rule: ^(a) and where nothing is said respecting costs, the defendant will be entitled to them, if he succeed at the trial, as costs in the cause; though the plaintiff, if he obtain a verdict, will not be entitled to the costs of opposing the rule.

If the defendant be unable to proceed to trial, on account of the absence of a material witness, or for want of documentary evidence, ^(b) he may move the court in term time, or apply to a judge in vacation on an affidavit of the facts, to put it off till the next term; or, in the Common Pleas, if necessary, till a more distant period: ^(c) And the court of King's Bench, upon application of the defendant, postponed the trial of an information for a misdemeanour, upon his consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the crown. ^(d) But the courts will not put off a trial, at the instance of the defendant, on account of the absence of a material witness, after he has pleaded a sham plea, by which a trial has been lost, unless he will pay the money into court; ^(e) nor if he has conducted himself unfairly, or been the cause of any improper delay. ^(f) So, where a cause is removed by the defendant from an inferior court, and in the mean time a witness dies, on account of which the defendant applies to put off the trial, he must bring the money into court, as a condition of the postponement. ^(g) When the defendant pleads in abatement, he must be prepared to prove his plea promptly; and a strong case must be made out, before the court will postpone the trial. ^(h) And the court of Common Pleas refused to put off a trial, on account of the absence of a material witness, by whose evidence the defence of *slavery* was intended to be established. ⁽ⁱ⁾ If the plaintiff refuse to consent to the examination of material witnesses for the defendant, who are going or reside abroad, on interrogatories, the courts will assist the defendant, by putting off the trial. ^(k) And the court of Common Pleas put off a trial, to enable the defendant to apply for a commission for examining witnesses abroad on interrogatories, in order to support pleas of justification to a declaration for a libel, where it appeared that the plaintiff had not promptly brought his action after the publication of the libel, and had been otherwise dilatory in bringing the cause to issue. ^(l) But where it is necessary to postpone a trial, for the purpose of sending abroad to examine witnesses [*771] *under a commission, the court of King's Bench, will not put off the trial *until* they are examined, which is too indefinite, but

(n) 4 Bur. 1928. Willes, 316. Barnes, 130, S. C. 2 H. Blac. 277. 4 Dowl. & Ryl. 834; but see 7 Price, 709.

(a) Barnes, 316, 464, C. P. 7 Price, 531, 709. M'Clell. 593, *in Scac.*; but see Forrest, 3. 1 Price, 61, (c). 2 Price, 16, 90, n. 6 Price, 202. 8 Price, 94.

(b) 1 Dowl. & Ryl. 159.

(d) 2 Maule & Sel. 602.

(f) 1 Bos. & Pul. 33.

(g) 1 Chit. Rep. 730; but see *id.* 686, (a).

(h) 2 Chit. Rep. 5. 1 Man. & Ryl. 111, (a), S. C.

(i) 1 Bos. & Pul. 454.

(l) 1 Chit. Rep. 685; and see 4 Dowl. & Ryl. 830.

(c) Pr. Reg. 398, 9. Barnes, 440, S. C.

(e) *Stockton v. Hodges*, T. 27 Geo. III. K. B.

(k) Cowp. 174. Doug. 419.

only to a definite period: (a) And the court of Common Pleas refused, by putting off a trial, or other indirect means, to compel a party to consent to a commission for the examination of witnesses in *Scotland*. (bb)

In the Exchequer, if there has been any delay in the interval between the issuing of the first process, and the filing of the information against the defendant, and during that interval he has gone abroad on his duty, as well as some of his witnesses, the court, on motion, will postpone the trial: (cc) And, in that court, if the trial of an information has been once postponed, at the instance of the attorney general, *pro defectu juratorum*, the court will also grant the defendant a rule to show cause why the trial should not be further postponed, on his application, if in the mean time a material witness, sworn to have been ready on the former occasion, is not forthcoming. (dd) But the court will not postpone the trial of an information, on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think there has been sufficient time for its return: (e) it should be stated in the affidavit, in support of such an application, that the return is expected, and at what time. (e)

An application to put off a trial beyond the present sittings, or from sittings to sittings, is never allowed in the King's Bench, on the part of the plaintiff, who having a control over his own record, has only to withdraw it, if he find he is not prepared to try the cause. (f) Much valuable time is thus saved, which would be wasted in these applications. Nor is there any great hardship imposed upon the plaintiff; for even if the judge were to make an order to put off the trial, he must pay costs to the defendant; and, either way, he could bring on his cause again for trial with equal facility. But where, from the sudden indisposition of a witness, who may be able again to attend in the course of a day or two, or for any temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, and yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record; and a judge at *nisi prius* will therefore, upon these grounds, make an order for the trial to stand over, till such time as the witness is likely to attend. (g)

*The application for putting off a trial should in general be [*772] made two days at least before the day of trial, (a) if the necessity for it was at that time known to the defendant: If not, it might formerly have been made afterwards, even when the cause was called on at *nisi prius*: (b) And an application may be made to a judge at *nisi prius*, to put off the trial of an issue directed by the Lord Chancellor. (c) But a judge sitting at *nisi prius* at *Westminster* cannot, upon motion, make an order in a cause entered for trial in *London*: (d) And an application was refused,

(a) 1 Chit. Rep. 685.

(bb) 1 Bos. & Pul. 210.

(cc) 2 Price, 116.

(dd) 3 Price, 35.

(e) *Id.* 221. And see 11 Price, 229, 232. 13 Price, 258. M'Clel. 251. 13 Price, 522, S. C. *Id.* 592, as to the form of an affidavit, &c. for putting off the trial of an information in the Exchequer. See, also, 13 Price, 181. M'Clel. 67, S. C., as to the grounds of putting off the trial, in *scire facias* on an extent.

(f) 3 Campb. 333, 4. It had been previously decided by Lord *Kenyon*, as was formerly ruled by Lord *Manfield*, in a *Chester* case, that the trial could not be put off, in favour of the plaintiff, in an action on a penal statute, M. 38 Geo. III. K. B.

(g) 3 Campb. 333, 4.

(a) Barnes, 437. Pr. Reg. 401, S. C. Barnes, 442, 444; but see 2 Taunt. 221.

(b) Peake's Cas. Ni. Pri. 3 Ed. 132. Barnes, 452.

(c) 4 Camp. 163.

(d) 3 Campb. 41.

to put off a trial at *nisi prius*, in order to enable the plaintiff to amend his declaration, by omitting the *profert* of the bond on which the action was brought.(*ee*) In the Common Pleas, it is a general rule of practice, that no motion to put off a trial will be entertained at *nisi prius*, where the motion might have been made in bank, in term time.(*ff*) It is also a rule in that court, that the judge will never put off the trial of a cause, upon the consent of the parties or counsel, at *nisi prius*; but the plaintiff must either proceed to try, or withdraw his record.(*gg*) The intention of this rule is, to prevent the time of the judge who sits at *nisi prius* from being occupied with discussing these motions: And a motion to put off a trial in *London* or *Middlesex*, on account of the absence of a witness, cannot be made, when there is not time to show cause within the term, if the party applying had it in his power to come earlier.(*h*) It seems, however, that in this court, as well as in the King's Bench, a judge at *nisi prius* will put off a trial, on application by a plaintiff, *till the next sitting*, if in term, or *for a few days*, if it be after term;(i) but if longer delay be required, the plaintiff can only obtain it by withdrawing the record: and this application is never granted, without very special circumstances, or the consent of the other party.(i) When the application is made to a judge at *nisi prius*, notice should first be given to the plaintiff's attorney, with a copy of the affidavit to be produced:(*k*) In other cases it is usual, and seems to be necessary in the Common Pleas,(*l*) to give previous notice of the intended motion.(*m*)

The affidavit should regularly be made by the defendant himself,(*n*) unless he be abroad, or out of the way; in which case it may be made by his attorney,(*o*) or a third person:(*p*) and in general it states that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial: that he has endeavoured, without effect, to get him *subpœnaed*; but that he is in hopes of procuring his future attendance.(*q*)

[*773] *to return.(*a*) But it seems that an affidavit, stating that the witness is not expected to return till a particular day, is sufficient; it being an implied assertion, that he is expected at that time:(*a*) And it does not seem to be necessary to mention in the affidavit, the *name* of the witness.(*b*) An affidavit in the common form is sufficient, when no cause of suspicion appears: But if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the party applying has not been guilty of any laches or neglect; and thirdly, that he is in reasonable expectation of being able to procure his attendance, at the time to which the trial is prayed to be deferred.(*c*) It is not necessary to swear to merits, in order to put off a trial, on account of the absence of a material witness;(d) nor will the court in the first instance,(*e*) nor even on a second application,(*f*) impose the terms of

(*ee*) 1 Stark. Ni. Pri. 74.

(*ff*) 1 Taunt. 565.

(*gg*) 2 Taunt. 221.

(*h*) 3 Taunt. 315.

(*i*) 2 Car. & P. 185.

(*k*) Cas. temp. Hardw. 128.

(*l*) Imp. C. P. 7 Ed. 325.

(*m*) Append. Chap. XXXIII. § 23.

(*n*) Barnes, 437. Pr. Reg. 401, S. C.

(*o*) Peake's Cas. Ni. Pri. 3 Ed. 132.

(*p*) Barnes, 448.

(*q*) Append. Chap. XXXIII. § 24.

(*a*) 1 Chit. Rep. 730, (*a*). 2 Chit. Rep. 411, S. C.

(*b*) 2 Dowl. & Ryl. 420. 4 Dowl. & Ryl. 832, (*a*).

(*c*) 3 Bur. 1514. 1 Blac. Rep. 514, S. C.; and see 1 Blac. Rep. 436. 8 East. 31. 8 Price, 292.

(*d*) *Duncan v. Thomasin*, M. 38 Geo. III. K. B.

(*e*) *Cookson v. Simpson*, T. 56 Geo. III. K. B. 1 Chit. Rep. 686, (*a*).

(*f*) 1 Chit. Rep. 182. 2 Chit. Rep. 411, S. C.

paying money into court, or giving security for the same: But upon a second motion to put off a trial, on account of the continued absence of a witness, the court will, if they think proper, inquire into the circumstances; and it is not to be considered that the trial is to be put off as a matter of course.(g) On a motion to postpone a trial, upon an affidavit suggesting the absence of the copy of a judicial document in the *West Indies*, sworn to be material and necessary on the trial of the cause, the court would not try the admissibility of the evidence, on an objection that, when it arrived, it could not be admitted; but postponed the trial, until the document should arrive.(h) In the Common Pleas, the affidavit as to the witness's being material ought to be positively sworn;(i) and the defendant must state particularly in his affidavit in what respect the evidence is material:(kk) And that court refused to put off the trial, because it appeared by the affidavit, that the witness went out of town, after notice of trial given.(l)

There are other causes for putting off the trial; such as the illness of the defendant's attorney,(m) or on account of a paper published with intent to influence the jury,(n) &c.: and when any of these occur, the affidavit should be framed accordingly. If a party be arrested in coming to attend the trial of his cause, the judge *at nisi prius* will put off the trial until he is released, without payment of costs, if any collusion can be shown to exist between the opposite party and the creditor who arrested him; *otherwise, it can only be upon payment of costs.(a) But the [*774] court will not put off the trial of a cause, brought by the assignees of a bankrupt, because a petition is pending against the commission of bankruptcy;(b) nor will they put off a trial, pending a suit relating to the same matter in a spiritual court.(c)[1]

(g) *Per Lord Ellenborough*, Ch. J. E. 55 Geo. III. K. B. 1 Chit. Rep. 686, (a).

(h) 1 Dowl. & Ry. 159.

(ii) *Barnes*, 448. Pr. Reg. 402.

(kk) *Corbyn v. Dawson*, E. 36 Geo. III. C. P. Imp. C. P. 7 Ed. 327.

(l) *Barnes*, 442.

(m) *Say*, Rep. 63.

(n) 1 Bur. 512. 2 Ken. 276, S. C. 4 Durnf. & East, 285. 7 Moore, 87. 3 Brod. & Bing. 272, S. C.

(a) 1 Campb. 229.

(b) 2 Chit. Rep. 411.

(c) 2 Salk. 646, 649.

[1] It was stated at the commencement of this chapter, that trials, in England, were at bar or *in prius*; and it was so, until the passing of the Law Amendment Act, 3 & 4 W. IV. c. 42. By that statute, a new mode of trial has been introduced for small causes. Its provisions in this respect are these: "In any action depending in any of the superior courts of common law at *Westminster*, for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of *summons*, shall not exceed twenty pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue, directed to such sheriff, or judge, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." And there is a similar clause in the late act, for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster*; 4 & 5 W. IV. c. 62, § 20.

The provisions of the law amendment act, respecting the trial of issues before the sheriff, &c. are confined to actions for the recovery of debts or demands, in which the sum sought to be recovered, and indorsed on the writ of *summons* does not exceed 20*l*. It therefore applies only to actions for debts and pecuniary demands, for sums not exceeding that amount, and not to actions of *tort*; *Watson v. Abbott*, 2 Crompt. & M. 150. 4 Tyr. Rep. 64. 2 Dowl.

* CHAPTER XXXIV.

Of the RECORD of NISI PRIUS, JURY PROCESS, COMMON and SPECIAL JURIES, and VIEWS.

HAVING, in the preceding chapter, shown what is to be done, when the parties are not ready or willing to proceed to trial, I shall next consider, when

Rep. 215, S. C.; but see *Price v. Morgan*, 2 Meeson & W. 53. And it was determined in one case, *Trotter v. Bass*, 1 Scott, 403; 1 Bing. N. R. 516; 3 Dowl. Rep. 497; 1 Hodges, 23; 9 Leg. Obs. 414, S. C.; and see *Edge v. Shaw*, 4 Dowl. Rep. 189; 2 Crompt. M. & R. 415, S. C., that the court or a judge has no power to reduce the amount indorsed upon a writ of *summons*, so as to make the cause triable by the sheriff. But it was afterwards holden, that where a cause is proper to be tried by the sheriff, under the writ of trial act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, and than is allowed by the act, the court will allow the writ to be amended; *Edge v. Shaw*, 4 Dowl. Rep. 189. 2 Crompt. M. & R. 415, S. C. *Prodeham v. Round*, 4 Dowl. Rep. 569. 1 Har. & W. 667. 11 Leg. Obs. 323, 4, S. O. *per Patteson, J.* And it seems that the court will not set aside a trial before the sheriff, on the ground that the case was not within the statute, at the instance of the party who obtained the order for the writ of trial; *Price v. Morgan*, 2 Meeson & W. 53. The application for a writ of trial may be made either to a judge at chambers, or to the court; and it seems that when an application has been made to a judge at chambers, who has refused to make the order, the court will not entertain the application, although the party might, under the act, have come before the court in the first instance; *Davies v. Lloyd*, 1 Tyr. & G. 28. 4 Dowl. Rep. 478, S. C.

In pursuance of the above act, if the court in which the suit is depending, or any judge of a superior court, is satisfied upon hearing counsel, or the attorneys or agents for both parties, that the sum sought to be recovered does not exceed *twenty pounds*, and that the trial will not involve any difficult question of fact or law, they will make a rule or order for trial of the issue or issues joined therein, before the sheriff of the county where the action is brought, or any judge of a court of record for the recovery of debt in such county; and that a writ issue, directed to such sheriff or judge, for trial thereof accordingly. An *affidavit* is sometimes required by the court or a judge, in support of the application for a rule or order for a writ of trial: For the form of this *affidavit*, when necessary, see Append. to Tidd *Sup.* 1833, p. 307; but it is commonly granted, without an *affidavit*, by summons and order, *Id.* 307, *b.*, at a judge's chambers. The writ of trial is directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court: And where a writ of trial was directed to the mayor of *Colchester*, and the cause was tried by his deputy, the court refused to set aside the proceedings, on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that the officer had no authority to appoint a deputy; *Clark v. Marner*, 4 Moore & S. 171. 2 Dowl. Rep. 774, S. C. This writ begins by stating that the plaintiff had impeached the defendant, in the court from which it issued, in an action on promises, (or of *debt*, &c. *as the case may be*;) and after setting forth the declaration, plea, and issue or issues joined, and that the sum sought to be recovered, and indorsed on the writ of *summons*, does not exceed 20*l.*, and that it is fitting that the issue or issues should be tried before the sheriff or judge to whom it is directed, commands the said sheriff or judge, that he summon twelve free and lawful men, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the issue or issues joined between the parties, and that he proceed to try such issue or issues accordingly; and when the same shall have been tried in manner aforesaid, that he make known to the court what shall have been done by virtue of the writ, with the finding of the jury thereon indorsed, on the return day; For the form of the writ of trial, see R. Pl. H. & W. IV. Sched. No. 5; and see Append. to Tidd *Sup.* 1833, p. 308.

If the plaintiff do not proceed to trial in due time, the defendant may move for judgment as in case of a nonsuit, as well where the issue is directed to be tried before the sheriff, as where it comes on at the sittings or assizes; *Begbie v. Grenville*, 2 Dowl. Rep. 238; and see *Walls (or Halls) v. Redmayne*, 2 Dowl. Rep. 508. 8 Leg. Obs. 331, S. C. *per Taunton, J.* *Horwood v. Roberts*, 2 Dowl. Rep. 534. 9 Leg. Obs. 30, S. C., *Maddely (or Madely) v. Batty*, 3 Dowl. Rep. 205. 9 Leg. Obs. 110, S. C. This motion is made in the same manner, and governed by the same principles, as the motion for judgment as in case of a nonsuit in ordinary cases; *Ward v. Krank*, 9 Leg. Obs. 251, *per Patteson, J.*

On a writ of trial, the sheriff has the same power of directing a *nonsuit*, as a judge at *nisi*

they are, the preparatory steps to be taken, with regard to the record of *nisi prius*; the jury process, or process for convening the jurors, with their qualifications, disqualifications, and exemptions; and the mode of proceeding for returning and impanelling *common* juries, striking *special* juries, summoning jurors, and obtaining views.

The record of *nisi prius* which is supposed to be transcribed from the issue roll, contains an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the *venire facias*, as in the issue or paper-book: and is in nature of a commission to the judges at *nisi prius*, for the trial of the cause. (a) It begins with the *placita*, or style of the court, of the term issue was joined; and, in the King's Bench, after the award of the *venire facias*, there is always a second *placita*, of the term in or after which the cause is tried: (b) But, in the Common Pleas, there is no second *placita*, when the parties go to trial the same term issue is joined, unless on the death or change of a chief-justice. (c) The record then concludes with an entry, called the *jurata*, (d) stating that "the jury is respited before the lord the king, or his justices, at *Westminster*, or (by *original* in the King's Bench,) wheresoever the king shall then be in *England*, until the return of the *distringas* in the King's Bench, or *habeas corpora juratorum* in the Common Pleas, unless the chief-justice or judges of assize shall first come on the day of trial, at the sittings or assizes, for default of the jurors, because none of them did appear;" and the sheriff is required to have the bodies of the jurors, to make the said jury accordingly: After which, at the assizes in the King's Bench, and at the sittings also in the Common Pleas, the *jurata* ends with what is called the *sciendum*, (d) being a certifi-

(a) Append. Chap. XXXIV. § 1, 2; and for the record in the Exchequer, see *id.* § 4, &c.

(b) *Id.* § 1.

(c) Gilb. C. P. 80, 81. 1 Crompt. 3 Ed. 229. 2 Wms. Saund. 5 Ed. 253, (8). Append. Chap. XXXIV. § 2. And for the form of a *placita* in the Common Pleas, on the death or removal of a chief-justice in term time, see *id.* § 3.

(d) Append. Chap. XXXIV. § 1, 2.

prius in an ordinary case; *Watson v. Abbot*, 2 Crompt. & M. 150. 4 Tyr. Rep. 64. 2 Dowl. Rep. 215, S. C. And the verdict of a jury, on trial of the issue or issues, is declared by the act, Stat. 3 & 4 W. IV. c. 42, § 18, to be "as valid, and of the like force, as a verdict of a jury at *nisi prius*; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers, with respect to amendment on such trial, as are therein-after given to judges at *nisi prius*." An under-sheriff is holden to be justified in laying down a rule, that no person but a barrister, or an attorney, shall appear as the advocate of a party, on a writ of trial; *Tribe v. Wingfield*, 2 Meeson & W. 128.

On the return day of the writ of trial, the sheriff is required thereby, to make known to the court, what he shall have done by virtue thereof, with the finding of the jury thereon indorsed. For the form of the indorsement of a nonsuit or verdict, on the writ of trial, see R. Pl. H. 4 W. IV. Sched. No. 6, 7. Append. *Post*, § 6, 7; and see Append. to Tidd *Sup.* 1833, p. 310, that judgment may be given thereupon. And at the return of such writ, the act directs that "costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, deputy, or judge, before whom such trial shall be had, shall certify, Append. to Tidd *Sup.* 1833, p. 300, under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new trial, or a judge of any of the said courts shall think fit to order, *Id. ibid.*, that judgment or execution shall be stayed, until a day to be named in such order;" Stat. 3 & 4 W. IV. c. 42, § 18.

Where a certificate is granted by the sheriff or judge before whom the trial is had, or a judge's order obtained for staying judgment or execution, the unsuccessful party may move the court above to set aside a nonsuit or verdict, and have a new trial; or, with the permission of the judge before whom the cause was tried, but not otherwise, to set aside the verdict, and enter a nonsuit; *Ricketts v. Burman* (or *Bird*), 4 Dowl. Rep. 578. 11 Leg. Obs. 259, S. C. But the absence of a witness is no ground for a new trial: the application ought to be made to postpone the trial; *Edwards v. Dignam*, 2 Dowl. Rep. 642; and see *Henning v. Samuel*, 2 Dowl. Rep. 766. 3 Moore & S. 818, S. C.

cate of the delivery of the writ of *distringas* or *habeas corpora*, to the deputy sheriff of the county, to be executed according to law, &c.

[*776] *In the King's Bench, the record of *nisi prius* was formerly made out by the clerks of the chief clerk : (aa) but it is now done by the attorneys, and is to be fairly engrossed, on a press or skin of parchment, (bb) which is carried to the *nisi prius* office, where it is sealed and passed; for which are paid seven shillings and sixpence for the first eight sheets, seven shillings for every eight sheets after, and sixpence to the sealer. (cc) In *London* and *Middlesex*, all records of *nisi prius* are to be sealed, on or before the respective days appointed by the lord chief-justice, in the sittings paper, for their trial; (dd) or, when the cause is to be tried at the adjournment day in *London*, the record must be sealed in time to have it entered with the marshal, two days before the adjournment day. (e) And there is an old rule of court, that no record of *nisi prius*, for the trial of an issue at the *assizes*, shall be sealed after the end of three weeks next after the end of the term. (f) But by obtaining a judge's order, for which the clerk is paid two shillings, and which he will procure at his leisure, the record may now be sealed at any time before the *assizes*. (g) In causes which stand over from one sitting to another, the records should be regularly re-sealed, previous to the sitting to which they stand over; or in default thereof, the causes cannot be tried. (h)

In the Common Pleas, the record of *nisi prius* was formerly engrossed on an issue of a preceding term, by the clerk of the treasury; (i) but it is now made out in all cases by the plaintiff's attorney, except where the cause is tried by *proviso*; and should be engrossed in a fair legible character, beginning every pleading with a new line, and the first word thereof in a greater character than the rest: and where there are several counts, they should be noticed by figures in the margin. (k) The record of *nisi prius* being engrossed, is taken, with the warrants of attorney, to the clerk of the warrants, who will mark the record; it being a rule in the Common Pleas, that the clerk of the treasury shall not sign or seal any record of *nisi prius*, unless the same be first signed or stamped by the clerk of the warrants, or his deputy, to the end it may thereby appear that the warrants of attorney are duly filed. (l) The record is then taken to the prothonotaries, who sign it, and are required to take care that it is properly engrossed, (m) after which it is signed and sealed by the clerk of the treasury: and it is a rule, that records of *nisi prius* for the *assizes*, shall be signed by the prothonotaries, and signed and sealed by the clerk of the trea-

[*777] sury, within three weeks next after the end of every *Hilary* *term, and of every *Trinity* term, unless, for reasonable cause, a special warrant shall be obtained for that purpose. (a)

If the issue has not been previously entered of record, it must be so entered, or at least an *incipitur* made, before the passing of the record of *nisi*

(aa) R. T. 1 Jac. II. R. M. 5 Ann. reg. 1, K. B.

(bb) R. M. 5 Ann. reg. 1, (b), K. B.

(cc) R. M. 5 Ann. reg. 1, (a), K. B.

(dd) R. E. 7 Geo. 1, K. B.

(e) 1 Archb. K. B. 163.

(f) R. T. 31 Car. II. K. B.; and see former rules of T. 15 Car. II. reg. 2. R. H. 15 & 16 Car. II. reg. 2. R. H. 20 & 21 Car. II. K. B. R. T. 29 Car. II. reg. 4, C. P.

(g) R. T. 31 Car. II. (a), K. B.

(h) R. E. 33 Geo. III. R. M. 6 Geo. IV. K. B. 2 Wils. 144 C. P. Post, 781.

(i) R. M. 1654, § 21. R. T. 29 Car. II. reg. 2, C. P.

(k) R. T. 29 Car. II. reg. 2, C. P.

(l) R. H. 2 & 3 Jac. II. C. P. Ante, 95, 6, 569.

(m) R. M. 29 Car. II. reg. 2, C. P.

(a) R. T. 29 Car. II. reg. 2 C. P.

prius: For it is a rule of court in the King's Bench, that "no record of *nisi prius* shall be sealed, or passed at the *nisi prius* office, by the *custos breviarum*, or any clerk of that office, before the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to and signed by the secondary; for which no fee shall be demanded or paid, but the usual and accustomed fee due to the chief clerk, for entry of such issue on record."^(b) And in the Common Pleas it is a rule, that the prothonotaries shall not sign any record of *nisi prius*, until the issue, or an *incipitur* thereof, shall be fairly entered upon record, and the fees first paid for the entry thereof.^(c) In practice it is usual, in the King's Bench, when the issue has not been previously entered, to make an *incipitur* on a roll of the term issue was joined, and to take the roll, record of *nisi prius*, and draft of the issue, to the clerk of the judgments; who enters the issue, and marks the roll, record and issue paper, taking three shillings and sixpence for the first *ten* sheets, and one shilling for every *six* more. Parol evidence is inadmissible, to prove the day on which a cause was tried at *nisi prius*; but it should be proved by the production of the *nisi prius* record.^(d)

In the Exchequer, the record begins with the *placita*,^(e) or style of the court; and after setting out the pleadings, as in the issue,^(f) proceeds with the award of the writ of *venire facias*, and the sheriff's return thereto, of a panel of the names of the jurors; and, on their non-appearance, a *distringas* is awarded for bringing them in; after which the record concludes by requiring the parties to attend before the chief baron, or justices of assize, on the day of trial, and afterwards in court, to hear judgment:^(g) And if the cause is to be tried in the country, a commission issues to the justices of assize, for the trial of it;^(h) the statute of *nisi prius* extending only to the courts of King's Bench and Common Pleas:⁽ⁱ⁾ This commission contains a clause of *mittimus*:^(k) And when the cause is to be tried in a county palatine, a writ of *mittimus* is issued in the King's Bench and Common Pleas, as well as in the Exchequer, for carrying down the record.^(l)

The first process for convening the jury, in the King's Bench, and Common Pleas, is a *venire facias*; which is a judicial writ, commanding the *sheriff, or other officer to whom it is directed, to *cause* [*778] *to come* before the king at *Westminster*, (by *bill*, or, by *original*, wheresoever, &c.) in the King's Bench, or before the justices at *Westminster* in the Common Pleas, on a certain day therein mentioned, twelve good and lawful men of the body of the county,^(a) qualified according to law,^(bb) by whom the truth of the matter may be the better known, and who are in no wise of kin either to the plaintiff or to the defendant, to make a jury of

(b) R. M. 5 Ann. reg. 1, K. B. See also the rules of H. 1649, reg. 2. E. 1657, reg. 3. T. 1 Jac. II. K. B. R. E. 5 W. & M. reg. 1. C. P. Ante, 734.

(c) R. E. 5 W. & M. reg. 1, C. P.; and see R. M. 1654, § 21, C. P. Ante, 734.

(d) 6 Esp. Rep. 80, 83.

(e) Append. Chap. VIII. § 112.

(f) Append. Chap. XXX. § 6.

(g) Append. Chap. XXXIV. § 4, 5.

(h) Id. § 8.

(i) Ante, 747.

(k) Append. Chap. XXXIV. § 8.

(l) Id. § 9, 10, 11, 12.

(a) Stat. 4 Ann. c. 16, § 6; and see the statute 24 Geo. II. c. 18, § 3. 1 P. Wms. 223. Willes, 597. 1 Wils. 125, S. C.

(bb) Stat. 6 Geo. IV. c. 50, § 13.

the country between the parties in the action, because as well the plaintiff as the defendant, between whom the matter in variance is, have put themselves upon that jury; and that he return the names of the jurors,(c) &c.

By the statute *Westm. 2* (13 Edw. I.) c. 30, the clause of *nisi prius* was directed to be inserted in the *venire facias*; and at first the trial was had upon that writ,(dd) as it still is in the case of a trial at bar. This practice was attended with many inconveniences: for in the first place, the jury were not obliged to attend, under any penalty, on the day of *nisi prius*; and if they did attend, the defendant might have cast an *essoyn*, and so the jury, after much expense and trouble, were obliged to return, leaving the cause untried.(ee) Another inconvenience was, that the parties, not seeing the panel beforehand, could not be prepared to make their challenges.(ff) To obviate this latter inconvenience, it was enacted, by the statute 42 Edw. III. c. 11, that "no inquests, except of assize and gaol delivery, shall be taken by writ of *nisi prius* or otherwise, at the suit of any one, before the names of all them that shall pass in the inquests, shall be returned in court." From thenceforward, the clause of *nisi prius* could not be inserted in the *venire facias*, as it was directed by the statute *Westm. 2*, and therefore it was taken out of that writ, and placed in the *distringas*, or *habeas corpora*,(g) as the practice continues to this day. The *venire* too was made returnable on a day before the trial; by which means they got rid of the *essoyn* at *nisi prius*: for by the statute of *Marlbridge*, (52 Hen. III.) c. 13, "after a man hath put himself upon any inquest, he shall have but one *essoyn*, or one default:" and by the statute *Westm. 2*, (13 Edw. I.) c. 27, the *essoyn* shall be allowed him at the next day, which is the day of the return of the *venire*.(h) And though the defendant never appears now, upon the return of the *venire*, yet heretofore he was demanded solemnly; and if he made default, there went out a *distringas* or *habeas corpora* against the jury, with a clause in it to distrain the defendant; and if after this he made default again, it was peremptory, because there was no process left to bring him in.(i) If a *venire* be awarded, and the parties do not go to trial for several terms, a new *venire* is awarded from [*779] term to term, and the cause *continued by *vicecomes non misit breve*;(a) but the *venire* never in fact issues, till the term when the cause is tried.

The trial of causes at *nisi prius* is had upon the *distringas*, in the King's Bench,(b) and upon the *habeas corpora juratorum*, in the Common Pleas.(c) The former is a judicial writ, commanding the sheriff or other officer to whom it is directed, to *distrain* the jurors by all their lands and chattels, &c. so that he may have their bodies before the king at *Westminster*, or (by *original*), wheresoever, &c. on [the first return day in term, after the trial,] or before the chief-justice, or judges of assize, if they shall first come on [the day of trial,] at [the place where the cause is intended to be

(c) Append. Chap. XXXIV. § 13, &c.

(dd) Gilb. C. P. 74. 2 Salk. 454. 2 Ld. Raym. 1143, S. C.

(ee) Gilb. C. P. 74, 5; 78. (ff) *Id.* 76, 7.

(g) *Id.* 77. 2 Salk. 454. 2 Ld. Raym. 1143, S. C.

(h) Gilb. C. P. 74, 5; 77, 8. 1 Salk. 216. 2 Ld. Raym. 925, S. C. 2 Salk. 454. 2 Ld. Raym. 1143, S. C.

(i) 1 Salk. 216. 2 Ld. Raym. 925, S. C.

(a) Gilb. C. P. 83; and see Append. Chap. XXX. § 49, 52.

(b) Append. Chap. XXXIV. § 20, 23.

(c) For the history of these w.rts, see Gilb. C. P. 72; and for the form of the *habeas corpora juratorum*, in C. P. see Append. Chap. XXXIV. § 22.

tried,] to make a certain jury between the said parties, of a plea of, &c. (according to the nature of the action,) and to hear thereof their judgment of many defaults,(d) &c. The writ of *habeas corpora juratorum* commands the sheriff, &c. that he *have*, before the justices at *Westminster*, on [the first return day in term, after the trial,] or before the chief-justice, or judges of assize, if they shall first come, &c. the *bodies* of the several persons named in the panel annexed to the writ, jurors summoned in court between the parties, (naming them,) of a plea, &c. to make that jury.(e)

After a *distringas* or *habeas corpora* had issued, with a clause of *nisi prius*, if the cause stood over, for default of jurors, till a subsequent term, the plaintiff at common law could not have had a *venire de novo*,(f) unless for some fault in executing or returning the *distringas* or *habeas corpora*:(gg) but he must have sued out an *alias* or *pluries distringas*, or *habeas corpora*, for bringing in the same jury. And still, if after a *special jury* has been struck in a *criminal* case, the cause goes off for default of jurors, no new jury can be struck; but the cause must be tried by the jury first appointed:(h) And the same jury shall serve for the trial of the cause, notwithstanding an intermediate change of sheriffs.(i) But if the same special jurymen are struck to try several causes on the same question, and the court being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also on motion discharge the same special jurymen from trying the second cause.(k) Where a common jury panel was returned, together with a special jury panel, and, no special jurymen appearing, the cause was tried by a common jury, the trial was set aside.(l) But where the plaintiff having obtained a rule for a special jury, had neglected duly to summon them; it was ruled at *nisi prius*, on the defendant's objecting to proceeding in the cause, that on the appearance* of some [*780] of the special jurors, the plaintiff was entitled to pray a *tales*, and proceed in the trial.(a)

By the statute 6 Geo. IV. c. 50,(b) "if any plaintiff or demandant in any cause which shall be at issue in any of his majesty's courts of record at *Westminster*, or any defendant in any action of *quare impedit* or *replevin* which shall be so at issue, shall sue out any writ of *venire facias*, upon which any writ of *habeas corpora* or *distringas* with a *nisi prius* shall issue, in order to the trial of the said issue at the assizes or sessions of *nisi prius*, and shall not proceed to trial at the first assizes or sessions of *nisi prius* after the *teste* of such writ of *habeas corpora* or *distringas*, then and in every such case, (except when a view by jurors shall be directed as thereafter mentioned),(c) such plaintiff, demandant, or defendant, whensoever he shall think fit to try the said issue at any other assizes or sessions of *nisi prius*, shall sue forth a new writ of *venire facias*, commanding the sheriff to return *anew*,(dd) twelve good and lawful men of the body of his county, qualified according to law, and the rest of the writ shall proceed in the accustomed manner; which writ being duly returned, a writ of *habeas*

(d) Append. Chap. XXXIV. § 20.

(f) Gilb. C. P. 83; and see 2 Wms. Saund. 5 Ed. 253, (8).

(gg) Gilb. C. P. 92. 5 Durnf. & East, 464.

(h) 5 Durnf. & East, 453; but see 2 Barn. & Cres. 104.

(i) 3 Taunt. 404.

(a) Ry. & Mo. 429, per Littledale, J. after consulting with Gaselee, J.

(b) § 16; and see stat. 7 & 8 W. III. c. 32, § 1. This statute, however, did not extend to criminal cases. *Rex v. Franklin*, H. 5 Geo. II. K. B., cited in 5 Durnf. & East, 454, &c.

(c) Com. Rep. 248.

(e) *Id.* § 22.

(i) Cowp. 412.

(l) 4 Maule & Sel. 467.

(dd) Append. Chap. XXXIV. § 19.

corpora or *distringas*, with a *nisi prius*, shall issue thereupon, (for which the same fees shall be paid as in the case of the *pluries habeas corpora* or *distringas*, with a *nisi prius*,) upon which such plaintiff, demandant or defendant shall and may proceed to trial, as lawfully and effectually to all intents and purposes, as if no former writ of *venire facias* had been prosecuted in that cause, and so *toties quoties*, as the case shall require: And if any defendant or tenant in any action, depending in any of the said courts, shall be minded to bring to trial any issue joined against him, where by the practice of the court he may do the same by *proviso*, he shall or may, of the issuable term next preceding such intended trial, to be had at the next assizes or sessions of *nisi prius*, sue out a new *venire facias* to the sheriff, in the form aforesaid, by *proviso*, and prosecute the same by writ of *habeas corpora* or *distringas*, with a *nisi prius*, as lawfully and effectually to all intents and purposes, as if no former writ of *venire facias* had been sued out or returned in that cause, and so *toties quoties*, as the matter shall require."(*e*)

The *venire* and *distringas*, or *habeas corpora*, are directed, according to the award of these writs, (*f*) to the *sheriff* of the county in which the action is laid, or of an adjoining county: but when the sheriff is a party, or interested in the cause, they are directed to the *coroner*; (*f*) or, if there are two sheriffs, and one of them is interested, to the other; and if the coroner, as well as the sheriff, is interested, the *venire* and *distringas* are directed to *elisors*. (*f*) In a county *palatine*, a *mittimus* is awarded to [*781] the *justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back again to the court above. (*a*)

In point of form, the *venire* and *distringas*, or *habeas corpora*, are general or special. When only one issue is to be tried, or there are several issues of the same nature, the *venire* and *distringas* or *habeas corpora* are general, to make a jury of the country between the parties, of the plea or action, whatever it may be: But when there are several issues, in fact and in law, (*b*) or some issues in fact to be tried by the country, and others by the record; (*c*) or several defendants, and some of them plead and others let judgment go by default, (*d*) the writs are special, as well to try the issues in fact, as to assess the damages upon the issues in law, or in fact to be tried by the record, or against the defendants who let judgment go by default. (*e*) And when breaches are suggested, after a plea of *non est factum*, on stat. 8 & 9 W. III. c. 11. § 8, the jury are directed to try the issue, and in case it shall be found for the plaintiff, to inquire of the truth of the breaches, and assess the damages sustained thereby. (*ff*) If the defendant carry down the cause by *proviso*, the following clause is inserted in the *distringas* or *habeas corpora*: "Provided always, that if two writs shall come to the sheriff, he shall only execute and return one of them." (*g*)

The *venire facias* is tested on the first day of the term, in or after which the cause is to be tried; and is made *returnable* on some day before the trial, being a *general* return day or day *certain*, according to the previous

(*e*) 2 Wms. Saund. 336, *b*.

(*f*) *Ante*, 723.

(*b*) *Id.* § 17.

(*d*) *Id.* § 15.

(*ff*) Append. Chap. XXX. § 10. Chap. XXXIV. § 18.

(*g*) 2 Lil. P. R. 612, 617. Lil. Ent. 676; and see Append. Chap. XXXIV. § 21.

(*a*) Append. Chap. XXXIV. § 9, 10, 11, 12.

(*c*) *Id.* § 16.

(*e*) 2 Lil. P. R. 636. *Ante*, 722.

proceedings: (h) If in a country cause, the *venire* by *original* is made returnable on the last general return day, or if by *bill*, on the last day of the term before the assizes: And the *distringas* or *habeas corpora* is tested on the *quarto die post* of the return by *original*, or by *bill* on the return of the *venire*; and made returnable on the first general return day or day certain, in term time, after the trial. It is not necessary by *original*, that there should be *fifteen* days between the teste and return of the jury process. (i) The *venire facias* and *distringas* or *habeas corpora*, are sued out together, and do not require signing, in the King's Bench; but, in the Common Pleas, the *venire* is signed by the prothonotaries, and the *habeas corpora* by the clerk of the juries: (k) and, after being sealed, they are taken to the sheriff's office to be returned. In causes which stand over from one sitting to another, it is a rule, in the King's Bench, that the writ of *distringas* or *habeas corpora* should be regularly altered and resealed, previous to the sitting to which they stand over; or in default thereof, the causes cannot be tried: (l) And, for enforcing obedience to the said rule, [*782] it is ordered, (a) that "the marshal do not insert in the daily list of causes for trial, any causes wherein the writ of *distringas* and record shall not have been regularly resealed, previous to the sitting to which the same cause may stand over."

It will next be proper to consider the *qualifications*, *disqualifications*, and *exemptions* of jurors. By the statute 6 Geo. IV. c. 50, (b) for consolidating and amending the laws relating to jurors and juries, it is enacted, that "every man, except as thereafter excepted, between the ages of *twenty-one* years and *sixty* years, (b) residing in any county in *England*, who shall have in his own name or in trust for him, within the same county, *ten* pounds by the year above reprises, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person, (c) or who shall have, within the same county, *twenty* pounds by the year above reprises, in lands or tenements, held by lease or leases for the absolute term of *twenty-one* years, or some longer term, or for any term of years determinable on any life or lives, (d) or who, being a householder, shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of *Middlesex*, on a value not less than *thirty* pounds, or in any other county on a value of not less than *twenty* pounds, or who shall occupy a house containing not less than *fifteen* windows, shall be qualified and shall be liable to serve on juries, for the trial of all issues joined in any of the king's courts of record at *Westminster*, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, *nisi prius*, oyer and terminer, and gaol delivery, such

(A) On the traverse of an inquisition out of Chancery, the *venire* is returnable on a general return day. 1 Wils. 77.

(i) Stat. 13 Car. II. stat. 2, c. 2, § 6.

(k) Imp. C. P. 7 Ed. 357.

(l) R. M. 6 Geo. IV. K. B.

(l) R. E. 33 Geo. III. K. B.

(b) § 1, 2; and see stat. 13 Edw. I. c. 38. 7 & 8 W. III. c. 32, § 4. And for regulating the qualification and manner of enrolling jurors in *Scotland*, &c. see stat. 6 Geo. IV. c. 22. 7 Geo. IV. c. 8. See also stat. 7 Geo. IV. c. 37, to regulate the appointment of juries in the *East Indies*.

(c) See stat. 13 Edw. I. c. 38. 27 Eliz. c. 6. 4 & 5 W. & M. c. 24, § 15. 3 Geo. II. c. 25, § 18.

(d) See stat. 3 Geo. II. c. 25, § 18.

VOL. II.—5

issues being respectively triable in the county in which every man so qualified respectively shall reside; and shall also be qualified and liable to serve on grand juries, in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding or division, in which every man so qualified respectively shall reside: and that every man, (except as thereafter excepted,) being between the aforesaid ages, residing in any county in *Wales*, and being there qualified to the extent of three fifths of any of the foregoing qualifications shall be qualified, and shall be liable to serve on juries, for the trial of all issues joined in the courts of great sessions, and on grand juries in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, in every county of *Wales*, in which every man so qualified as last aforesaid respectively shall reside.”^(c)

*The *disqualifications* of jurors depend on the same statute; ^(aa) [*783] by which it is provided, that “no man, not being a natural born subject of the king, is or shall be qualified to serve on juries or inquests, except only in the cases thereafter expressly provided for, (of juries *de medietate linguæ*); ^(bb) and no man who hath been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry or excommunication, is or shall be qualified to serve on juries of inquests in any court or on any occasion whatsoever.”

And, by a subsequent clause of the same statute, ^(c) “the qualification thereinbefore required for jurors, and the regulation for procuring lists of persons liable to serve on juries, shall not extend to the jurors or juries in any liberties, franchises, cities, boroughs, or towns corporate not being counties, or in any cities, boroughs, or towns being counties of themselves, which shall respectively possess any jurisdiction, civil or criminal; but that in all such places, the sheriffs, bailiffs, or other ministers having the return of juries, shall prepare their panels, in the manner heretofore accustomed: Provided always, that no man shall be impanelled or returned by the sheriffs of the city of *London*, as a juror to try any issue joined in his majesty’s courts of record at *Westminster*, or to serve on any jury at the sessions of oyer and terminer, gaol delivery, or sessions of the peace, to be held for the said city, who shall not be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, and have lands, tenements, or personal estate, of the value of 100*l.*: ^(d) And that the lists of men resident in each ward of the city of *London*, who shall be so qualified as therein mentioned, shall be made out, with the proper quality or addition, and the place of abode of each man, by the parties who have heretofore been used and accustomed in each ward to make out the same respectively; and that such shop, &c. shall for the purposes of that act, be respectively deemed and taken to be the place of abode of every occupier thereof.”

And, by § 52, “no man shall be liable to be summoned or impanelled to serve as a juror, in any county in *England* or *Wales*, or in *London*, upon

^(c) See stat. 4 & 5 W. & M. c. 25, § 15.

^(aa) § 3.

^(bb) Stat. 6 Geo. IV. c. 50, § 47; and see stat. 27 Edw. III. st. 2, c. 8; 28 Edw. III. c. 13; 8 Hen. VI. c. 29, as to the right of an *alien* to be tried, and the mode of trial, by a jury *de medietate linguæ*, in criminal cases.

^(c) § 50.

^(d) See stat. 3 Geo. II. c. 25, § 19.

any inquest or inquiry to be taken or made by or before any sheriff or coroner, by virtue of any writ of inquiry, or by or before any commissioners appointed under the great seal, or the seal of the court of Exchequer, or the seals of the courts of the said counties palatine, or the seals of the courts of great session of *Wales*, who shall not be duly qualified according to that act, to serve as a juror upon trials at *nisi prius*, in such county in *England* or *Wales*, or in *London* respectively: Provided always, that nothing therein contained shall extend to any *inquest to be taken [*784] by or before any coroner of a county, by virtue of his office; or to any inquest or inquiry to be taken or made by or before any sheriff or coroner of any liberty, franchise, city, borough, or town corporate, not being counties, or of any city, borough or town, being respectively counties of themselves; but that the coroners in all counties, when acting otherwise than under a writ of inquiry, and the sheriffs and coroners in all such places as are therein mentioned, shall and may respectively take and make all inquests and inquiries by jurors of the same description, as they have been used and accustomed to do before the passing of that act."

The grounds of exemption from serving on juries, are specified in the second section of the act; by which it is provided, that "all peers; all judges of the king's courts of record at *Westminster*, and of the courts of great session in *Wales*; all clergymen in holy orders; all priests of the Roman Catholic faith, who shall have duly taken and subscribed the oaths and declarations required by law; (a) all persons who shall teach or preach in any congregation of protestant dissenters, whose place of meeting is duly registered, and who shall follow no secular occupation except that of a schoolmaster, producing a certificate of some justice of the peace, of their having taken the oaths, and subscribed the declaration required by law; (b) all serjeants and barristers at law, actually practising; all members of the society of doctors of law, and advocates of the civil law, actually practising; all attorneys, solicitors, and proctors, duly admitted in any court of law or equity, or of ecclesiastical or admiralty jurisdiction, in which attorneys, solicitors, and proctors have usually been admitted, actually practising, and having duly taken out their annual certificates; all officers of any such courts, actually exercising the duties of their respective offices; all coroners, gaolers, and keepers of houses of correction; all members and licentiates of the royal college of physicians in *London*, actually practising; all surgeons, being members of one of the royal colleges of surgeons in *London*, (c) *Edinburgh*, or *Dublin*, and actually practising; all apothecaries, certificated by the court of examiners of the apothecaries' company, and actually practising; (d) all officers, in his majesty's navy or army, on full pay; all pilots, licensed by the Trinity house of *Deptford Strand*, *Kingston upon Hull*, or *Newcastle upon Tyne*, and all masters of vessels in the buoy and light service, employed by either of those corporations, and all pilots licensed by the lord warden of the cinque ports, or under any act of parliament or charter for the regulations of pilots in any other port; all the household servants of his majesty, his heirs and successors; all officers of customs and excise; all sheriffs' officers, high constables, and parish clerks, shall be and

(a) See stat. 31 Geo. III. c. 32, § 8.

(b) See stat. 1 W. & M. c. 18, § 11. 19 Geo. III. c. 44. 52 Geo. III. c. 155, § 9.

(c) See stat. 5 Hen. VIII. c. 6. 18 Geo. II. c. 15, § 10.

(d) See stat. 6 & 7 W. & M. c. 4. 55 Geo. III. c. 194.

are thereby absolutely freed and exempted from being returned, [*785] and from**serving* upon any juries or inquests whatsoever; and shall not be inserted in the lists, to be prepared by virtue of that act, as thereafter mentioned; Provided also, that all persons exempt from serving upon juries in any of the courts aforesaid, by virtue of any prescription, charter, grant, or writ, shall continue to have and enjoy such exemption, in as ample a manner as before the passing of that act, and shall not be inserted in the lists thereafter mentioned."

The jury returned by the sheriff, on the *venire facias* is *common* or *special*. A *common* jury is returned and impanelled by the sheriff, pursuant to the statute 6 Geo. IV. c. 50. (a) by which it is enacted, that every sheriff, upon the receipt of every such writ of *venire facias* and precept for the return of jurors, shall return the names of men contained in the jurors' book, required to be copied by the clerk of the peace, from the lists returned by the high constable to the court of quarter sessions, and delivered by the clerk of the peace to the sheriff, or his under-sheriff, and by the sheriff, on quitting his office, to his successor, (bb) for the then current year, and no others; and that where process for returning a jury, for the trial of any of the issues aforesaid, shall be directed to any coroner, elisor, or other minister, he shall have free access to the jurors' book for the current year, and shall in like manner return the names of men contained therein, and no others: Provided always, that if there shall be no jurors' book in existence for the current year, it shall be lawful to return the jurors from the jurors' book for the year preceding."

And "every sheriff or other minister, to whom the return of juries for the trial of issues before any court of assize or *nisi prius* in any county of *England*, except the counties palatine, may belong, shall, upon his return of every writ of *venire facias*, (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck by order or rule of court,) annex a panel to the said writ, containing the names, alphabetically arranged, together with the places of abode and additions, of a competent number of jurors named in the jurors' book; and that the names of the same jurors shall be inserted in the panel annexed to every *venire facias*, for the trial of all issues at the same assizes or sessions of *nisi prius*, in each respective county; which number of jurors shall not in any county be less than *forty-eight*, or more than *seventy-two*, unless by the direction of the judges appointed to hold the assizes or sessions of *nisi prius* in the same county, or one of them, who are and is thereby empowered, by order under their or his hands or hand, to direct a greater or lesser number, and then such number as shall be so directed, shall be the number to be returned; and that in the writ of *habeas corpora juratorum* or *distringas*, subsequent to such writ of *venire facias*, it shall not be requisite to insert the names of all the jurors contained in such panel, but it shall be sufficient to insert in the mandatory parts of such writs respectively, 'the bodies of the several persons in the panel to this writ annexed named,' or words of the like [*786] *import; and to annex to such writs respectively, panels containing the same names as were returned in the panel to such *venire facias*, with their places of abode and additions; and that for making the returns and panels aforesaid, and annexing the same to the respective writs, the ancient legal fee, and no other, shall be taken; and that the men

(a) § 14, 15.

(bb) Stat. 6 Geo. IV. c. 50, § 12.

named in such panels, and no others, shall be summoned to serve on juries at the then next court of assizes or sessions of *nisi prius*, for the respective counties named in such writs." (a)

In the counties *palatine*, and courts of great sessions in *Wales*, it is enacted by the same statute, (b) that "every sheriff or other minister, to whom the return of juries for the trial of causes in the superior courts of the said counties *palatine*, or in the court of great sessions in any county of *Wales*, may belong, shall, *ten* days at least before the said courts shall respectively be held, or before every great sessions, summon a competent number of men, named in the jurors' book, so as such number be not less than 48, nor more than 72, without the direction of the judge or judges of the courts for such counties *palatine* respectively, or of the judge or judges of the great sessions; who is and are thereby empowered, if he or they shall see cause, by rule of court, or by an order of any judge thereof to be made in vacation, if necessary, to direct a greater or lesser number to be summoned; and that the sheriff or other minister who shall summon such jurors, shall return a list, containing the names, alphabetically arranged, and the places of abode and additions of the jurors so summoned, on the first day of the court to be holden for the said counties *palatine* respectively, or at the first court of the second day of every great sessions; and that the jurors so summoned, or a competent number of them, as the judge or judges of such courts or great sessions respectively shall direct, and no others, (unless in cases where a special jury shall be struck,) shall be named in every panel to be annexed to every writ of *venire facias juratores*, *habeas corpora juratorum*, and *distringas*, which shall be issued out and returnable for the trial of causes in such courts respectively, or at such great sessions." (c)

And, by § 19, "the sheriff or other minister, to whom the return of jurors for the trial of causes in any county in *England*, (except the counties *palatine*,) may belong, shall cause to be made out an alphabetical list of the names of all the jurors contained in the panels to the several writs of *venire facias* annexed as aforesaid, with their respective places of abode and additions; and the sheriff or other minister, to whom the return of jurors for the trial of causes in any county *palatine*, or in any county in *Wales*, may belong, shall cause to be made out in like manner, a list of all the jurors so summoned in such respective counties as aforesaid; and every such sheriff or other minister shall keep such list in the office of his under-sheriff or deputy, for seven days at least before the sitting of the next court of assize or *nisi prius*, or the next *court to be holden for any [*787] county *palatine*, or the next court of great sessions in any county in *Wales*; and the parties in all causes to be tried at any such court of assize or *nisi prius*, or court of any county *palatine* or great sessions, and their respective attorneys, shall, on demand, have full liberty to inspect such list, without any fee or reward to be paid for inspection." (aa)

By a subsequent clause, in the same statute, (bb) it is enacted, that "in any county in which the justices of assize in *England*, or the justices of the superior courts of the said counties *palatine*, or the judges of the great sessions in any county of *Wales*, shall think fit so to direct, the sheriff or other minister, to whom the return of the *venire facias juratores*, or other process for the trial of causes at *nisi prius*, doth belong, shall summon and

(a) See stat. 3 Geo. 2, c. 25, § 8. R. E. 1651, K. B.

(b) § 17, 18.

(c) See stat. 3 Geo. II. c. 25, § 9, 10.

(aa) See stat. 42 Edw. III. c. 11. 6 Henry VI. c. 2.

(bb) § 22.

impanel such number of jurors, not exceeding one hundred and forty-four, as such judges or justices respectively shall think fit to direct, to serve indiscriminately on the *criminal* and *civil* side; and that where such judges or justices respectively shall so direct, the sheriff or other minister shall divide such jurors equally into two sets, the first of which sets shall attend and serve for so many days at the beginning of each assize or great sessions, as such judges or justices respectively shall, within a reasonable time before the commencement of such assize or great sessions, respectively think fit to direct; and the other of which sets shall attend and serve for the residue of such assize or great sessions: (cc) Provided always, that such sheriff or other minister shall, in the summons to the jurors in each of such sets, specify whether the juror named therein is in the first or second set, and at what time the attendance of such juror will be required; (d) and the sheriff or other minister, to whom the return of the *venire facias juratores*, or other process for the trial of causes at *nisi prius*, doth belong, shall, upon his return of every such writ or process, annex thereto a panel, containing the names, alphabetically arranged, together with the additions and places of abode, of the jurors in each of such sets; and during the attendance and service of the first of such sets, the jury on the civil side shall be drawn from the names of the persons in that set; and during the attendance and service of the second of such sets, from the names of the persons in such second set." (e)

Upon the execution of a writ of inquiry, the plaintiff, we may recollect, sometimes moves the court for a rule to have a *good* jury, (f) which is a better sort of *common* jury: (g) and, before the introduction of special juries, this rule appears to have been frequently granted, for the trial of causes at *nisi prius*. (h)

Special juries appear to have been first introduced in the King's Bench, upon trials at bar, in causes of great consequence; wherein the [*788] court *would anciently make a rule, upon motion and affidavit, for the master to name forty-eight freeholders, and that each party should strike out twelve, by one at a time, (the plaintiff or his attorney beginning first,) and that the remaining twenty-four should be the jury to be returned for the trial of the cause. (a) A rule having been made accordingly, the plaintiff's attorney attended the master, but the defendant's attorney would not attend, and thereupon the master nominated forty-eight, in the presence of the plaintiff's attorney only: Upon a motion to set aside this nomination, the court thought fit to order a new jury to be struck; but made it a standing rule for the future, that "when the master is to strike a jury, he shall give notice to the attorneys on both sides to be present, and if one come and the other do not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve for him that is absent." (b) If, by rule of court, the master was ordered to strike a jury, in case it were not expressed in the rule that he should strike forty-eight, and each of the parties should strike out twelve, the master was to strike twenty-four, and the parties had no liberty to strike out any. (c)

(cc) See stat. 1 & 2 Geo. IV. c. 46, § 1.

(d) Same stat. § 2.

(e) Same stat. § 4.

(f) *Ante*, 576.

(g) 5 Durnf. & East, 460.

(h) 1 Str. 265.

(a) 2 Lil. P. R. 123; and see 4 Barn. & Ald. 476, 7.

(b) 2 Lil. P. R. 127. 1 Salk. 405. R. T. 8 W. III. reg. 2 K. B.

(c) 1 Salk. 405.

Analogous to the practice upon trials at bar, it was sometimes usual, in other cases, where it was conceived an indifferent jury would not be returned, for the court on motion to order the sheriff to attend the master, with the freeholders' book, and the master in the presence of the attorneys on both sides to strike a jury. (d) But probable matter must have been shown to the court, to induce them to grant this rule: (d) and it being doubted, whether it could be had without consent, (e) it was declared and enacted, by the statute 3 Geo. II. c. 25, § 15, that "it should and might be lawful to and for his majesty's courts of King's Bench, &c. on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action cause or suit whatsoever, depending or to be brought and carried on in the said courts of King's Bench, &c. and the said courts were thereby authorized and required, upon motion as aforesaid, to order and appoint a jury to be struck, before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries had been and were usually struck in such courts respectively, upon trials at bar had in the said courts; which said jury, so struck as aforesaid, should be the jury returned for the trial of the said issue."

The method of striking a special jury formerly was, for the sheriff, or his under-sheriff, to attend the master in the King's Bench, or prothonotaries in the Common Pleas, with his book of freeholders, at the time appointed for that purpose by the master or prothonotaries, who, in the presence of the attorneys on both sides, made out a list of *forty-eight* persons from the freeholders' book, out of whom each party was at liberty to strike *twelve*, and the remaining *twenty-four* were summoned and returned by the sheriff, to try the cause. (a) In nominating the jury, it was usual [*789] to select those persons only against whose names the addition of *esquire* was placed: But where the plaintiff moved to set aside the special jury panel, on the ground that some of the persons named therein were retail tradesmen, and therefore not entitled to the addition of *esquire*, the court of King's Bench held, that as the affidavit did not negative the qualification of the jurors excepted to, they could not interfere. (b) The practice, as to striking special juries, was nearly the same in *criminal*, as in *civil* cases: But in striking a special jury, for the trial of an information filed by the attorney-general *ex officio*, the master of the crown-office was not bound to take the jurors as they occurred upon the sheriff's books, but was to make a selection; and where he had made such selection impartially, the court of King's Bench refused to cancel the list of persons so selected. (c) And, in the Exchequer, where it was shown, to the satisfaction of the court, on a statement of facts by affidavit, that in the reduced list of special jurymen, there were persons non-resident or exempt, or that from other causes it was clear there were less than *twenty-four* effective jurymen remaining on the panel, and it was probable that a sufficient number could not be had to attend, on the trial of an information, they ordered a new jury to be impanelled. (dd)

At present, the method of striking special juries is regulated by the statute 6 Geo. IV. c. 50, (ee) by which it was enacted and declared, that "is

(d) 2 Lil. P. R. 123.

(e) *Id.* 122.

(a) Bac. Abr. tit. *Juries*, D. Bul. Ni. Pri. 304, 5; and see 1 Chit. Rep. 85, (a). Imp. K. B. 10 Ed. 311. Imp. C. P. 6 Ed. 337.

(b) 1 Chit. Rep. 85.

(c) 1 Barn. & Ad. 193; and see 1 Chit. Rep. 85, (a). 4 Barn. & Ald. 471.

(dd) 8 Price, 220.

(ee) § 30, &c.

and shall be lawful for his majesty's courts of King's Bench, Common Pleas, and Exchequer at *Westminster* respectively, (f) and for the judges of the said courts of the three counties palatine, (g) and of the courts of great sessions in *Wales*, (h) upon motion made on behalf of the *king*, or upon the motion of any prosecutor, relator, *plaintiff*, or demandant, or of any *defendant* or tenant, in any case whatsoever, whether *civil* or *criminal*, or on any *penal* statute, excepting only indictments for treason or felony, depending in any of the said courts, and the said courts and judges respectively are thereby authorized, in any of the cases before mentioned, to order and appoint a special jury to be struck, before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury, in such manner as the said courts respectively have usually ordered the same; and every jury so struck, shall be the jury returned for the trial of such issue." But where the plaintiff having obtained a rule for a special jury, had neglected duly to summon them, it was, we have seen, (i) ruled at *nisi prius*, that on the appearance of some of the special jurors, the plaintiff was entitled to pray a *tales*, and proceed in the trial. (k)

[*790] *And, by § 31, "every man who shall be described in the jurors' book for any county in *England* or *Wales*, or for the county of the city of *London*, as an *esquire*, or person of higher degree, (aa) or as a *banker* or *merchant*, shall be qualified and liable to serve on special juries, in every such county in *England* and *Wales*, and in *London* respectively, and the sheriff of every county in *England* and *Wales*, or his under-sheriff, and the sheriffs of *London* or their secondaries, shall within *ten* days after the delivery of the jurors' book for the current year to either of them, take from such book the names of all men who shall be described therein as *esquires* or persons of higher degree, or as *bankers* or *merchants*, and shall respectively cause the names of all such men to be fairly and truly copied out, in *alphabetical* order, together with their respective places of abode and additions, in a separate list to be subjoined to the jurors' book, which list shall be called "the special jurors' list;" and shall prefix to every name in such list, its proper number, beginning the numbers from the first name, and continuing them in a regular arithmetical series, down to the last name; and shall cause the said several numbers to be written, upon distinct pieces of parchment or card, being all, as nearly as may be, of equal size; and after all the said numbers shall have been so written, shall put the same together, in a separate drawer or box, and shall there safely keep the same, to be used for the purpose thereafter mentioned."

And, by § 32, "whenever any of the courts or judges above mentioned shall order a special jury to be struck, before the proper officer of such court, such officer shall appoint a time and place for the nomination of such special jury; and a copy of the rule of court, and of such officer's appointment, shall be served on the under-sheriff of the county in *England* or *Wales*, in which the trial is to be had, or on the secondary of the city of *London*, if the trial is to be had there, and also on all the parties who have usually been served with the same respectively, in the accustomed manner; and the said officer, at the time and place appointed, being attended by such under-sheriff or secondary, or his agent, who are thereby respectively required to bring

(f) See stat. 3 Geo. II. c. 25, § 15.

(g) See stat. 13 Geo. III. c. 51.

(k) Ry. & Mo. 429.

(g) See stat. 6 Geo. II. c. 37.

(i) *Ante*, 779, 80.

(aa) 1 Chit. Rep.

with them the jurors' book, and such special jurors' list, and all the numbers so written on distinct pieces of parchment or card as aforesaid, shall, in the presence of all the parties in any of the cases aforesaid, and of their attorneys, (if they respectively choose to attend, or if the said parties or their attorneys, all or any of them, do not attend, then in their absence,) put all the said numbers into a box, to be by him provided for that purpose; and after having shaken them together, shall draw out of the said box *forty-eight* of the said numbers, one after another, and shall, as each number is drawn, refer to the corresponding number in the special jurors' list, and read aloud the name designated by such number: And if, at the time of so reading any name, either party, or his attorney, shall object that the man whose name shall have been so referred to is in any manner *incapacitated [*791] from serving on the said jury, and shall also then and there prove the same to the satisfaction of the said officer, such name shall be set aside and the said officer shall, instead thereof, draw out of the said box another number, and shall in like manner refer to the corresponding number in the said list, and read aloud the name designated thereby, which name may be in like manner set aside; and other numbers and names shall in every such case be resorted to, according to the mode of proceeding thereinbefore described, for the purpose of supplying names in the places of those set aside, until the whole number of *forty-eight* names, not liable to be set aside, shall be completed: And if in any case it shall so happen that the whole number of *forty-eight* names cannot be obtained from the special jurors' list, in such case the said officer shall fairly and indifferently take, according to the mode of nomination heretofore pursued in nominating special juries, such a number of names from the general jurors' book, in addition to those already taken from the special jurors' list, as shall be required to make up the full number of *forty-eight* names; all and every of which *forty-eight* names shall in such case be equally deemed and taken to be those of special jurors; and the said officer shall afterwards make out for each party a *list*, of the *forty-eight* names, together with their respective places of abode and additions; and after having made out such list, shall return all the numbers so drawn out, together with all the numbers remaining undrawn, to such under-sheriff or secondary, or his agent, to be by such under-sheriff or secondary safely and securely kept for future use: And all the subsequent proceedings for reducing the said list, and all other matters whatsoever relating to special juries, shall remain and continue in force as heretofore, except where the same, or any part thereof is expressly altered by that act; and all the fees heretofore payable on the striking of special juries, shall continue to be paid in the accustomed manner."

Provided always, that nothing therein contained shall be construed to prevent the parties in any cause, or their attorneys, from consenting to have a special jury nominated, according to the mode used and accustomed before the passing of that act; and upon a consent to that effect, signed by each party or his attorney, being communicated to the proper officer, he is thereby authorized and required to nominate a special jury, for the trial of every such cause, according to the mode used and accustomed before the passing of that act."(a)

Provided also, that "where any special jury shall be ordered, by any rule in any of the courts aforesaid, to be struck by the proper officer of such

court, in any cause arising in any county of a city or town, except the city of *London*, the sheriff or sheriffs thereof, or the under-sheriff respectively, shall be commanded by such rule, to bring or cause to be brought before the proper officer of such court, the books or lists of persons qualified [*792] to serve on juries, within the same county of a city or *town; and in every such case, the jury shall be taken and struck out of such books or lists respectively, in the manner heretofore used and accustomed."(*aa*)

It was formerly holden, that the fees for *striking* a special jury should be paid by the party applying for it; but that the other expenses of the trial should abide the event of the suit.(*b*) But now, by the statute 6 Geo. IV. c. 50,(*c*) "the person or party who shall apply for a special jury, shall pay the fees for *striking* such jury, and all the expenses occasioned by the trial of the cause by the same; and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto, in case the cause had been tried by a common jury; unless the judge, before whom the cause is tried, shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." And, by the same statute,(*d*) "no juror, who shall serve upon any special jury, shall be allowed or take, for serving on any such jury, more than such sum of money as the judge who tries the issue shall think just and reasonable, and which shall not exceed the sum of one pound one shilling, except in causes wherein a view is directed, and shall have been had by such juror." A certificate for the costs of a special jury, cannot be granted the day after the trial:(*e*) and when it is granted, the practice has been to allow the sums only paid to the jury in court.(*f*) On a *criminal* information for a libel, the judge cannot certify for the costs of a special jury, struck by the prosecutor.(*g*) And if a case be not gone into at the trial, the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a very large amount, and because persons of considerable rank are called on their *subpoenas*.(*h*) A special jury having been obtained, on the motion of the defendant, the cause was referred, and by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator; the court held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury.(*i*)

The motion for a special jury is a motion of course, requiring only the signature of a counsel or serjeant; upon which a rule is drawn up by the clerk of the rules in the King's Bench,(*k*) or secondaries in the Common Pleas,(*l*) and an appointment obtained thereon from the master in [*793] the former, *or prothonotaries in the latter court, to nominate the forty-eight. A copy of this rule and appointment is then served

(*aa*) Stat. 6 Geo. IV. c. 50, § 36; and see stat. 3 Geo. II. c. 25, § 17.

(*b*) Say. Costs, 181. 2 Str. 1080. Cas. Pr. C. P. 138. Barnes, 123, S. C.

(*c*) § 34; and see stat. 24 Geo. II. c. 18, § 1.

(*d*) § 35; and see stat. 24 Geo. II. c. 18, § 2.

(*f*) 2 Chit. Rep. 154.

(*h*) 1 Car. & P. 537.

(*k*) Append. Chap. XXXIV. § 24; and for the rule for a special jury in the Exchequer, see *id.* § 26.

(*l*) Append. Chap. XXXIV. § 25.

(*e*) 3 Campb. 316.

(*g*) 1 Esp. Rep. 229.

(*i*) 1 Barn. & Ald. 663.

upon the opposite attorney, and also on the under-sheriff, who attends the master or prothonotaries, at the time appointed, with the jurors' book, special jurors' list and numbers, as directed by the act; and the nomination being made, lists of the persons nominated are made out for each party, by the master's or prothonotaries' clerk. Another appointment is then obtained from the master or prothonotaries, to reduce the jury, and serve on the opposite attorney; upon which the attorneys on both sides should attend, and the master or prothonotaries will strike out *twelve* names for each of them, beginning with the plaintiff first, or, if either of the attorneys do not attend, he will strike out twelve names for him that is absent.^(a) The rule for a special jury, in term time, must be served a reasonable time before the day of trial: and therefore, where a cause stood for trial at a sitting in term, and after the rising of the court the day before the trial, the defendant served the plaintiff with a rule for a special jury, and the cause was notwithstanding tried by a common jury, the court of King's Bench held the proceedings to be regular.^(b)

The plaintiff, it seems, ought in all cases to sue out the jury process even though the special jury be moved for by the defendant; ^(c) and, in *London*, he chooses his own officer to summon them. And, by a late rule of the court of King's Bench, ^(d) "in all cases where a rule for a special jury shall have been obtained, for the trial of any cause in the county of *Middlesex*, and notice for summoning the same shall be given; such notice, together with the *distringas*, shall be left at the office of the sheriff of the said county, before *seven* o'clock in the evening next but one before the day on which such jury shall be required to attend, unless such jury shall be required to attend on a *Monday*, and then before *seven* in the evening of the preceding *Friday*; and that all notices of countermand, for summoning special juries, shall be left at the said office, before *twelve* o'clock at noon of the day immediately preceding the day for which the jury was to have been summoned." And the sheriff will not be allowed *extra* expenses of summoning special jurors, on account of their residing at a distance from each other; therefore the court will make a rule absolute, for the sheriff to refund money received on this account, although he has actually expended all the money.^(e)

The time and mode of *summoning* juries are regulated by the statute 6 Geo. IV. c. 50, § 25, by which it is enacted, that "the summons of every man to serve on juries, not being special juries, in any of the courts aforesaid, shall be made by the proper officer, *ten* days at the least before the day on which the juror is to attend, by showing to the man *to [*794] be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing, under the hand of the sheriff or other proper officer, containing the substance of such summons: And the summons of every man to serve on special juries, in any of the courts aforesaid, shall be made by the like persons, and in the like manner as aforesaid, *three* days at the least before the

(a) R. T. 8 W. III. *reg.* 2 K. B.

(b) 2 Barn. & Ald. 400. 1 Chit. Rep. 234, S. C.; and see R. T. 30 Geo. III. R. H. 44 Geo. III. K. B. 10 East, 1. 2 Campb. *Introd.* xii. by which the rule for a special jury should be drawn up and served, in *London* and *Middlesex*, on or before the day preceding the adjournment day after each term.

(c) Imp. K. B. 10 Ed. 311. Imp. C. P. 7 Ed. 349.

(d) R. T. 5 Geo. IV. K. B. 3 Barn. & Cres. 177. 4 Dowl. & Ryl. 836.

(e) 1 Chit. Rep. 175.

day on which the special juror is to attend: Provided always, that that act shall not require any longer time for summoning any jurors in the city of *London*, or county of *Middlesex*, than has been heretofore by law required; nor shall give any longer time for the return of any writ of *venue facias*, *habeas corpora*, or *distringas*, than has been heretofore by law required; but that where there shall not be *ten* days between the awarding of such writ, and the return thereof, every juror may be summoned, attached, or distrained, to appear at the day and time therein mentioned, as he might heretofore have been."

And, by a subsequent clause of the same statute, (a) "no sheriff, under-sheriff, coroner, elisor, bailiff, or other officer or person whatsoever, shall, directly or indirectly, take or receive any money or other reward, or promise of money or reward, to excuse any man from serving, or from being summoned to serve, on juries, or under any such colour or pretence: And that no bailiff or other officer appointed by any sheriff, &c. to summon juries, shall summon any man to serve thereon, other than those whose names are specified in a warrant or mandate, signed by such sheriff, &c. and directed to such bailiff, or other officer: And if any sheriff, &c. shall wilfully transgress in any of the cases aforesaid, or shall summon any juror, not being a special juror, less than *ten* days before the day on which he is to attend, or shall summon any special juror less than *three* days before the day on which he is to attend, except in the cases thereinbefore excepted, the court of assize, *nisi prius*, *oyer* and *terminer*, gaol delivery, great sessions, or superior court of the said counties palatine, or court of sessions of the peace, within whose jurisdiction the offence shall have been committed, may, and is thereby required, on examination and proof of such offence, in a summary way, to set such a fine upon every person so offending, as the court shall think meet, according to the nature of the offence."

The facility of obtaining a rule for a special jury in civil cases is attended with this inconvenience, that when the cause is to be tried at a sitting in term, the defendant, by obtaining it, may put off the trial till the sittings after term, it not being usual to try special jury causes in term time; by which means, the plaintiff is delayed from getting judgment till the next term, which may be at the distance of some months. To obviate this inconvenience, it is usual, in the King's Bench, when a rule for a special jury has been obtained for the mere purpose of delay, (b) to move the court,

on an affidavit of the circumstances, for a rule to show cause, [*795] *why the rule for a special jury should not be discharged; which the court will make absolute, on an affidavit of service, unless good cause be shown to the contrary. But the court will not discharge the rule for a special jury, when there is sufficient reason to believe, that it is material for the defendant to have his cause tried by such a jury: (aa) And where an *ejectment* by *original* was appointed for trial at the last sittings in term, and the defendant obtained a rule for a special jury, the court refused to discharge the rule, on the ground of its having been applied for too late; because the plaintiff could not have obtained judgment as of the term, supposing he had succeeded. (bb) If a defendant however, who has obtained and served a rule for a special jury, take no further steps upon it, the plaintiff will be entitled to have the cause tried in its regular order, as

(a) § 43; and see stat. 3 Geo. II. c. 25, § 6.
(aa) 1 Chit. Rep. 178, 238, 490, *in notis*.

(b) 1 Chit. Rep. 489, 90.
(bb) *Id.* 238.

a common jury cause; and the court will not afterwards relieve the defendant, except under very special circumstances.(c)

In the Common Pleas, when a rule for a special jury has been obtained for the purpose of delay, it is not usual, as in the King's Bench, to move the court, on an affidavit of the circumstances, for a rule to show cause, why the rule for a special jury should not be discharged: But if delay be suggested as the motive for the application, and not satisfactorily denied, the practice seems to be, for the court to direct the cause to be tried by a special jury within the term,(d) unless such terms are offered as will obviate the objection;(e) and giving judgment of the term is not in all cases satisfactory. When the application, however, is merely to regulate the trial, it must be made, not to the court, but to the judge who presides at *nisi prius*.(f) And where it was not suggested by the plaintiff, that delay was the motive for the defendant's application for a special jury, the court would not interfere; although it was sworn that the defendant had acknowledged the debt, and the deponents believed he had no defence to the action.(g) So where, in an action on a bond, the defendant, after plea, had admitted the debt, but obtained a rule for a special jury, the court would not order the cause to be tried within the term, unless the plaintiff stated further grounds, from which they might judge, whether it was a fit cause to be tried by a special jury, or not.(h)

In actions of *waste*, trespass *quare clausum fregit*, and other actions, where it appears to the court, or a judge in vacation, to be proper and necessary that the jurors, whether common or special, who are to try the issues, should, for the better understanding of the evidence have a *view* of the messuages, lands, or place in question, the court or a judge will grant a rule or order for such view,(i) pursuant to the statutes 4 Ann. c. 16. § 8, and 6 Geo. IV. c. 50, § 23. By the former of these statutes, the court *is authorized "to order special writs of *distringas*, or [*796] *habeas corpora*, to issue, by which the sheriff or other officer, to whom they are directed, shall be commanded to have *six* out of the first *twelve* of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matters in question shown to them, by two persons in the said writs named to be appointed by the court;(a) and the said sheriff, or other officer who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had, according to the command of the said writ."(b)

Before the making of the above statute, there could have been no view, till after the cause had been brought on to trial; when, if the court saw the question involved in any obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again.(cc) Upon this statute, it had become the practice to grant a view of

(c) 2 Stark. Nl. Pri. 369; and see 1 Chit. Rep. 534.

(d) 4 Taunt. 470. 4 Moore, 414, 470.

(e) 7 Taunt. 390.

(f) Append. Chap. XXXIV. § 28, 9; 33, 35, 37.

(g) Append. Chap. XXXIV. § 30, 31.

(cc) 1 Bur. 253. 2 Salk. 685. 11 East, 184.

(a) 4 Moore, 414.

(h) *Id.* 470.

(b) And see stat, 3 Geo. II. c. 25, § 14.

course, upon the motion of either party: And a notion having prevailed, that *six* of the first twelve upon the panel must attend upon the view, and appear at the trial, and that if they did not, the cause must be put off, the judges thought it their duty to interfere, and to take care that their ordering a view should not obstruct the course of justice, and prevent the cause from being tried: for they were all clearly of opinion, that the act of parliament meant that a view should not be granted, unless the court were satisfied that it was proper and necessary; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed for a great length of time. Accordingly they resolved, not to order a view any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms as might prevent an unfair use being made of it. *(d)* Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that "in case no view be had, or if a view be had by any of the jurors, though not six of the first twelve, or of those mutually consented to by the parties or their agents, yet the trial shall proceed, and no objection be made on either side on account thereof, or for want of a proper return to the writ." *(e)*

In a *criminal* case, there could formerly have been no view, without consent. *(f)* But now, by statute 6 Geo. IV. c. 50. *(g)* "where in any case, either civil or criminal, or on any penal statute, depending in any of the said courts of record at *Westminster*, or in the counties palatine, or great sessions in *Wales*, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should [*797] *have the *view* of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case, such court, or any judge thereof in vacation may order a rule to be drawn up, containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff, a sum of money to be named in the rule, for payment of the expenses of the view, and commanding special writs of *venire facias*, *distringas* or *habeas corpora*, to issue, by which the sheriff or other minister, to whom the said writ shall be directed, shall be commanded to have *six* or more of the jurors named in such writs, or in the panels thereto annexed, (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the sheriff, or such other minister as aforesaid,) at the place in question, some convenient time before the trial, who then and there shall have the place in question shown to them, by two persons in the said writs named, to be appointed by the court or judge; and the said sheriff or other minister who is to execute any such writ shall, by a special return upon the same, certify that the view hath been had according to the command of the same, and shall specify the names of the viewers." On this statute a rule has been made, in the court of King's Bench, *(a)* that "upon every application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff; that

(d) 1 Bur. 253.

(e) *Id.* 257; and see Append. Chap. XXXIV. § 28, 9.

(g) § 23; and see stat. 4 Anne. c. 16, § 8. 3 Geo. II. c. 25, § 14.

(a) R. T. 7 Geo. IV. K. B. 5 Barn. & Cres. 795. 8 Dowl. & Ry. 757.

(f) 1 Ken. 384.

the sum to be deposited shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed *five* miles; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above *five* miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff: And it is further ordered, that the under-sheriff shall pay, and shall account for, the money so deposited, according to the scale set down in the rule."

In actions of *waste*, and trespass *quare clausum fregit*, the necessity for a view in general appears on the face of the pleadings; and, in other cases, the motion for it has become a motion of course in the King's Bench, requiring only counsel's signature; upon which a rule of court^(b) is drawn up in term time, or a judge's order in vacation: But in the Common Pleas, it is said that a rule for a view is never granted without an affidavit in any case, except in an action of *waste*; ^(c) and therefore, in other cases, an application must be made for the rule, to the court in term time, or to a judge in vacation, on an affidavit of the circumstances. ^(d) *In the Exchequer, the court will not grant a [*798] view of the premises, where the question may be tried by the production of a model. ^(aa)

The rule for a view is drawn up by the clerk of the rules in the King's Bench, or secondaries in the Common Pleas; and it is always made a part of the rule or order, that no evidence shall be given on either side, at the time of taking thereof. ^(bb) But it has been holden, that on a view, the showers may show marks, boundaries, &c. to enlighten the viewers; and may say to them, "these are the places to which we shall adapt our evidence on the trial." ^(cc) Before the rule or order is drawn up, an application should be made to the opposite attorney, for the name of his shower; and the names of both showers must be inserted in the rule or order, and also in the writ of *distringas*, ^(dd) or *habeas corpora*, ^(e) &c. with the time and place of meeting for proceeding on the view. The attorneys in the cause may, it seems, be showers. And if the opposite attorney will not name a shower, an appointment for that purpose should be obtained on the rule, from the master or prothonotaries; who, in case of non-attendance, will name one *ex parte*. ^(f) The rule or order being drawn up, a copy of it must be served on the opposite attorney, and the original left with the sheriff, together with the names of the jurors, if *special*, and he will summon them; if *common*, he will summon such as he thinks proper.

^(b) Append. Chap. XXXIV. § 28, 9; 37.

^(c) Barnes, 467; and see 9 Moore, 497. 2 Bing. 262, S. C.

^(d) Append. Chap. XXXIV. § 32. For the form of the rule in C. P. see *id.* § 33; and for the form of the rule in the Exchequer, see *id.* § 35.

^(aa) 1 Price, 130; and see 2 Chit. Rep. 422.

^(bb) Append. Chap. XXXIV. § 28, 9; 33, 35, 37.

^(cc) Barnes, 458.

^(dd) Append. Chap. XXXIV. § 30, 31, 36.

^(e) *Id.* § 34.

^(f) Imp. C. P. 7 Ed. 351.

*CHAPTER XXXV.

Of the BRIEF, EVIDENCE, and WITNESSES.

PREVIOUSLY to the trial, a *brief* should be prepared by the attorney for each party, and delivered to counsel; containing a copy or full abstract of the pleadings, a clear statement of the facts of the case, with such observations as occur thereon, and a proper arrangement of the proofs, with the names of the witnesses. The great rule to be observed in drawing briefs, as it is well expressed in a late useful publication, (a) consists in conciseness with perspicuity. And though in general the plaintiff has only *two* counsel, yet he may be allowed for fees to *three*, on taxation of costs, in a cause of difficulty. (b)

The next thing to be attended to is the *evidence*: [1] for unless the parties

(a) 1 Sel. Pr. 2 Ed. 459; and see Lee's Prac. Dic. 2 Ed. 298, &c. for some useful observations, as to the mode of drawing briefs.

(b) 1 Chit. Rep. 544.

[1] In the present note it is proposed to consider, 1st, the recent regulations, in England, as to the admission of written or printed documents, &c.; 2dly, the admissibility of interested witnesses; and 3dly, the examination of witnesses or interrogatories, &c. It was formerly necessary that the copy of a judgment, writ, or other *public* document, if not admitted by the adverse party, should be proved at the trial by the person making such copy; and the handwriting to or execution of any written instrument stated upon the pleadings, must also have been proved, if not admitted, by the attesting witness, or other person acquainted with such handwriting, or execution: But this practice being attended with great and unnecessary expense to the parties, it was ordered by a general rule of all the courts, R. H. 2 W. IV. reg. VI; 3 Barn. & Ad. 392; 8 Bing. 307; 2 Crompt. & J. 201, that "the expense of a witness, called only to prove the copy of any judgment, writ, or other *public* document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy; and unless such adverse party shall have refused or neglected to make such admission." And by another rule, R. H. 2 W. IV. reg. VII; 3 Barn. & Ad. 392; 8 Bing. 307; 2 Crompt. & J. 201, it is ordered, that "the expense of a witness, called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial, such summons stating therein the name, description, and place of abode of the intended witness, have neglected or refused to admit such handwriting, or execution; or unless the judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission."

By the law amendment act, 3 & 4 W. IV. c. 42 § 15; and see 2 Rep. C. L. Com. 17, 67, reciting that it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes; it is enacted, that "it shall and may be lawful for the judges of the superior courts of common law at *Westminster*, or any *eight* or more of them, of whom the chief of each of the said courts shall be *three*, at any time within *five* years after that act shall take effect, to make regulations, by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial, by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies, for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory in all courts of common law, and of the like force, as if the provisions therein contained had been expressly enacted by parliament."

In pursuance of the law amendment act, a rule of court was made by all the judges, R. Pr. H. 4 W. IV. reg. 20; 10 Bing. 456; 2 Crompt. & M. 6, 7, by which it is ordered, that "either party, after plea pleaded, and a reasonable time before trial, may give notice to the

are prepared to prove their allegations, it is needless for them to go to trial: And herein, there are two things to be principally considered in every

other, either in town or country, in the form thereto annexed, or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within *forty-eight* hours, to make the admission specified, the party requiring such admission may call on the party required, by *summons* to show cause before a judge, why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial, to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause; Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly: Provided also that the judge may give such time for inquiry, or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit; and that if the party required shall consent to the admission, the judge shall order the same to be made."

And it is thereby further ordered, that "no costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it: and that a judge may make such order as he may think fit, respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause."

On this rule, the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial, (such proof being satisfactory to the judge, and so certified by him,) whatever might be the result of the cause, if after such examination the defendant did not admit them; *Smith v. Bird*, 3 Dowl. Rep. 641. 1 Hodges, 96, S. C. And as to what shall be deemed a reasonable notice, to allow copies to be given in evidence, see *Tynn* (or *Tinn*) v. *Billingsley*, 3 Dowl. Rep. 810. 2 Cramp. M. & R. 253. 5 Tyr. Rep. 788. 10 Leg. Obs. 397, 8, S. C. And if, on a summons to admit the handwriting of the defendant, his attorney refuse to admit it, and the usual order be made, the judge at the trial will certify for the costs of a witness who is called to prove the handwriting, if such witness, on his examination in chief, depose to no other fact. The court, however, has not jurisdiction under the above rule, to order the admission of documents; but if a judge at chambers desire parties coming before him to go before the court, they will be heard, though the court will pronounce no judgment, leaving that to be done by the judge at chambers; *Stracey v. Blake*, 7 Car. & P. 404, per Ld. Abinger, Ch. B.; and see *Same v. Same*, 1 Tyr. & G. 528.

Where a plaintiff was not consulted, in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the court granted a new trial, with costs to be paid by the defendant. *Doe d. Tindal v. Roe*, 5 Dowl. Rep. 420. A variance, however, in the date of a note declared on, and of one admitted by a judge's order, is immaterial, where it does not appear that the defendant has been misled. *Field v. Flemming*, (or *Hemming*), 5 Dowl. Rep. 450. 1 Murphy & H. 21, S. C.

It is a general rule, that the witnesses should be such as are not interested in the event of the suit; but in order to render the rejection of witnesses, on the ground of interest, less frequent, it is enacted by the statute 3 & 4 W. IV. c. 42, that "if any witness shall be objected to as incompetent, on the ground that the verdict or judgment, in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him." On this statute, where the defendant proved, in support of a plea of payment, the payment of a certain sum to H. the plaintiff's attorney, on the plaintiff's account, in answer to which the plaintiff tendered H. as a witness to prove that the defendant afterwards called upon him, and got the money back again, but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict, the court held that the witness was competent, and that the evidence ought to have been received; *Bowers v. Evans*, 1 Meeson & W. 214. So, in action against a legatee for money had and received, brought to recover the value of a horse sold by him after the testator's death, which it was alleged was sent to the testator on trial only by the

action, first, *what* is to be proved; and secondly, the *manner* of proving it. The evidence in all cases is governed by the pleadings; it being necessary

plaintiff, the executor, who was also residuary legatee, was holden not to be an incompetent witness. *Bowman v. Willis*, 3 Bing. N. R. 669. 13 Leg. Obs. 508, 9, S. C. So, in case for an infringement of a patent, a purchaser of a license to use the patent is a competent witness for the plaintiff. *De Roone v. Fairlie*, 1 Moody & R. 457. A witness who may be liable to the costs of the action as special damages, may be made competent, by indorsement on the record, pursuant to the above statute. *Pickles v. Hollings*, 1 Moody & R. 468. So, the person under whom the defendant justifies in *trespass*, may be rendered a competent witness for the defendant, by the like indorsement. *Creevey v. Bowman*, 1 Moody & R. 496. And it seems from a late case, determined by the court of Exchequer, (*Yeomans v. Legh*, 2 Meeson & W. 419; and see *Faith v. McIntyre*, 7 Car. & P. 44; *Fancourt v. Bull*, 1 Bing. N. R. 681; 1 Scott, 645; 1 Hodges, 98, S. C.) though there are previous decisions *at nisi prius* to the contrary, (*Mitchell v. Hunt*, 6 Car. & P. 351, *per Patteson, J.*; *Harrington v. Caswell*, *Id.* 352; *Harding v. Cobley*, *Id.* 684, *per Ld. Denman*, Ch. J.; and see *Biss v. Mountain*, 1 Moody & R. 302; *Burgess v. Cuttill*, (or *Cuthill*), 6 Car. & P. 282; 1 Moody & R. 315, S. C.; *per Ld. Lyndhurst*, Ch. B.; *Ante*, 483, 4.) that in an action on the case for negligence, in driving a carriage by the defendant's servant, the servant is a competent witness for the defendant, without a release; his name being indorsed on the record. This statute, however, does not apply to cases where the witness has a direct and immediate interest in the event of the suit, independently of the verdict: Therefore, the drawer of an accommodation bill is not a competent witness for the defendant, in an action by the indorsee against the acceptor. (*Ante*, 483.) So, in an action against one of two makers of a joint and several promissory note, the other maker of the note cannot be called as a witness for the defendant, to prove that the consideration given for the note was an illegal consideration; his interest in defeating the note altogether, rendering him incompetent. *Slegg v. Phillips*, 2 Har. & W. 51. So, a witness interested in the result of a suit in equity, is not made competent, on an issue directed in such suit, by the statute 3 & 4 W. IV. c. 42, § 26, 7. *Stewart v. Barnes*, 1 Moody & R. 472. And if a right of way be pleaded for the inhabitant householders of M. to fetch water, an inhabitant householder of M. may be examined as a witness, in support of this plea; *Knight v. Moore*, 7 Car. & P. 258, *per Williams, J.* This statute, however, does not make the drawer of an accommodation bill a competent witness for the defendant, in an action by the indorsee against the acceptor; *Burgess v. Cuttill* (or *Cuthill*), 6 Car. & P. 282; 1 Moody & R. 315, S. C., *per Ld. Lyndhurst*, Ch. B.; and see *Biss v. Mountain*, *Id.* 302, *per Alderson, J.* So, in an action against a carrier, for negligence in carrying a parcel, the carrier's servant is not made a competent witness for the defendant; *Harrington v. Caswell*, 6 Car. & P. 352. So, in an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff, without a release; and the statute has made no alteration in the law on this point; *Harding v. Cobley*, 6 Car. & P. 664, *per Ld. Denman*, Ch. J.; and see *Biss v. Mountain*, 1 Moody & R. 302; but see *Fancourt v. Bull*, 1 Hodges, 98; 1 Bing. N. R. 681; 1 Scott, 645, S. C. In these cases, therefore, the witness cannot be examined, without a release. And a release by an individual corporator to the corporation, of all his interest in the subject-matter of the action, will not render him an admissible witness, in an action of *trespass* for an injury done to the corporation land; *Bailiffs and Assistants of Godmanchester v. Phillips*, 1 Har. & W. 686. 6 Nev. & M. 211, S. C.

By the same statute, Stat. 3 & 4 W. IV. c. 42, § 27, "the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party; and shall be afterwards entered on the record of the judgment: and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

Before the statute 1 W. IV. c. 22, great difficulties were often experienced, from the impossibility of obtaining the personal attendance of witnesses at the trial. Sometimes it was found that they were unable to attend, by reason of absence in foreign countries; sometimes, by reason of dangerous illness, or permanent infirmity. To prevent a failure of justice from any of these circumstances, the courts of law frequently availed themselves of the opportunity which an application for some indulgence afforded, to obtain, as a condition, the consent of a party to an examination of such witnesses, previously to the trial, upon *interrogatories*, before an officer of the court, or before commissioners; and the courts, in proper cases, would restrain a plaintiff from proceeding to trial, until he consented to a *commission* for examining material witnesses residing abroad: But when the courts of law had not the opportunity of compelling the *consent* of parties by such indirect means, recourse must have been

to prove every thing that is put in issue, and no more. On the general issue, the plaintiff must prove the whole of his case; but on a special issue,

had to a court of equity, where a new suit must have been instituted for the purpose, as auxiliary to the suit at law; 2 Rep. C. L. Com. 23, 4, 73, &c.

These inconveniences were in part remedied by the statute 13 Geo. III. c. 63, § 44; which enacted, that "when and as often as the *East India* company, or any person or persons, should commence or prosecute any action or suit, in law or equity, for which cause had arisen in *India*, against any other person or persons, in any of his Majesty's courts at *Westminster*, it should and might be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses; and such examination being duly returned, should be allowed and read, and should be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action."

Upon this statute, writs were granted in several cases, by the court of King's Bench, *Mullick v. Lushington*, M. 26 Geo. III.; *East India Company v. Ld. Malden*, E. 32 Geo. III.; *Taylor v. East India Company*, M. 33 Geo. III. K. B.; and, in one of them, *Spalding v. Mure*, T. 35 Geo. III. K. B., the motion being made on the last day of term, the court awarded such writ, even before issue joined. And the court of Common Pleas granted a *mandamus* to a court in *India*, to examine witnesses on behalf of the defendant in a civil action; *Grilliard v. Hogue*, 1 Brod. & B. 519; 4 Moore, 313, S. C. Where a defendant, at his own expense, had obtained a writ of *mandamus*, under the above statute, for examining witnesses in *India*, and depositions were returned, and filed at the secondary's office of the Common Pleas, the court held that the plaintiff was entitled to copies of them, on payment of the charges for making such copies, although he had not attended in court in *India*, either by his agent or counsel; *Davidson v. Nicol*, 5 Moore & P. 185; 1 Dowl. Rep. 220. *Davis v. Nicholson*, 7 Bing. 358, S. C. And where a *mandamus* was granted for the defendant to examine witnesses in *India*, the plaintiff, having obtained a verdict, was holden to be entitled to his costs of cross-examining such witnesses; *Whytt v. Macintosh*, 2 Man. & R. 133; 8 Barn. & C. 317, S. C. But where the plaintiff had applied for and obtained such writ, which was returned, with the depositions, to this country, but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it, and the plaintiffs obtained a verdict, the court held that they were not entitled to the costs attending the writ, or of the office copies of the depositions; *Fairlie v. Parker*, 1 Moore & P. 438.

The powers and provisions of the above statute, which confined the power of the courts in granting writs of *mandamus* for the examination of witnesses in *India*, to causes of action arising in that country, were extended by the statute 1 W. IV. c. 22, § 1; by which it is enacted, "that all and every the powers, authorities, provisions, and matters, contained in the therein recited act, Stat. 13 Geo. III. c. 63, relating to the examination of witnesses in *India*, shall be, and the same are thereby extended to all colonies, islands, plantations, and places, under the dominion of his majesty, in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at *Westminster*, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for." On this statute the court has power to issue a *mandamus*, to examine a witness in *India*, wheresoever the cause of action may have arisen; *Bain v. De Vetry*, 1 Gale, 52. 3 Dowl. Rep. 516. 10 Leg. Obs. 46, S. C.

And it is thereby further enacted, that "when any writ or commission shall issue, under the authority of the said recited act, or of the power thereinbefore given by that act, the judge or judges to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are judges does or may possess for that purpose, in suits or causes depending in such court;" Stat. 1 W. IV. c. 22, § 2. And "that the costs of every writ or commission to be issued under the authority of the said recited act, or of the power thereinbefore given by that act, in any action at law depending in either of the said courts at *Westminster*, and of the proceedings thereon, shall be in the discretion of the court issuing the same;" *Id.* § 3.

The application for a writ of *mandamus* may be made by either party; and must be to the court in which the action is pending, supported by an *affidavit* of the facts, showing the necessity for issuing such writ: The rule, if granted, is in the first instance only a rule nisi, *Doe & Grimes (or Winter) v. Pattison*, 3 Dowl. Rep. 35; 9 Leg. Obs. 108, S. C. *per Littledale, J.*, which must be served on the opposite party, and if no sufficient cause be shown, it will be made absolute of course; and should be drawn up with the clerk of the rules in the King's Bench and Exchequer, and with the secondaries in the Common Pleas. The writ of *mandamus* is made out by the attorney; and, after being signed and sealed, should be for-

it is only necessary to prove the particular point referred to the jury; for whatever is not expressly denied, is admitted by the pleadings. The man

warded to an agent, to be delivered to the judge or judges of the court to whom it is directed, with proper instructions for the examination of the witnesses: Chapm. Prac. K. B. 2 Ed. 235.

The practice of examining witnesses on interrogatories, in other cases, is regulated by the statute 1 W. IV. c. 22, § 4, &c.; by which it is enacted, that "it shall be lawful to and for each of the courts at *Westminster*, and also the court of Common Pleas of the county palatine of *Lancaster*, and the court of pleas of the county palatine of *Durham*, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon *interrogatories* or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a *commission* to issue, for the examination of witnesses on oath, at any place or places out of such jurisdiction, by *interrogatories* or otherwise; and by the same, or any subsequent order or orders, to give all such directions, touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

Under the above act, a rule of court, or order of a judge, may be obtained, on a proper *affidavit*, for the examination of witnesses on oath, upon *interrogatories*, or *visâ voce*, within the jurisdiction of the court where the action is depending; or for a *commission* to issue, for their examination on oath, at any place or places out of such jurisdiction, by *interrogatoria* or otherwise. And a witness may be ordered to be examined upon interrogatories, on the trial of an issue directed by the court of Chancery; *Bourdieu* (or *Bordeaux*) v. *Rowe*, 1 *Hodges*, 93. 1 *Scott*, 608. 1 *Bing. N. R.* 721, S. C. If the witness be in *Scotland*, he must be examined on a *commission*, and not under a *mandamus*; *Wainwright v. Bland*, 1 *Gale*, 103. 3 *Dowl. Rep.* 653. 10 *Leg. Obs.* 78, S. C. And the court granted a *commission*, for the examination of a witness residing in *Dublin*, in an action for criminal conversation with the plaintiff's wife; *Norton v. Lamb*, 5 *Dowl. Rep.* 181. *Norton v. Id. Melbourne*, 3 *Bing. N. R.* 67. 3 *Scott*, 398, S. C. In order to obtain a rule or order for the examination of witnesses within the jurisdiction of the court, the name of the person before whom the examination is to take place must be mentioned; *Doe d. Thorn v. Phillips*, 1 *Dowl. Rep.* 56. 2 *Leg. Obs.* 76, S. C. *per Taunton, J.* And where it was suggested, that the plaintiff had deferred his application for the examination of witnesses about to sail for *India*, until the last moment, in order to elude a cross-examination, the examination was ordered to be taken provisionally; the plaintiffs satisfying the court by *affidavit*, that the application had not been delayed with any sinister intention; *Pirie v. Iron*, 8 *Bing.* 143. 1 *Moore & S.* 224. 1 *Dowl. Rep.* 252, S. C. It has been doubted, whether an advanced state of pregnancy be a cause for the examination of a female witness by the prothonotary, under the above statute: If it be, it must be shown, by *affidavits* of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause; *Abraham v. Newton* (or *Norton*), 8 *Bing.* 274. 1 *Moore & S.* 384. 1 *Dowl. Rep.* 266, S. C. But the court permitted the examination of a witness before the prothonotary, under the above statute, on payment of costs, upon the *affidavit* of his medical attendant, who swore that he was in a precarious state, and could not attend at the trial without great danger; *Pond v. Dimes*, 3 *Moore & S.* 161. 2 *Dowl. Rep.* 730, S. C.

"When any rule or order shall be made for the examination of witnesses, within the jurisdiction of the court wherein the action shall be depending, by authority of that act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do: And the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had, by attachment, for the proceedings against a witness for non-attendance, see Chapm. Prac. K. B. 2 Ed. 251., (the judge's order being made a rule of court, before or at the time of the application for an attachment,) if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served, together with, or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compellable to produce at a trial of the cause;" stat. 1 W. IV. c. 22, § 5.

ner of proof depends on the nature of the evidence, which is written or unwritten : (c) In general, the parties must come prepared with the best exist-

(c) Glib. Evid. 5. Bul. Ni. Pri. 221.

And it is thereby further enacted, that "it shall be lawful for any sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination, under the authority of that act, by virtue of a writ of *habeas corpus*, to be issued for that purpose; which writ shall and may be issued by any court or judge, under such circumstances, and in such manner, as such court or judge may now by law issue the writ, commonly called a writ of *habeas corpus ad testificandum*."

If the examination is directed to be taken on *interrogatories*, the party prepares his interrogatories, which must be engrossed on parchment, and signed by counsel, and a copy given to the opposite party, in order that he may prepare cross-interrogatories, if he think proper. Notice of the time and place of examination of the witness, must also be given to the adverse attorney; and the examination must be on oath, or affirmation of the witness, the oath to be administered by the person taking the examination, or by a judge of the court in which the action is pending; Chapm. Prac. K. B. 2 Ed. 241.

If the examination be ordered to be taken *visd voce*, an appointment must be obtained from the person directed by the rule or order to take the examination: which appointment must specify the time and place of taking the examination, and a copy of the rule or order, with the appointment, must be served on the opposite party; and the witness will then be examined on oath or affirmation, to be administered by the person appointed by the rule for that purpose, in the presence of all parties, or such of them as think proper to attend: *Id.* 241, 2.

The power of the courts at Westminster to grant commissions for the examination of witnesses abroad, on the statute 1 W. IV. c. 22, is not confined to cases where the witnesses reside within the king's dominions; but a commission may issue to examine them, in any place out of the jurisdiction of the courts, on motion in that court in which the action shall be depending; *Duckett v. Williams*, 1 Crompt. & J. 510. 1 Tyr. Rep. 502. 1 Price, N. R. 40. 1 Dowl. Rep. 291, S. C. *Reynard v. Cope*, 1 Tyr. Rep. 505, (a). This statute, however, does not seem to apply to indictments, *Rez v. Lady Briscoe*, 1 Dowl. Rep. 520. 5 Leg. Obs. 384. S. C. *per Parke, J.*: And an application under it, for the examination of a witness resident out of the jurisdiction of the court, must be made as early as possible after issue joined; *Brydges v. Fisher*, 4 Moore & S. 458. Where a witness resides abroad, at so great a distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such commission, on the application of the defendant; but it must be made out to the satisfaction of the court, that the evidence of the witness would be admissible, and of service to the defendant when obtained; *Lloyd v. Key*, 3 Dowl. Rep. 253. And if it appear to the court, that a *mandamus* or commission to examine the witnesses abroad is moved for to delay the plaintiff, they will grant the writ only on bringing the money into court; *Dalton v. Lloyd*, 1 Gale, 102. Under this statute, a commission to examine witnesses abroad may be granted, without the usual clause, requiring the commissioners to take an oath as such, if circumstances be shown which make it appear that the commission will be inoperative, unless that clause be omitted; *Clay v. Stephenson*, 1 Har. & W. 409. 5 Nev. & M. 318. 3 Ad. & E. 807, S. C. And where an *affidavit* in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary, the court held it to be sufficient; and that the *affidavit* need not state that the evidence was admissible, or that the application was *bona fide*, and not for delay; and also that no *affidavit* of merits was necessary: and the court, in granting such an application, will not impose terms upon the party applying; *Baddeley v. Gilmore*, 1 Meeson & W. 55. 1 Tyr. & G. 369. 1 Gale, 410, S. C. But where a rule nisi was obtained for a commission to examine witnesses in *Jamaica*, founded upon an *affidavit*, stating that there were several persons residing in that island, but whose names were unknown to the deponent, who were cognizant of the facts on which the issue was joined, the court discharged the rule, on the ground that the *affidavit* must either specify the witnesses by name, or otherwise describe them; *Gunter v. Mactear*, (or *M'Kear*), 1 Tyr. & G. 245. 1 Meeson & W. 201. 1 Gale, 440. 4 Dowl. Rep. 722. 12 Leg. Obs. 213, S. C.

In an action on a policy of insurance, a rule having been obtained for a commission to examine witnesses abroad on interrogatories, *three weeks'* time was limited for taking the examinations; which proving insufficient, the time was afterwards enlarged; *Shovey v. Shobell*, 1 Tyr. Rep. 505, (a). In a subsequent case, where the defendant had obtained a rule for issuing a commission to take interrogatories in *France*, Lord *Tenterden* said that it would be limiting the commission too much, to make it part of the order, that it should be returned in *three weeks*; and observed, that if it were not returned in proper time, the plaintiff might apply that the case should proceed. *Reynard v. Cope*, 1 Tyr. Rep. 505, (a). The witnesses

ing evidence the nature of the case admits of; and the witnesses must be such as are not interested in the event of the suit.(d) But when an objec-

(d) *Cas. temp. Hardw.* 358. 4 *Bur.* 2251. 3 *Durnf. & East*, 27.

intended to be examined, were mentioned in the order. A rule of court for the examination of witnesses on interrogatories in a foreign country is not an absolute stay of proceedings, but only a limited one; *Forbes v. Wells*, 3 *Dowl. Rep.* 318. *Ward v. Grime*, 3 *Dowl. Rep.* 318. 9 *Leg. Obs.* 321, *per Patteson, J.* And, on an application by the defendant for a commission to examine witnesses abroad, the court refused to make it a part of the rule, to call upon the plaintiff to produce a bill of exchange in his possession, at the time of executing the commission; *Cuntliffe v. Whitehead*, 3 *Dowl. Rep.* 634.; and see *Baddeley v. Gilmore*, 1 *Meeson & W.* 55. 1 *Gale*, 410, *S. C.* So, the court will not stay the issuing of a commission to examine witnesses abroad, merely on the ground that some costs are due from the plaintiff to the defendant in equity; *Oughan v. Parish*, 4 *Dowl. Rep.* 29. 10 *Leg. Obs.* 505, 6, *S. C.* And the costs of executing a commission in a foreign country, are costs in the cause, unless some special ground be laid for ordering otherwise; *Prince v. Sama*, 4 *Dowl. Rep.* 5. 10 *Leg. Obs.* 238, *S. C. per Coleridge, J.*; and see *Clay v. Stephenson*, 5 *Nev. & M.* 318. 3 *Ad. & E.* 807. 1 *Har. & W.* 409, *S. C.*

The commission for the examination of witnesses out of the jurisdiction of the court, must be made out by the party obtaining the rule: and the interrogatories being prepared, engrossed on parchment, and signed by counsel, should be annexed to the commission, with the cross-interrogatories, if any: after which the same should be forwarded, with full instructions, to an agent, to be delivered to the commissioners, the time and place for examination being appointed, and notices thereof given, as directed by the commission; And the examinations having been taken in pursuance thereof, the commission and interrogatories, with the depositions annexed, are returned to the court in which the action is pending, certified under the seals of the commissioners; and either party will be entitled to a copy thereof; *Chapm. Prac. K. B.* 2 *Ed.* 242, 246.

As to the mode of examining witnesses on interrogatories, it is declared by the act, Stat. 1 *W. IV. c.* 22, § 7, to be "lawful for all and every person authorized to take the examination of witnesses by any rule, order, writ, or commission, made or issued in pursuance of that act, and he and they are thereby authorized and required, to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized, or by any judge of the court wherein the action shall be depending: And if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence, in the county wherein such evidence shall be given, or in the county of *Middlesex*, if the evidence be given out of *England*: And that it shall and may be lawful for the master, prothonotary, or any other person to be named in any such rule or order as aforesaid, for taking any examination in pursuance thereof, and he and they are thereby required to make, if need be, a special report to the court, touching such examination, and the conduct or absence of any witness or other person thereon, or relating thereto; and the court is thereby authorized to institute such proceedings, and make such order and orders, upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court;" Stat. 1 *W. IV. c.* 22, § 8.

The party succeeding in the action was not formerly entitled to the costs of examining his witnesses on interrogatories, or taking office copies of depositions; but the party whose witnesses were examined paid his own expense, unless it were otherwise expressed in the rule, *Stephens v. Crichton*, 2 *East*, 259; and see *Hul. Costs*, 2 *Ed.* 439.: and this held, as well with regard to witnesses examined abroad, as in this country, *Taylor v. Royal Exchange Assurance Company*, 8 *East*, 393: The reason was, that by the practice of the court of Chancery, a party applying for a commission to examine witnesses on his behalf, must pay the expenses; and unless the courts of law had adopted the same rule, with respect to the party applying for leave to examine witnesses abroad on depositions, which could not be done without the other party's consent, such consent would never have been given, but the applicant would have been driven to the expense of applying for a commission; *Same v. Same*, *Id.* 393, 4. But, in the Common Pleas, where the rule of court for examining witnesses by commission expressed that the depositions of witnesses at *Hamburg* and *Lubeck* were to be taken, and the commission was directed to persons at *Hamburg*, and the costs were ordered to abide the event of the trial, the expenses of bringing witnesses from *Lubeck* to *Hamburg* were allowed on taxation; *Muller v. Hartshorne*, 3 *Bos. & P.* 556. And now, by the statute 1 *W. IV. c.* 22, § 9, "the costs of every rule or order to be made for the examination of witnesses, under any commission or otherwise, by virtue of that act, and of the proceedings thereupon, shall, except in the case thereinbefore provided for, be costs in the cause, unless otherwise directed, either by the judge making such rule or order, or by the judge before

tion is made to a witness, that admits of any doubt, the courts, of late years, have endeavoured as far as possible, consistently with the old cases, to let the objection go to his *credit*, rather than his *competency*.(e)

*Written evidence is either *public* or *private*.(a) Some public [*800] writings are of record; others, not of record: and public writings, not of record, may be distinguished into such as are of a judicial nature, and such as are not judicial.(b) Records are acts of parliament, or judgments and recognizances, &c. which are the memorials of the legislature, and of the king's courts of justice, preserved in rolls of parchment; and they are considered of such high authority, that no evidence is allowed to contradict them.(c) Letters patent(d) also, judicial writs,(ee) and affidavits, when read and filed,(f) are considered as matters of record. Acts of parliament either relate to the kingdom in general, and are therefore called general or *public* acts, or only to the concerns of private persons, and are thence called *private* acts.(g) Of the former, the printed statute book is evidence; but of the latter, the regular proof is by an examined copy, compared with the original in the parliament office at *Westminster*.(h) Of other records, as they cannot be removed from place to place, copies are admitted, as the best producible evidence.(i) These copies are of two kinds; first, under seal;

(c) *Cas. temp. Hardw.* 358. 4 *Bur.* 2251. 3 *Durnf. & East*, 27. 1 *Durnf. & East*, 300; and see the statute 46 Geo. III. c. 37, for declaring the law with respect to witnesses refusing to answer. And for the law of evidence in general, and what evidence is required in particular cases, and the competency or incompetency of witnesses, see *Trials per pais*; *Gilbert's Law of Evidence*; the Abridgments of *Viner* and *Bacon*, tit. *Evidence*; *Comyn's Digest*, tit. *Testmoigne*; *Buller's Nisi Prius*; *Espinasse's Nisi Prius*, Vol. 2, Part III.; and the treatises on evidence, by *Peake* and *Phillips*.

(a) *Gilb. Evid.* 7. *Bul. Ni. Pri.* 221.

(b) 1 *Phil. Evid.* 6 Ed. 299.

(c) *Co. Lit.* 117, b. 260, a. *Gilb. Evid.* 7. *Bul. Ni. Pri.* 221.

(d) *Peake's Evid.* 5 Ed. 32. (c).

(ee) *Gilb. Evid.* 40. *Bul. Ni. Pri.* 234. 1 *Ken.* 345. *Say. Rep.* 299, S. C.

(f) 2 *Wils.* 371.

(g) *Gilb. Evid.* 11, 12. *Bul. Ni. Pri.* 222.

(h) *Gilb. Evid.* 12, 13. *Bul. Ni. Pri.* 225; but see 9 *Moore*, 64, as to the effect of an admission, by the town agents of the defendant's attorney, that the printed copy of a private act of parliament should be receivable in evidence, without formal proof.

(i) *Bul. Ni. Pri.* 226.

whom the cause may be tried, or by the court." Since the making of this statute, it is discretionary with the court, whether they will allow the expenses of foreign witnesses brought over for the purposes of a cause, or only the costs of a commission; *M'Alpine v. Poles*, (*Powles*, or *Coles*), 1 *Crompt. & M.* 795. 3 *Tyr. Rep.* 871. 2 *Dowl. Rep.* 299. 7 *Leg Obs.* 11, 12; S. C. *Excheq.* And the costs of a commission to examine a witness abroad, are not allowed to the party who obtains the commission, although successful in the action, where the examination is more peculiarly for his benefit; *Bridges* (or *Brydges*) *v. Fisher*, 1 *Bing. N. R.* 510. 1 *Scott*, 485. 1 *Hodges*, 36, S. C. But in order to review a taxation by the master, for disallowing the expenses of detention of a foreign witness in this country, it should be shown that the master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him; *White v. Mayor*, 5 *Tyr. Rep.* 487.

As the depositions on interrogatories, however, are only taken *de bene esse*, it is enacted by the above statute, stat. 1 W. IV. c. 22, § 10, that "no examination or deposition, to be taken by virtue of that act, shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant or deponent, is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases, the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions." And it has been holden, that witnesses, examined under a judge's order, in expectation of their going abroad, are examined as much for one side as the other; and either party may use their evidence at the trial, if it be shown that the witnesses are abroad: but this must be proved; and the statement in their depositions, that they are going abroad, is not sufficient for this purpose; *Proctor v. Lainsan*, 7 *Car. & P.* 629.

and secondly, not under seal.(k) Copies under seal are called exemplifications, and are of higher credit than any sworn copy.(k) Exemplifications are twofold; first, under the great seal; or secondly under the seal of the court:(k) The former are of themselves records of the greatest validity.(k) But when a record is exemplified under the great seal, it must be either a record of the court of Chancery, or sent for into Chancery, which is the centre of all the courts, by writ of *certiorari*; and from thence the subject receives a copy, under the attestation of the great seal.(l) The second sort of copies under seal are exemplifications under the seal of the court:(m) and these are of higher credit than a sworn copy.(m) Copies not under seal are of two sorts; first, sworn copies; and secondly, office copies.(n) But the copy of a copy is no evidence; it not being the best the nature of the case admits of.(o)

With regard to office copies, a difference is taken between a copy authenticated by a person trusted for that purpose, which is evidence without further proof, and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence, without proving it to have been actually examined.(p) Thus, the chirograph of a fine is evidence of such fine; because the chirographer is appointed to give out copies of the agreements between the parties, that are lodged of record:(p) But where a fine is to be proved with proclamations, (as it must be [*801] to bar a stranger,) *the proclamations must be examined with the roll; for though the chirographer is authorized by the common law to make out copies for the parties, of the fine itself, yet he is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.(a) So, when a deed is enrolled, the indorsement of the enrolment is evidence, without further proof of the deed; because the officer is entrusted to authenticate such a deed by enrolment; but if the officer of the court make out a copy, when he is not entrusted for that purpose, it ought to be proved to have been examined.(b) And the enrolment of a lease, under the statute 1 & 2 Geo. IV. c. 52, § 8, is not admissible as evidence of the deed, without proof of the execution.(c) The office copies of depositions are evidence in Chancery; but not at common law, without examination with the roll: for though that court have, for their own convenience, empowered their officers to make out such copies as should be evidence, yet the particular rules of that court are not taken notice of by the courts of common law; and therefore they are not evidence in those courts.(d)

Public writings, of a *judicial* nature, not of record, are judgments in the House of Lords;(e) proceedings in Chancery;(f) sentences in the

(k) Gilb. Evid. 19. Bul. Ni. Pri. 226.

(l) Gilb. Evid. 19, 20.

(m) *Id.* 20. Bul. Ni. Pri. 227, 8.

(n) *Id.* 24. Bul. Ni. Pri. 228.

(o) *Id.* 10. Bul. Ni. Pri. 226.

(p) *Id.* 25. Bul. Ni. Pri. 229.

(a) Gilb. Evid. 26, 7. Bul. Ni. Pri. 230.

(b) *Id.* 25, 6. Bul. Ni. Pri. 229.

(c) Ry. & Mo. 339.

(d) Bul. Ni. Pri. 229. And see further, as to depositions, Gilb. Evid. 60, &c. Bul. Ni. Pri. 239, &c. 2 Esp. Ni. Pri. 4 Ed. 257, 8, 9. Peake's Evid. 5 Ed. 57, &c. 1 Phil. Lvid. 6 Ed. 345, &c.; 374, &c.

(e) Gilb. Evid. 18. Peake's Evid. 5 Ed. 36. 1 Phil. Evid. 6 Ed. 376. Cowp. 17.

(f) Gilb. Evid. 47, &c. Bul. Ni. Pri. 235, &c. 2 Esp. Ni. Pri. 4 Ed. 253, &c. Peake's Evid. 5 Ed. 53, &c. 1 Phil. Evid. 6 Ed. 373, &c. 4 Barn. & Cres. 25. 6 Dowl. & Ryl. 127, S. C.

ecclesiastical courts, (g) courts of admiralty, (h) and foreign courts; (s) judgments in inferior courts, not of record; (k) rules of court; (ll) affidavits, not filed; (m) inquisitions, (n) and awards, (o) &c.: to which may be added, the books of the quarter sessions, (p) and books kept by the clerk of the judgments, (q) and other officers of the courts, (r) and the prison books of the King's Bench and Fleet prisons. (s) [A] Public writings, not judicial, are the journals of the lords or commons; (t) the *London Gazette*, for acts of state, such as the king's proclamations, and addresses to the crown, &c.; domesday book; surveys of ecclesiastical benefices, &c.; the pope's bull, and license, on questions respecting tithes, or the appropriation of benefices; the ancient books of the heralds' office, and their visitation books of counties, on questions of pedigree; books of history, to prove matters relating to the *kingdom in general; parish [*802] registers, (a) of christenings, marriages, and burials; rate books, or books for parish indentures; rolls of courts baron; (b) ancient terriers, or surveys of parishes or manors, which are either ecclesiastical or temporal; corporation books; (c) and public books of the *Navy* office, *Custom* house, (d) *Stamp* and *Post* offices, (d) *Bank*, (d) *South Sea* house, (d) *East India* company, (d) &c. With regard to the proof of entries in public books, it is now clearly settled, that whenever an original is of a public nature, and admissible in evidence, an examined copy will equally be admitted. (e) This rule is necessary, as well for the security of the document, as for the convenience of the public. But when the original is of a private nature, a copy will not be evidence, unless the original be lost or destroyed, or in the possession of the adverse party. (f)

Written evidence, of a *private* nature, is either of deeds under seal, or agreements, &c. not under seal (gg) and it is either in the possession of a party to the suit, or his adversary, or of a third person. [B] When deeds or writings are in the possession of the party he may produce them, proving,

(g) 2 Esp. Ni. Pri. 4 Ed. 259, &c. Peake's Evid. 5 Ed. 67, 8. 1 Phil. Evid. 6 Ed. 317, 322, &c. 376, &c.

(h) Peake's Evid. 5 Ed. 69, 70. 1 Phil. Evid. 6 Ed. 327, &c.

(i) 1 Phil. Evid. 6 Ed. 331, &c. 379, 80; and see 3 East, 221. 2 Stark. Ni. Pri. 8.

(k) Com. Dig. tit. *Evidence*, C. 1. 2 Blac. Rep. 836; and see Peake's Evid. 5 Ed. 72, 3. 1 Phil. Evid. 6 Ed. 360, 376. 2 Stark. Ni. Pri. 473.

(ll) *Ante*, 490.

(m) 1 M'Clel. & Y. 383.

(n) 1 Phil. Evid. 6 Ed. 355, 6; 372.

(o) *Id.* 360, 61; 380, 81.

(p) *Ante*, 593.

(q) *Ante*, 556.

(r) *Append. Intro.*

(s) *Ante*, 352.

(t) Gilb. Evid. 18. Peake's Evid. 5 Ed. 52, 3. 1 Phil. Evid. 6 Ed. 386, 7.

(u) *Ante*, 593, 4.

(v) *Ante*, 594, 5; and see Gilb. Evid. 73. Bul. Ni. Pri. 247. 2 Esp. Ni. Pri. 4 Ed. 264. Peake's Evid. 5 Ed. 85. 1 Phil. Evid. 6 Ed. 397, 8.

(w) *Ante*, 595, 6.

(x) *Ante*, 593. And see further, as to evidence of public writings, not judicial, Gilb. Evid. 73, &c. Bul. Ni. Pri. 247, &c. 2 Esp. Ni. Pri. 4 Ed. 264, &c. Peake's Evid. 5 Ed. 77, &c. 1 Phil. Evid. 6 Ed. 383, &c., and as to the inspection of public writings, in general, see Peake's Evid. 5 Ed. 89, &c. 1 Phil. Evid. 6 Ed. 405, &c. *Ante*, 593, &c.

(y) 3 Salk. 154. Comb. 337. Skin, 383, S. C.; and see 1 Phil. Evid. 6 Ed. 404, 5.

(z) 1 Phil. Evid. 6 Ed. 405.

(gg) As to the evidence of *private* writings, see Gilb. Evid. 77, &c. Bul. Ni. Pri. 249, &c. 2 Esp. Ni. Pri. 4 Ed. 270, &c. Peake's Evid. 5 Ed. 93, &c. 1 Phil. Evid. 6 Ed. 417, &c. And for the cases in which the parties are compellable to produce them, see 1 Phil. Evid. 6 Ed. 419, &c. *Ante*, 487, 590, &c.

[A] See 1 Greenl. on Evid. § 471, &c.

[B] See 1 Greenl. on Evid. § 557, &c.

when necessary, that they were duly executed: And no question can be asked, as to what the party has said of the contents of a written instrument, without the production of the instrument, or unless the non-production of it be accounted for. *(h)* When deeds or writings are in the possession or power of the adverse party, there are in general no means, at law, of compelling him to produce them; *(i)* but the practice in such case is to give him, or his attorney, a regular *notice* to produce the original: *(k)* not that, on proof of the notice, he is compellable to give evidence against himself, but the consequence will merely be, that if they are not produced, the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents. *(l)* And where A. bound himself as surety for B., to pay C. the balance of an account between B. and C. within a certain time after notice, it was holden, in an action by C. against A., that parol evidence of such notice could not be [*803] *given, without proof of the usual notice to produce it. *(a)* There are three descriptions of cases, where notice to produce an instrument is unnecessary: first, where the instrument produced, and that to be proved, are duplicate originals; *(b)* secondly, where the instrument to be proved is a notice to quit, or notice of the dishonour of a bill of exchange; *(c)* thirdly, where from the nature of the action, the defendant has notice that the plaintiff means to charge him with the possession of the instrument, in which case it is not necessary to give him any other notice than the action itself supplies. *(d)* In an action of *trover* therefore, for a bond, or bills of exchange, &c. though it was formerly the practice to give notice to produce them at the trial, *(e)* yet such notice is now holden to be unnecessary: *(f)* And the principle of the rule requiring notice, does not apply to the case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *sub-pœna*. *(g)* But an examined copy of a letter, containing notice of the dishonour of a bill of exchange, which is not produced, nor the subject-matter of the action, is not admissible without notice to produce the letter sent. 1 Mood. & M. 31.

When a notice is required, it need not be given to the defendant himself,

(h) Ry. & Mo. 187. 1 Car. & P. 558, S. C.

(i) 1 Phil. Evid. 6 Ed. 419, 421. In Equity, however, a party interested in documents, in the custody of his adversary, is entitled to their production. 1 Younge & J. 28; and see *Id.* 175.

(k) Append. Chap. XXXV. § 1; and see Peake's Evid. 5 Ed. 103, &c. 1 Phil. Evid. 6 Ed. 421, 2. 1 Car. & P. 199.

(l) 1 Phil. Evid. 6 Ed. 421, 2.

(a) 2 Stark. Ni. Pri. 174; and see 12 East, 237. 2 Moore, 349. *Ante*, 335.

(b) 2 Campb. 110. Anst. 82, 83; 366.

(c) 7 Moore, 112. 3 Brod. & Bing. 288, S. C.

(d) 1 Phil. Evid. 6 Ed. 423, 4; and see 6 Barn. & Cres. 398, 9, *per Bayley, J.*

(e) 1 Esp. Rep. 50.

(f) 4 Taunt. 868, *per Gibbs, J.*

(g) 4 Esp. Rep. 256; and see Peake's Evid. 5 Ed. 95. *Id.* Append. p. xxxi. xxxii. S. C. 1 Phil. Evid. 6 Ed. 424, 5.

even in penal actions ;(h) notice to his attorney or agent being deemed sufficient.(h) But, in an action by the plaintiffs A. and B., as assignees of C., against E., a notice to produce a document, entitled "A. and B. assignees of C. and D. against E." is insufficient, although A. and B. are in fact the assignees of C. and D.(i) And a notice served on the wife of the defendant's attorney at his lodgings, to produce a lease, on the evening before the trial, is too short.(k) So, at the assizes, a notice to produce given in the assize town is not, it seems, sufficient ; because it is to be presumed, that the party who comes from a distance may have left his papers at home.(l) But if a party to a cause, who is abroad, employs an attorney to conduct it, he will be presumed to have left in the hands of that attorney, all papers material to the cause ; and therefore if on the 13th of *December*, between the hours of *five* and *six* in the afternoon, notice is given to his attorney to produce a paper material to the cause, and the trial comes on on the 15th of *December*, this notice to produce is sufficient ; and if the paper be not produced, the other party may give secondary evidence of its contents.(m)

*The regular time of calling for the production of papers, is not until the party who requires them has entered upon his case ; [*804] and till that period arrives, the other party may refuse to produce them ; and there can be no cross-examination as to their contents, although the notice to produce them is admitted : (a) And if one party call for papers in the possession of the other, but, when they are produced, decline using them, the mere calling for them will not make them evidence for the adverse party.(b) If, however, the party who has called for papers inspect them, he thereby makes them evidence for the other party, although he has not used them himself in evidence.(c) And if a paper be put into the hands of a witness to refresh his memory, the counsel on the opposite side have a right to see it ; but if it be merely given him to prove a hand-writing to it, they have not.(d) If a defendant call on the plaintiff to produce at the trial a deed in his custody, to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed, when produced : (e) but in other cases, the execution ought to be regularly proved by the party who offers the instrument, as part of his evidence in the cause.(f) When a party, in compliance with the notice, produces the written instrument in his possession, he is entitled to have the whole read : (f) and if a writing produced refer to others, with such particularity as to make it necessary to inspect them, that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having these also read in evidence.(g) If a written paper be given in evidence, the judge may order it to be impounded ; but he cannot order any paper to be impounded, which is not given in evidence : It is not enough, that it be in court, in possession of one of the witnesses.(hh)

(A) 3 Durnf. & East, 306.

(k) 1 Stark. Ni. Pri. 283 ; and see 5 Esp. Rep. 46.

(l) 2 Car. & P. 127, *per Scarlett, arg.*

(a) 2 Stark. Ni. Pri. 22, 3 ; 49.

(c) 5 Esp. Rep. 235 ; and see 1 Phil. Evid. 6 Ed. 422, 3.

(d) 1 Car. & P. 582.

(e) 3 Taunt. 60 ; and see 2 Moore, 513. Gow, 26. 6 Moore, 347. 3 Brod. & Bing. 139, S. C. 6 Barn. & Cres. 28.

(f) 1 Phil. Evid. 6 Ed. 432 ; but see 3 Stark. Ni. Pri. 74.

(g) 4 Esp. Rep. 21. 5 Esp. Rep. 246. 1 Campb. 171. 1 Phil. Evid. 6 Ed. 433.

(hh) 1 Car. & P. 521.

(i) 2 Stark. Ni. Pri. 17.

2 Chit. Rep. 403, 4.

(m) *Id.* 126.

(b) 1 Esp. Rep. 210.

1 Car. & P. 10.

On a notice to produce papers, if they are not produced, this circumstance affords no legal ground for any inference respecting their contents, but merely entitles the opposite party to prove their contents by an examined copy, or parol evidence.⁽ⁱ⁾ And where the plaintiff had lost his part of an agreement under seal, after it had been duly stamped; and, at the trial of an action on the agreement, the defendant, upon notice, produced his part unstamped, and the plaintiff, the draft of the agreement; the court of Common Pleas held, that the defendant's part, unstamped, might be received in evidence.^(k) But before secondary evidence can be admitted, it ought to be clearly shown, that the writing required is in the possession of the [*805] other party,^(l) and that a notice to produce it has been *regularly served;^(a) it not being sufficient that the attorney admits the receipt of it.^(b) And, in order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce all letters, &c. not being deemed sufficient.^(c) But where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office; and the bailiff, on being called as a witness, did not produce it; the court of Common Pleas held, that proof of notice to the sheriff's attorney to produce it, was sufficient to entitle the party to give parol evidence of its contents.^(d) The notice to produce may be proved by a duplicate original,^(e) without notice to produce the other original:^(e) and slight evidence is sufficient in many cases to raise a presumption that the writing is in the possession of a party, when it exclusively belongs to him, and ought regularly to be in his possession, according to the usual course of business.^(f) If a paper be traced to the hands of the agent of a party in a suit, and notice has been given to such party to produce it, he is bound to do so, and the other side are not bound to call the agent: and if he has delivered it to the stamp office, to get certain duties allowed, and does not tell the party serving the notice to produce of that circumstance, parol evidence of the contents may be given.^(g)

When a deed or other writing, necessary to be produced on the trial of a cause, is in the possession or power of a third person, the legal process for compelling him to produce it, is by suing out a writ of *subpoena ad testificandum*; which is also the mode of enforcing the personal attendance of witnesses, when required to give *parol* or unwritten evidence. This is a judicial writ, issued on proper *præcipe*,^(h) commanding them to appear at the trial, to *testify* what they know in the cause, on the part of the plaintiff or defendant, as the case is, under the penalty of one hundred pounds each.⁽ⁱⁱ⁾ Four witnesses only can be put in one writ of *subpoena*;^(kk)

(i) 3 Campb. 363; and see 1 Car. & P. 139, 161, 282.

(k) 3 Bing. 292.

(l) Ry. & Mo. 18; and see 1 Car. & P. 135, 326. 2 Barn. & Cres. 494. 3 Dowl. & Ry. 669, S. C.

(a) 1 Phil. Evid. 6 Ed. 422; and see Ry. & Mo. 47. 1 Car. & P. 188, S. C.

(b) 1 Esp. Rep. 216.

(c) Ry. & Mo. 341; and see 1 M'Clel. & Y. 139.

(d) 3 Bing. 164.

(e) 1 Esp. Rep. 455. 4 Esp. Rep. 203. 1 Phil. Evid. 6 Ed. 427, 8; and see 7 Moore, 112. 3 Brod. & Bing. 288, S. C. *Ante*, 35, 335, 803.

(f) 1 Phil. Evid. 6 Ed. 422.

(g) 1 Car. & P. 582. And see further, as to notice to produce deeds and writings, &c. Peake's Evid. 5 Ed. 93, 4; 103, 4, &c. 1 Phil. Evid. 6 Ed. 421, &c.

(h) Append. Chap. XXXV. § 3, 7.

(ii) *Id.* § 4.

(kk) Cowp. 846.

and therefore it is frequently necessary to have several writs, which are signed and sealed. The name of a witness, though not in the original *subpœna*, may it seems be inserted therein at any time, if he have been regularly served with a copy.(*ll*) And if a cause appointed for one sitting be made a *remanet*, the *subpœna* must be re-sealed, and re-served:(*m*) it having been determined, that where a *notice in [*806] writing is given in such case for the last sitting, instead of a *subpœna*, the court will not grant an attachment thereon, against the witness for non-attendance.(*aa*.)

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the *subpœna*, called a *duces tecum*, commanding the witness to bring them with him.(*bb*) The writ of *subpœna duces tecum* is the regular and established process of the court; and though it was formerly doubted,(*c*) yet it is now settled, that this process is of compulsory obligation on the witness, to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse, the court, and not the witness, is to judge.(*d*) And a person in possession of any paper, who is served with a *subpœna duces tecum*, is bound to produce it, whether the paper belong to him or not;(e) or though there be a regular way prescribed by law for obtaining it.(*f*) The court however, in all such cases, will exercise their discretion, in deciding what papers shall be produced, and under what qualifications, as respects the interest of the witness.(*f*)

The *subpœna* being issued, a copy thereof should be made for each witness, and personally delivered to him,(*g*) a reasonable time before the day of trial; for witnesses ought to have a convenient time, to put their own affairs in such order, as that their attendance upon the court may be of as little prejudice to themselves as possible:(*h*) and notice in *London*, at two in the afternoon, for the witness to attend the sittings at *Westminster* that evening, has been held to be too short.(*i*) Where the witness lives within the weekly bills of mortality, it is usual to leave a shilling with the copy of the *subpœna*; but where he lives at a greater distance, he is not obliged to attend, unless his reasonable expenses are paid or tendered him, not only for going to, but also for returning from the trial; and when less is offered, the witness is not obliged to trust to the court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again.(*k*) And when an *officer of the [*807] court is served with a *subpœna duces tecum*, to produce a judg-

(*ll*) Holt Ni. Pri. 526.

(*m*) *Sydenham v. Rand*, T. 24 Geo. III. K. B.

(*aa*) *Sydenham v. Rand*, T. 24 Geo. III. K. B. *Gillet v. Mawman*, T. 47 Geo. III. C. P.

(*bb*) Append. Chap. XXXV. § 7; and see *Clerk's Manual*, 31. *Thes. Brev.* 304. *Off. Brev.* 385.

(*c*) 1 Esp. Rep. 405. 4 Esp. Rep. 43.

(*d*) 9 East, 473.

(*e*) 6 Esp. Rep. 116; and see 1 Campb. 14. Holt Ni. Pri. 241, *in notis.* Ry. & Mo. 64.

(*f*) Holt Ni. Pri. 239. 3 Stark. Ni. Pri. 140. And see further, as to the *subpœna duces tecum*, Peake's Evid. 5 Ed. 196, 7. 1 Phil. Evid. 6 Ed. 418, 19. See also stat. 5 Geo. IV. c. 106, § 1, for compelling the attendance of witnesses, residing out of the jurisdiction of the courts of Great Sessions in *Wales*.

(*g*) 2 Str. 1054.

(*h*) 1 Str. 510.

(*i*) *Id. ibid.* and see 5 Esp. Rep. 46. 2 Chit. Rep. 403, 4. *Ante*, 803.

(*k*) 2 Str. 1150. 13 East, 16, (*a*), S. C.; more fully stated, 1 Blac. Rep. 36; 1 H. Blac. 49. 2 Chit. Rep. 201. But a witness who is *subpœnaed* by a defendant indicted for a conspiracy,

ment book, if the personal attendance of the officer be necessary, he must be informed so, or the court will not grant an attachment.(a) It was not formerly necessary, upon summoning a witness before commissioners of bankrupt, to be examined touching the bankrupt's effects, to tender him the expenses of his journey beforehand; though if he were in fact without the means of taking the journey, it might have been an excuse for not obeying the summons.(b) The rule was, that the witness must attend, and was entitled to have his reasonable expenses, to be settled by the commissioners.(cc) But, by the statute 6 Geo. IV. c. 16,(dd) "where any person known or suspected to have any estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the commissioners, every such person shall have such costs and charges as the said commissioners in their discretion shall think fit; and every witness summoned to attend before the commissioners, shall have his necessary expenses tendered to him, in like manner as is now by law required, upon service of a *subpœna*, to a witness in an action at law."

A witness attending on a *subpœna* is, we have seen,(e) privileged from arrest.[A] But if he neglect to attend, without having a sufficient excuse, he is liable to be proceeded against three ways; first, by attachment, for a contempt of the process of the court;(f) secondly, by special action on the case for damages, at common law;(g) and thirdly, by action on the statute 5 Eliz. c. 9. § 12, for the penalty of *ten pounds*, and also for the

is compellable to give evidence, though such defendant refuse to pay his expenses; and the indictment having been removed by *certiorari*, and coming down to the assizes as a civil record, does not make any difference in this respect. 1 Car. & P. 322.

(a) 2 Chit. Rep. 403.

(b) 8 East, 319.

(cc) 2 Rose, 75.

(dd) § 35; and see stat. 1 Jac. I. c. 15, § 11. 3 Geo. IV. c. 81, § 2.

(e) *Ante*, 195, 6, &c. Peake's Evid. 5 Ed. 198, 9.

(f) 1 Str. 510. 2 Str. 810, 1054, 1150. Cowp. 386. Doug. 861. *Ante*, 479.

(g) Doug. 561.

[A] "Witnesses as well as parties are protected from arrest, while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo morando et redeundo*. A *subpœna* is not necessary to protection, if the witness have consented to go without one; nor is a writ of protection essential for this purpose; its principal use being to prevent the trouble of an arrest, and an application for discharge, by showing it to the arresting officer; and sometimes, especially where a writ of protection is shown, to subject the officer to punishment for contempt. Preventing, or using means to prevent, a witness from attending court, who has been duly summoned, is also punishable as a contempt of court. On the same principle, it is deemed as a contempt to serve process upon a witness even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending; though any service elsewhere, without personal restraint, it seems, is good. But this freedom from arrest is a personal privilege, which the party may waive, and if he willingly submits himself to the custody of the officer, he cannot afterwards object to the imprisonment, as unlawful. The privilege of exemption from arrest does not extend only through the whole sitting or term of the court, at which the witness is summoned to attend, but it continues during the space of time necessarily and reasonably employed in going to the place of trial, staying there until the trial is ended, and returning home again. In making this allowance of time, the courts are disposed to be liberal; but unreasonable loitering and deviation from the way will not be permitted. But a witness is not privileged from arrest by his bail, on his return from giving evidence; and if he has absconded from his bail, he may be retaken, even during his attendance at court."

"This privilege is granted in all cases, where the attendance of the party or witness is given in any matter pending before a lawful tribunal having jurisdiction of the cause. Thus, it has been extended to a party attending on an arbitration, under a rule of court; or on the execution of a writ of inquiry, to a bankrupt and witnesses, attending before the commissioners on notice, and to a witness attending before a magistrate, to give his deposition under an order of court." 1 Greenl. on Evid. § 316, 317.

further recompence given by that statute, if it has been previously assessed by the court out of which the process issued.(g) An attachment lies against an attorney in the cause, for not attending upon a *subpœna*, to give evidence of collateral facts;(h) and it may be even had against a peer of the realm.(i) Also, by the mutiny act,(k) "all witnesses duly summoned by the judge advocate, or person officiating as such, who shall not attend on courts martial, shall be liable to be attached in the court of King's Bench, &c. upon complaint made to the said court, in like manner as if such witness had refused to attend on a trial, in any criminal proceeding in that court." But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served, a sufficient time before the trial,(l) and that his reasonable expenses were paid or tendered him.(m) The motion for an attachment against a person *subpœnaed* as a witness, for not attending, should, as in other cases of contempt, be brought *forward as soon as possible: and [*808] therefore the court refused an attachment in *Hilary* term, for non-attendance at the preceding summer assizes, and left the party to his civil remedy.(a)

In the Common Pleas, it was not formerly usual for the court to grant an attachment against a witness, for non-attendance upon a *subpœna*: [A] but the party aggrieved was left to his remedy by action.(b) And in a late case, that court refused an attachment against a witness, who being *subpœnaed* without particular notice when the cause would come on, left the court to attend to urgent business; the cause having been tried in his absence, and the plaintiff nonsuited for want of his evidence.(c) So, an attachment was refused, where the witness was induced to leave the court, by the representation of the adverse attorney.(d) So, where the witness

(g) Doug.*561. (h) 2 Str. 810. 2 Ld. Raym. 1528. S. C. Cowp. 845; but see 3 Bur. 1687.

(i) Say. Rep. 50. 1 Wils. 332. S. C., but *vide ante*, 192.

(k) 7 & 8 Geo. IV. c. 4, § 28.

(l) 2 Str. 1054.

(m) *Id.* 1150. 1 Blac. Rep. 36. 8 East, 323. 13 East, 16, (a).

(a) — v. *St. Leger*, H. 37 Geo. III. K. B.

(b) Barnes, 33, 35, 497. Pr. Reg. 435. 1 H. Blac. 49, and see 13 East, 16, (a). *Ante*, 479.

(c) 5 Taunt. 260.

(d) *Id.* 262.

[A] "Where a witness has been duly summoned, and his fees paid or tendered, or the payment or tender waived, if he wilfully neglects to appear, he is guilty of a contempt of the process of court, and may be proceeded against by an attachment. It has sometimes been held necessary that the cause should be called on for trial, the jury sworn, and the witness called to testify; but the better opinion is, that the witness is to be deemed guilty of contempt whenever it is distinctly shown that he is absent from court with intent to disobey the writ of *subpœna*; and that the calling of him in court is of no other use than to obtain clear evidence of his having neglected to appear; but that it is not necessary, if it can be clearly shown by other means that he has disobeyed the order of court. An attachment for contempt proceeds not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court; and it is said, that it must be a perfectly clear case to call for the exercise of this extraordinary jurisdiction. The motion for an attachment should therefore be brought forward as soon as possible, and the party applying, must show, by affidavits or otherwise, that the *subpœna* was seasonably and personally served on the witness, that his fees were paid or tendered, or the tender expressly waived, and that every thing has been done which was necessary to call for his attendance. But if it appears that the testimony of the witness could not have been material, the rule for an attachment will not be granted. If a case of palpable contempt is shown, such as an express and positive refusal to attend, the court will grant an attachment in the first instance; otherwise, the usual course is to grant a rule to show cause. It is hardly necessary to add that if a witness, being present in court, refuses to be sworn or to testify, he is guilty of contempt. In all cases of contempt, the punishment is by fine and imprisonment, at the discretion of the court." Greenl. on Evid. § 319.

resided twenty four miles from the assize town, and his expenses were not tendered to him till the evening before the trial, the court would not grant an attachment.(*ee*) So, an attachment was refused, against a witness, who omitted to attend a trial, after being served on the 3d of July, with a *subpoena* dated the 18th of June, and calling on him to attend on the 2d of July.(*ff*) So, the court will not entertain a motion for an attachment, where more than a term has elapsed since the service of the *subpoena*.(*gg*) And, in general, they will not grant an attachment against a witness for not appearing to give evidence, unless a clear case of contempt be made out against him.(*h*) An attachment, however, was granted against a witness, where, after a *subpoena* served on him, he attended in court, and during the opening of the plaintiff's case, thinking he was not able to prove a particular fact, he left the court, and the plaintiff was non-suited for want of his evidence.(*i*)

It has been ruled at *nisi prius*, that no action lies against a witness for non-attendance, unless the cause has been called on, and jury sworn.(*k*) But the propriety of this doctrine was questioned by the court in a subsequent case; by which it seems, that a party who is *subpoenaed* to attend as a witness, is guilty of a contempt, by neglecting to attend, although the cause be not called on for trial.(*l*) The counsel for the plaintiff has the right, on a cause being called on, to have a witness called on his *subpoena*, without swearing the jury: 1 Moody & M. 115. And though the court of Common Pleas, in one case,(*m*) would not grant an attachment against a witness, where the affidavit did not state that he was duly called on his *subpoena* at the trial, yet from a subsequent case(*n*) it seems, that whenever it is distinctly shown, that the party meant to disobey the order of the court, he is guilty of a contempt; and that the calling of the witnesses upon his *subpoena*, is only for the purpose of obtaining
[*809] clear evidence of his having *neglected to appear; but that it is not necessary, if it can be clearly shown by other means, that the party has disobeyed the order of the court.

When the witness is detained in prison, a *habeas corpus ad testificandum*(*a*)[A] is necessary, to bring him up; for which an application is made to the court or a judge, upon an affidavit(*b*) sworn to by the party applying,(*c*) stating that he is a material witness, and willing to attend;(d) and if he be at a distance, the court will expect it to be specially shown how he is material.(*e*) Upon this application, the court in their discretion will make a rule, or the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed and sealed: And the court of King's Bench, in one instance, issued a writ of *habeas corpus ad testificandum*, to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to show cause on the different persons concerned, no cause being shown.(*f*) But doubts having arisen,

(*ee*) 6 Taunt. 9. 1 Marsh. 410, S. C.

(*gg*) 3 Bing. 223.

(*i*) 3 Moore, 579; and see 3 Barn. & Ald. 598. 4 Barn. & Ald. 202.

(*k*) Peake's Cas. Ni. Pri. 3 Ed. 85.

(*m*) 3 Moore, 222.

(*a*) Append. Chap. XXXV. § 10.

(*d*) Cowp. 672. *Per Cur.* H. 20. Geo. III. K. B.

Peake's Evid. 5 Ed. 198.

(*e*) *Standard v. Rater*, M. 26 Geo. III. K. B.

(*ff*) 1 Bing. 366. 8 Moore, 387, S. C.

(*h*) 6 Taunt. 9. *Ante*, 479.

(*l*) 3 Barn. & Ald. 598.

(*n*) 3 Barn. & Ald. 600, *per East, J.*

(*b*) *Id.* § 8.

(*c*) Fort. 396.

Rea v. Murray, M. 26 Geo. III. K. B.

(*f*) 4 East, 587.

[A] See 1 Greenl. on Evid., § 312.

whether the justices of his majesty's courts of record at *Westminster* had power to award writs of *habeas corpus*, for bringing persons detained in custody, under civil or criminal process, before courts martial, commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting under commission or warrant from his majesty; it was enacted, by the statute 43 Geo. III. c. 140, that "it shall be lawful for any judge of his majesty's court of King's Bench or Common Pleas respectively, or for any baron of his majesty's court of Exchequer, of the degree of the coif, at his discretion, to award a writ or writs of *habeas corpus*, for bringing any prisoner or prisoners detained in any gaol or prison, in that part of the united kingdom of *Great Britain* and *Ireland* called *England*, before any court martial, or before any commissioners of bankrupt, (g) commissioners for auditing the public accounts, or other commissioners acting by virtue or under the authority of any commission or warrant from his majesty, his heirs or successors, for trial, or to be examined touching any matter depending before such courts martial or commissioners respectively; and the like proceedings shall be had upon such writ or writs of *habeas corpus*, so to be awarded as aforesaid, as by law may now be had upon writs of *habeas corpus*, for bringing persons detained in gaol before magistrates or courts of record, for such purposes as aforesaid." The application for a *habeas corpus*, under this statute, ought to be made to a judge out of court. (h)

And, by the statute 44 Geo. III. c. 102, for the more effectual administration of justice in *England* and *Ireland*, by the issuing of writs of *habeas corpus ad testificandum* in certain cases; "it shall be lawful for any *judge of his majesty's courts of King's Bench or Common [*810] Pleas of *England* and *Ireland* respectively, or any baron of his majesty's court of Exchequer, of the degree of the coif, in *England*, or any baron of his majesty's court of Exchequer in *Ireland*, or any justice of oyer and terminer or gaol delivery, being such judge or baron as aforesaid, at his discretion, to award a writ or writs of *habeas corpus*, for bringing any prisoner or prisoners detained in any gaol or prison, before any of the said courts, or any sitting of *nisi prius*, or before any other court of record in the said parts of the said united kingdom, to be there examined as a witness or witnesses, and to testify the truth before such courts, or any grand, petit, or other jury, in any cause or causes, matter or matters, civil or criminal depending or to be inquired into or determined in any of the said courts: And that every justice of great sessions in *Wales*, and in the county palatine of *Chester*, shall have the like authority, within the limits of his jurisdiction." (a) But a *habeas corpus ad testificandum* will not lie, to bring up a prisoner of war: (b) And where the application for it appeared to be a mere contrivance, to remove a prisoner in execution, the court refused to grant it. (c) The writ being sued out, should be left with the sheriff, or other officer in whose custody the wit-

(g) For the mode of bringing bankrupts, when in custody, before commissioners, to be examined, *vide ante*, p. 202.

(h) 2 Maule & Sel. 582.

(a) And see the statutes 45 Geo. III. c. 92, § 3, 4, for compelling the attendance of witnesses, to give evidence in criminal prosecutions, in every part of the united kingdom; and 55 Geo. III. c. 157, for the better examination of witnesses, in the courts of equity in *Ireland*.

(b) Doug. 419, and see 6 Durnf. & East, 497. 7 Durnf. & East, 745.

(c) 3 Bur. 1440.

ness is detained, who will bring him up, on being paid his reasonable charges.(d)

When a material witness is going or resides abroad, so that he cannot attend at the trial, the party requiring his testimony may move the court in term time, or apply to a judge in vacation,(e) on a proper affidavit,(f) for a rule or order to have him examined on interrogatories *de bene esse*.(gg) before one of the judges of the court, if he reside in town, or if in the country or abroad, before commissioners specially appointed, and approved of by the opposite party.(hh)[A] The rule or order for this purpose cannot be obtained without *consent*; the depositions of witnesses upon interrogatories not being the best existing evidence the nature of the case admits of: for though cross interrogatories may be filed, yet the full benefit of a cross examination cannot be supplied by depositions:(i) and therefore, without the consent of the defendant, the court on motion will not give the plaintiff leave to examine an attesting witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he is incapable through illness of attending in person, and

that he is not likely to recover so as to be able to attend, not-
[*811] withstanding it also appears *by the affidavit, that the defendant had at one time admitted the execution of the deed; nor will they, on these grounds, grant a rule for dispensing with the attendance of such witness at the trial.(a) The court, however, will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent;(b) and if the defendant refuse, the court will not give him judgment as in case of a nonsuit. In the Exchequer, the court will grant a commission to examine a witness who is in this country, on an affidavit of his being under a necessity of going abroad before the day of trial although the cause be not at issue, and the answer has not come in.(c) And in that court, on a bill filed by underwriters for a commission to examine witnesses abroad, to prove the circumstances under which a ship had been condemned and sold, as not worth repair; the court held, that an affidavit of the plaintiff's solicitor, stating his information and belief that there were several witnesses abroad whose testimony was necessary for the plaintiff's, to be sufficient, though it did not state any grounds for his belief. 1 Younge & J. 578.

The rule or order being obtained, for the examination of witnesses on interrogatories, a *commission*(dd) issues, when necessary; and *interrogatories*(ee) which ought not to be leading, are prepared, and copied, and signed

(d) 1 Crompt. 3 Ed. 242, 244. *Qu.* whether the officer may not require an *indemnity*, against the prisoner's escape? *Id. ibid.*

(e) Append. Chap. XXXV. § 14.

(f) *Id.* § 11.

(gg) *Id.* § 12, 13, 15.

(hh) 1 Crompt. 3 Ed. 224, Append. Chap. XXXIV. § 16; and see 2 Price, 166, 172; 8 Price, 290, as to the practice of the court of Exchequer, in granting the defendant a commission to examine witnesses abroad.

(i) Barnes, 447.

(a) 4 Taunt. 46; and see 2 Chit. Rep. 199.

(b) Cowp. 174. Doug. 419; and see 1 Bos. & Pul. 210. *Ante*, 770.

(c) 1 Price, 449; and see *id.* 381, as to the costs of witnesses in that court.

(dd) Append. Chap. XXXV. § 17; and for the oath of the witnesses, commissioners, and clerks see *id.* § 18, 19, 20.

(ee) Append. Chap. XXXV. § 21, 2, 24.

[A] See 1 Greenl. on Evid. &c. 320.

by a counsel or serjeant: This done, a copy of the interrogatories is given to the opposite attorney, with notice of the time when the witness is to be examined, in order that he may file cross interrogatories, (f) if he think proper. At the time appointed, the witness is taken, with the interrogatories, to the judge's chambers, or before the commissioners appointed by the rule or order, where he is examined; and his depositions being taken and sworn to, copies are made out, and delivered to the party requiring them. It is no objection to the proceedings under a commission to examine witnesses abroad, that a clerk to the plaintiff's attorney is appointed one of the commissioners, and settled the draft of the depositions of one of the plaintiff's witnesses. (g) And where a commission directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the *English* language, and send the same to *England*, and to swear an interpreter, to interpret the depositions of such witnesses as did not understand the *English* language; and it appeared by the return that the depositions, in the first instance, were reduced into writing in the *foreign* language, and translated by the interpreter into the *English* language, within an interval of *six* weeks; the court held, that the commission was well executed, by the commissioners returning the depositions, so translated into the *English* language. (h)

As the depositions, however, are only taken *de bene esse*, they cannot be made use of, if the witness should happen to be in this country at the time of the trial. (i) And, to entitle a party to read depositions taken upon interrogatories, it is not sufficient to show that the witness is a seafaring *man, and that he lately belonged to a vessel lying in [*812] the river *Thames*, without proving that any efforts had recently been made to find him. (a) But the rule is not to be taken so strictly, as to render it absolutely necessary that a witness who is about to go abroad, should be on his voyage when the trial comes on: If the ship has sailed, though it may have put back, or if the witness be on board and the ship ready to sail, though prevented by contrary winds, that it seems would be sufficient. (b) A copy of the deposition of a witness examined upon interrogatories at the chief justice's chambers, signed by the chief justice, and delivered out by his clerk, must be taken *prima facie* to be a correct copy of what has been sworn by such witness; nor need the original examination be produced, unless some suspicion of forgery be thrown upon the signature of the deponent. (c) And depositions taken under an old commission, may it seems be admitted, without producing the commission, as it may be presumed to be lost; but it is otherwise in the case of a recent transaction, where the depositions have been lately taken: In the latter case, the commission should be produced; but there is no occasion to produce the bill and answer upon which it was founded, provided the authority under which the depositions were taken, be produced: (d) If the master of a vessel, examined on interrogatories, refer to his log book, the parts referred to may be read as part of his depositions. (e) And if one of the questions refer to a letter, the letter must be produced, or the whole of

(f) *Id.* § 23.

(g) 4 Moore, 424.

(h) 4 Barn. & Ald. 377.

(i) 2 Salk. 691. 12 Mod. 493; and see Bul. Ni. Pri. 239. 1 Campb. 172. 1 Chit. Rep. 89, (a).

(a) 1 Campb. 171.

(b) 6 Esp. Rep. 92.

(c) 1 Campb. 101. Willis, on *Interrogatories*, 27.

(d) 6 Esp. Rep. 85.

(e) 1 Campb. 171.

the examination will be rejected; the party cannot abandon the particular question only. (f) When a witness is examined on interrogatories by the plaintiff, and cross interrogatories on the part of the defendant, although it should appear, when his evidence is read at the trial, that he was an interested witness, and ought to have been released, his evidence notwithstanding may be read, without proving him to have been released, previous to such examination: The objection is too late at the trial; and should have been made at the time he was examined: (g) or the court should be moved to suppress the deposition, if it be illegally or irregularly taken, without staying till it be produced at *nisi prius*. (hh) And where rules of court had been obtained for examining witnesses on interrogatories, by both the plaintiff and defendant, with liberty to each to exhibit cross interrogatories; and one of the rules ordered, that the interrogatories, depositions, &c. so taken, should be admitted, read, and given in evidence at the trial of the cause, saving all just exceptions; it seems that the plaintiff is entitled to make use of answers to interrogatories which had been exhibited on behalf of the defendant, although the plaintiff had not examined such witnesses on cross interrogatories: And the court [*813] held, that if the plaintiff read the answers *to interrogatories put by the defendant, he cannot object to the admissibility of some of the answers, because they referred to written documents which were not produced. (a)

The party succeeding is not entitled to the costs of examining his witnesses on interrogatories, or taking office copies of depositions; but the party whose witnesses are examined pays his own expense, unless it be otherwise expressed in the rule. (b) And this holds as well with regard to witnesses examined abroad, as in this country: (c) The reason is, that by the practice of the court of Chancery, a party applying for a commission to examine witnesses on his behalf, must pay the expenses; and unless the courts of law adopted the same rule, with respect to the party applying for leave to examine witnesses abroad on depositions, which cannot be done without the other party's consent, such consent would never be given, but the applicant would be driven to the expense of applying for a commission. (d) But, in the Common Pleas, where the rule of court for examining witnesses by commission, expressed that the depositions of witnesses at *Hamburgh* and *Lubeck* were to be taken, and the commission was directed to persons at *Hamburgh*, and the costs were ordered to abide the event of the trial, the expenses of bringing witnesses from *Lubeck* to *Hamburgh* were allowed on taxation. (e) The defendant having put off the trial, on the terms that a witnesses, who was going abroad, should be examined on interrogatories, the court of King's Bench held, that the

(f) 5 Esp. Rep. 246.

(g) Holt Ni. Pri. 485. And see further, as to interrogatories at law, and the depositions thereon, Willis on *Interrogatories*, 24, &c.

(hh) *Per Cur.* M. 20 Geo. III. K. B.

(a) Ry. & Mo. 203. 1 Car. & P. 606, S. C.

(b) 2 East, 259. In E. 24 Geo. III. K. B. Master *Forster*, on being asked by the court, said that costs of examining witnesses on interrogatories, were always borne by the party obtaining the rule for that purpose; and did not abide the event of the cause, unless it was so ordered by the court. This case was cited by the court, as showing the rule, in 2 East, 259; and see *Hullock on Costs*, 2 Ed. 439.

(c) 8 East, 393.

(e) 3 Bos. & Pul. 556.

(d) *Id.* 393, 4.

plaintiff having detained the witness until the trial, after he had been examined on interrogatories, and cross examined by the defendant, was entitled to the costs of the detention; but that the defendant was entitled to deduct his costs of the interrogatories for cross examining the witness.(f)

By the statute 13 Geo. III. c. 63, § 44, it is enacted, that "when and as often as the *East India* company, or any person or persons shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen in *India*, against any other person or persons, in any of his majesty's courts at *Westminster*, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action."(g) These writs have been *accordingly issued in [*814] several cases in the King's Bench;(a) and in one of them,(b) the motion being made on the last day of term, the court awarded such a writ, even before issue joined. And the court of Common Pleas, in a late case, granted a *mandamus* to the court in *India*, to examine witnesses on behalf of the defendant in a *civil* action.(c)

When a witness is sent for from abroad *bonâ fide*, for the purpose of the cause, and not for any other purpose, or for any other action, it is in the discretion of the master in the King's Bench, or prothonotaries in the Common Pleas, to allow the costs of bringing him over, and of sending him back, as well as the expense of maintaining him here; whether he were sent for and arrived before,(d) or after the commencement of the action:(e) And where a foreigner, being in this country before the commencement of an action, has been detained to give evidence upon a trial, the courts will allow the costs of detaining him, computed from the day of the writ sued out, to the day of trial.(f)[1] So, where the captain of a merchant's ship, domiciled in this country, was detained by the plaintiff for a considerable time, to give evidence in a cause, before it was at issue, the court of King's Bench held, that the master was at liberty, in taxing the costs, to allow the expense of maintaining the witness during such

(f) 1 Chit. Rep. 89.

(g) For the form of a rule for the examination of witnesses in *India*, on this statute, see Append. Chap. XXXV. § 26, for the affidavit in support thereof, *id.* § 25; and for the *mandamus* thereon, *id.* § 27. And see the statutes 24 Geo. III. c. 25, for establishing a court of judicature, for the more speedy and effectual trial of persons accused of offences committed in the *East Indies*; § 78, 81, and 42 Geo. III. c. 85, by which offences committed by persons employed in any public service abroad, may be prosecuted in the court of King's Bench in *England*; § 1; and that court is authorized on motion to award a writ of *mandamus* to any court of judicature, or the Governor, &c., of the country where the offence was committed, to obtain proof of the matters charged; § 2, and may order an examination on interrogatories *de bene esse*, where *vivâ voce* evidence cannot conveniently be had, § 3; and see 8 East, 31.

(a) *Mullick v. Lushington*, M. 26 Geo. III. K. B. *East India Company v. Lord Malden*, E. 33 Geo. III. K. B. *Taylor v. East India Company*, M. 33 Geo. III. K. B.

(b) *Spalding v. Mure*, T. 35 Geo. III. K. B.

(c) 1 Brod. & Bing. 519. 4 Moore, 313, S. C.

(d) 4 Taunt. 55. 3 Taunt. 379, *contra*.

(e) 1 Marsh. 563. 4 Taunt. 695, *contra*.

(f) 4 Taunt. 697.

[1] So, a witness returning from a journey to the continent, which he had undertaken before the subpoena, sooner than he otherwise would have done, is entitled to the expenses of that journey, though the trial is at the place of his abode. 1 Moody & M. 96.

detention.(g) But it is not usual, in that court, to allow merchants coming from abroad as witnesses, a compensation for their loss of time.(h) And where A. furnished goods abroad for B. the owner of a ship, at the request of C. the captain, who drew the bills on B. payable to A. which B. refused to accept, whereupon A. sent for a witness from abroad, for the support of an action against B., pending which C. arrived in this country, and A. then discontinued his action against B. and commenced another against C., in which he recovered by means of the witness he had brought from abroad, the court of Common Pleas held, that C. was only liable for the costs of the witness while detained in this country, and not for those of bringing him over, or of sending him back.(i)

[*815] *In the King's Bench, the expenses of a person sent to inquire after the subscribing witnesses to a bond, are not allowed on the taxation of costs:(aa) nor will the court allow the expenses of witnesses, if brought too early to attend a trial at the assizes.(bb) But the court will not direct the master to review his taxation, because he has allowed for witnesses who were not called.(cc) And where there is reasonable ground for supposing that the evidence of a witness will be admissible, the master may allow his expenses, on taxation of costs, against the other party.(d) In the Common Pleas, no costs are allowed for a witness, who has not been paid before the claim is made:(e) And it seems, that where many useless witnesses are called by the successful party, the judge will cause the prothonotary to be apprised of it, to guide him in his taxation of costs.(f) But where the plaintiff had *subpoenaed* witnesses, and paid their expenses, after they had been previously *subpoenaed* by, and received their expenses from the defendant, without the knowledge of the plaintiff, the court allowed the latter the expenses he had paid those witnesses for their attendance, although they were not called for him at the trial.(g) And the plaintiff is entitled to a sum paid for the postage of foreign letters, sworn to be solely applicable to the cause.(h) Compensation for loss of time, in attending as witnesses, is only allowed to medical men, and attorneys:(i) Merchants coming from abroad as witnesses, are not entitled to such compensation;(k) nor scientific persons, unless they are medical men, such as physicians or surgeons:(l) and the expense of experiments necessarily made for the purpose of affording evidence, on a point in dispute, new to scientific men, is not allowed on the taxation of costs.(m) But, in the Common Pleas, the expenses have been allowed, of plans taken and used for the information of the court;(n) and of successful searches made in parish registers, and public offices, for the purpose of proving and establishing a pedigree.(o)

(g) 1 Barn. & Cres. 276. 2 Dowl. & Ry. 424, S. C.

(h) 5 Maule & Sel. 156; and see 4 Moore, 300. 1 Brod. & Bing. 515, S. C. 6 Moore, 235. 3 Brod. & Bing. 72, S. C. 7 Moore, 120. 3 Brod. & Bing. 292, S. C.

(i) 6 Taunt. 88. 1 Marsh. 463, S. C. And see further, as to the expenses of witnesses from abroad, 1 Phil. Evid. 6 Ed. 6. (aa) 3 Maule & Sel. 89.

(bb) 2 Chit. Rep. 200. (cc) *Id. ibid.*, and see 11 Price, 510; but see McClell. 705.

(g) 1 Barn. & Cres. 276. 2 Dowl. & Ry. 424, S. C.

(e) 7 Moore, 120. 3 Brod. & Bing. 292, S. C.

(d) 1 Barn. & Cres. 267.

(f) 1 Car. & P. 105.

(g) 7 Taunt. 337. 1 Moore, 76, S. C.

(h) 7 Moore, 120. 3 Brod. & Bing. 292, S. C.

(i) 5 Maule & Sel. 156, 159, (a). 4 Moore, 300. 1 Brod. & Bing. 515, S. C. 6 Moore, 242. 3 Brod. & Bing. 75, S. C. 7 Moore, 120. 3 Brod. & Bing. 292, S. C.

(k) 5 Maule & Sel. 156. *Ante*, 814.

(l) 6 Moore, 242. 3 Brod. & Bing. 75, S. C.

(m) 6 Moore, 235. 3 Brod. & Bing. 72, S. C.

(n) 2 Bing. 75. 9 Moore, 158, S. C.

(o) 9 Moore, 642. 2 Bing. 341, S. C.

* CHAPTER XXXVI.

Of ENTERING the CAUSE for TRIAL; and REFERENCES to ARBITRATION.

THE parties being prepared, and ready to proceed, the cause is *entered* for trial, with the clerk of the papers in the King's Bench, or secondaries in the Common Pleas, on a trial at bar; or, with the marshal, at *nisi prius*.

In the King's Bench, the old rule for entering causes in *London* and *Middlesex* was, that unless they were entered with the chief-justice, *two* days before the sittings at which they were to be tried, the marshal might enter a *ne recipiatur*, at the request of the defendant or his attorney: (a) And this rule still holds, with regard to trials at the sittings in term. But if a cause was to be tried at the sittings after term, a *ne recipiatur* could not be entered, until after proclamation made, by order of the chief-justice, for bringing in the record; and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur*. (b) And where a defendant had entered a cause in the marshal's book, with a *ne recipiatur*, and the plaintiff brought the cause to trial on such entry, as an undefended cause, and obtained a verdict, the court set aside the verdict for irregularity. (c) There was formerly a rule in this court, as well as in the Common Pleas, that no cause should be set down for trial, until the record was brought in; but that rule has been departed from in both courts, for the convenience of suitors: Parties often set down their causes before the records are brought in; and it frequently happens, that the causes are compromised, before they proceed to the length of carrying in the record. (d) At present, by a rule of the King's Bench, "all causes to be tried at the sittings after term, must be entered, and the records delivered to the marshal, at the times following: viz. the causes in *Middlesex*, the first day of the sitting after term in *Middlesex*; and the causes for *London*, *two* days before the adjournment day in *London*:" (e) and they should be so entered by *nine* o'clock in the evening. But where the court had set aside a judgment in *ejectment* against a casual ejector, on the tenant's undertaking to enter into the consent rule, plead, and take short notice of trial for the adjourned sittings, the adjournment day being *Monday* the *eleventh* of *April*, and the defendant having pleaded on *Saturday* the *ninth*; the lord chief justice, on application being made on the *eleventh*, *allowed the cause to be entered. (aa) Special jury causes are [*817] appointed for particular days: And, in term time, the rule for a special jury must be served a reasonable time before the day of trial. (bb) At the sittings after term, it is a rule, that "no cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively." (cc)

(a) R. H. 15 & 16 Car. II. reg. 2, K. B.

(b) R. M. 4 Ann. (a), K. B.

(c) 8 Dowl. & Ry. 456.

(d) 1 Dowl. & Ry. 181, per Abbott, Ch. J.

(e) R. H. 34 Geo. III. K. B.; and see Notice, M. 77 Geo. II. K. B.

(aa) 1 Car. & P. 620.

(bb) 2 Barn. & Ald. 400. 1 Chit. Rep. 234, S. C. Ante, 793.

(cc) R. T. 30 Geo. III. R. H. 44 Geo. III. K. B. 10 East, 1. 2 Campb. Introd. xii.

In the Common Pleas, it appears to have been formerly a rule, that records of *nisi prius* in *London* and *Middlesex*, should be entered in the marshal's book, *two* days at least exclusive before the day of trial, according to the ancient course; or in default thereof, a *ne recipiatur* might be entered: (dd) and accordingly it was holden, that in *London* and *Middlesex*, *ne recipiatur* might be entered, after *eight* o'clock in the evening, the day next but one before the day of sitting. (ee) Afterwards the practice was, that no record or writ of *nisi prius* would be received at any sitting after term in *Middlesex*, unless the same was delivered to and entered with the marshal, within *two* days after the last day of every term; nor at any sitting after term in *London*, unless the same was delivered to, and entered with the marshal, the day before the day to which the sitting in *London* should be adjourned. (f) But now the rule is, that all records of *nisi prius* for the sittings after term, in *London* and *Middlesex*, shall be passed with the clerk of the treasury, and the causes entered with the marshal, *two* days at least before the adjournment day; and in default thereof, the defendant may, after *eight* o'clock in the evening of the second day preceding the adjournment day, enter a *ne recipiatur*: (g) which in effect restores the old practice. And it is also a rule, that no cause can be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury shall be served, and the cause marked in the marshal's book as a special jury cause, *two* days previous to the adjournment day, in *Middlesex* or *London* respectively. (h) In the Exchequer it is a rule, (i) that "all causes to be entered for trial in *London* and *Middlesex*, shall be entered as follows, that is to say, if notice of trial shall be given at any sitting within term, *two* days before the day of sitting; and if at a sitting after term, before *eight* o'clock in the evening of the day before the *first* day of such sitting, or before *eight* o'clock in the evening of the day before the day on which such sitting shall be adjourned; and that if the same shall not be so entered for such sittings respectively, a *ne recipiatur* may be entered."

[*818] *At the *assizes*, it is a rule, that the writ and record shall be entered together: (a) And, by an order of all the judges, "no writ and record of *nisi prius* shall be received, in any county in *England*, unless they shall be delivered to, and entered with the marshal, before the first sitting of the court after the commission day, except in the county of *York*; and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court on the second day after the commission day, otherwise they shall not be received." (b) The court will not allow a cause to be entered for trial, with the marshal, after

(dd) R. E. 1 Jac. II. reg. 2, C. P.; and see N. H. 8 Geo. I. C. P.; but see R. M. 1654, § 21. C. P., by which it appears that the ancient course, in *London* and *Middlesex*, was to enter causes in the marshal's book, *four* days before the trial.

(ee) Cas. Pr. C. P. 37, N. H. 8 Geo. I. n. C. P.

(f) N. E. 2 Geo. III. C. P. Barnes, 494.

(g) R. H. 23 Geo. III. C. P.

(h) R. T. 52 Geo. III. C. P. 4 Taunt. 600. 2 Chit. Rep. 378.

(i) R. T. 29 Geo. III. in *Seac. Man. Ex. Append.* 222. 8 Price, 502.

(a) R. T. 10 & 11 Geo. II. K. B. & C. P.

(b) R. H. 14 Geo. II. 3 Campb. 365. In this order, there is an exception of the county of *Norfolk*, and well as that of *York*; but, by a subsequent order of the judges, in H. 32 Geo. III. the time allowed for delivering and entering writs and records of *nisi prius*, at the *assizes* for the county of *Norfolk*, or city of *Norwich*, is the same as in other counties. *Man. Ex. Append.* 232, 3. And for the fees payable to the marshal, for putting in the record of *nisi prius* at the *assizes*, see R. E. 13 Jac. I. K. B.

the regular time, though there be no *ne recipiatur* entered by the defendant.(c) And both in *London* and *Middlesex*, as well as at the *assizes*, every cause shall be tried in the order in which it is entered, beginning with *remanets*, unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary; who thereupon may make such order for the trial of the cause, so to be put off, as to him shall seem just.(d) The court in bank, however, will not give directions as to the order in which a special jury cause shall be tried at *nisi prius*, though the special jury appears to have been obtained for delay:(e) But where a cause was set down for the first sittings in term, and the defendant obtained a rule for a special jury, the chief justice directed that the cause should be tried at the second sittings, on a suggestion that the rule was obtained with that view.(f) And if a special jury has been applied for by the defendant, and he has not caused the special jurors to be summoned, the chief justice will take it at the end of the day on which it would have been tried by the special jury; and not let it remain, till all the special jury causes in the list are gone through.(gg)

The fact of a cause being set down in the written list of causes at *nisi prius*, is notice to the attorney, that it may be tried at any time in the course of the day; and therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial only on payment of costs.(h) And where a cause, which stood in the printed paper below the last cause mentioned in the written list, was taken out of its turn, and tried as an undefended cause, the counsel for the defendant objecting thereto, and declining to appear; the court held, that the trial was regular, and refused a new trial, though on payment of costs *without an affidavit of merits.(a) On indictments for [*819] misdemeanors, at the instance of private prosecutors, when both the defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's being entered first, and the prosecutor's lower in the list, the trial must take place in the order of entry.(b) And a jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict.(cc) If a witness be suddenly taken ill, the judge at *nisi prius*, we have seen,(dd) will order the trial to stand over till a future day in the same sittings, when he is likely to attend, though he will not put off the trial on that ground to a future sittings: Nor will he try a cause out of its order, for the purpose of preventing an injunction in equity, against proceeding to trial.(ee) And in the Common Pleas it is a rule, that the court will never put off the trial of a cause, upon

(c) Dowl. & Ry. Ni. Pri. 6.

(d) R. H. 14 Geo. II. and *Notice*, M. 17 Geo. II. K. B.

(e) 1 Chit. Rep. 489, (a); and see 7 Taunt. 390. *Ante*, 794, 5.

(f) 1 Chit. Rep. 489; and see *id.* 534.

(g) 3 Barn. & Ald. 328.

(h) 5 Barn. & Ald. 907. 1 Dowl. & Ry. 553, S. C.; and see 2 Chit. Rep. 269.

(i) Ry. & Mo. 20.

(j) *Id.* 27, 147. 5 Dowl. & Ry. 413, S. C. Ry. & Mo. 210. 1 Car. & P. 608, S. C. Ry. & Mo. 298, S. P.; and see *id.* 213. 1 Car. & P. 613, S. C., where the judge discharged the jury from giving any verdict, in an action for a wager deposited with a stakeholder, on the event of a dog fight, to be paid over to the winner, and which was not demanded of the stakeholder until after the event was determined: but see 7 Dowl. & Ry. 130.

(k) *Ante*, 771.

(l) 1 Campb. 559; and see 1 Stark. Ni. Pri. 31, 63.

(gg) 1 Car. & P. 64.

the consent of the parties or counsel at *nisi prius*; but the plaintiff must either proceed to try, or withdraw his record.(f)

The cause being entered, stands ready for trial at the bar of the court, or before the judge at *nisi prius*: And in this stage of the proceedings, or more commonly at the trial, when one or other of the parties is fearful of the event, the matter in dispute is sometimes referred to *arbitration*. This mode of terminating differences will be the subject of the remainder of the present chapter. But it should be observed, that the doctrine of arbitration is not necessarily connected with a suit at law, as it frequently exists where no suit is depending; being a mode of settling disputes, by agreement of the parties to refer them to the decision of one or more indifferent persons as arbitrators.

Arbitrations are of two kinds; first, when there is a cause depending in court; and secondly, when no cause is depending. The submission, in the former case, is either by *rule* of court,(g) or judge's *order*,(hh) before the trial, or by order of *nisi prius* at the trial,(i) which may be afterwards made a rule of court; and upon a submission of this kind, the plaintiff usually takes a verdict for his security, particularly when there is special bail, who would not otherwise be liable for the sum awarded. In the other case, the submission is by *agreement* of the parties, which is either in writing, or by parol; or by the positive directions of an act of [*820] parliament, *as in the case of inclosure acts. After an order of *nisi prius* had been made to refer a cause to arbitration, with the consent of the defendant's counsel and attorney, the court of Common Pleas would not set it aside, on an affidavit by the defendant, expressly denying his attorney's authority to refer; though the application was made before any step taken by the arbitrator, except the appointment of a meeting.(a) So, after the parties at *nisi prius* had entered into a rule of court, arranging the terms of alternate enjoyment of a watercourse, in which terms the defendant was disappointed of the expected benefit, the court of Common Pleas refused to open the rule, and let the defendant proceed to trial, upon putting the plaintiff in *statu quo*, or on any terms whatever:(b) But they amended an order of reference at *nisi prius*, made a rule of court, by inserting such omitted matters as were incident to the substance of the agreement between the parties.(c) And where an order of *nisi prius* had been obtained, upon the usual terms of filing no bill in equity, &c. the court permitted it to be amended, by striking out these words; it appearing that a bill in equity was necessary to attain the justice of the case.(d)

References made by rule of court having been found to contribute much to the ease of the subject, in the determining of controversies, the parties being obliged thereby to submit to the award, under the penalty of imprisonment, it was enacted by the statute 9 & 10 W. III. c. 15, § 1, that it shall and may be lawful for all merchants and traders, and others desiring to

(f) 2 Taunt. 221. *Ante*, 772.

(hh) *Id.* § 2, 3.

(a) 3 Taunt. 486; and see 1 Salk. 86, *accord.* 1 Chit. Rep. 193, (a); but see 6 Barn. & Cres. 255. *Ante*, 93, 529.

(b) 5 Taunt. 628.

(d) 4 Taunt. 254; but see 2 Chit. Rep. 29. 5 Moore, 167.

(g) Append. Chap. XXXVI. § 1.

(i) *Id.* § 4.

(c) *Id.* 662.

and any controversy, suit or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their *submission* of their suit to the award or umpirage of any person or persons, should be made a *rule* of any of his majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the *bond(e)* or promise, whereby they oblige themselves respectively, to submit to the award or umpirage of any person or persons; which agreement being so made, and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an *affidavit* thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said *affidavit* in court, be entered of record in such court; and a *rule* shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly; which process shall *not [*821] be stopped or delayed in its execution, by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption, or other undue means." The intent of this act was to put submissions, where no cause was depending in court, upon the same footing with those where there was a cause depending; and it is only declaratory of what the law was before, in the latter case.(a) But where the plaintiff's attorney, having received a sum of money from the defendant for the plaintiff, in the progress of the cause, entered into an agreement to secure it to the latter, in which was contained a *proviso*, that the agreement should be made a rule of court; the court of Common Pleas held, that they had no authority to direct it to be done, the statute 9 & 10 W. III. c. 15, being confined to cases of submissions to arbitration, and the plaintiff's attorney being no party to the original suit; and that the plaintiff's only remedy was by action for breach of the agreement.(b)

This statute, being confined to courts of *record*, does not it seems extend to the court of Chancery:(c) And it is also confined to the submission of disputes of a *civil* nature: Therefore, the court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment.(d) And they will not entertain an application for setting aside an award, founded upon an indictment at the assizes, for not repairing a road, though the question in dispute be of a *civil* nature.(e) A *parol* submission is not within the statute;(f) nor a submission in writing, unless it is agreed to be made a rule of court: But where there is such an agreement, it seems that the court will enforce the

(e) Append. Chap. XXXVI. § 5.

(a) 2 Bur. 701.

(c) But see 2 Madd. Chan. 713.

(d) 8 Durnf. & East, 520; but see 11 East, 46. 7 Taunt. 422. 1 Moore, 120, S. C.

(e) 2 Dowl. & Ry. 265.

(f) 7 Durnf. & East, 1. 6 Moore, 488.

(b) 7 Moore, 486. 1 Bing. 133, S. C.

execution of a *parol* award by attachment.(g) A consent, in the arbitration bond to make the *award* a rule of court, instead of the *submission*, will it seems warrant the interposition of the court, under this act:(h) And where a submission was by bond, and at the end of the condition there was this clause, *and if the obligor shall consent that this submission be made a rule of court, that then, &c.* the court on motion held these conditional words to be a sufficient indication of consent, and made the submission a rule of court.(i) So, where the agreement to make the submission a rule of court was no part of the condition, but was thereunder written, and not signed; it appearing by affidavit that the subscription was made before the execution of the bond, it was taken by the court to be part of the condition, as an indorsement by way of defeasance is part of the deed; and the submission was made a rule of court.(k) An agreement stamp is not [*822] necessary to an arbitration bond, though it* contain, besides the usual clauses, an agreement respecting the manner in which the costs should be paid.(aa)

A submission to arbitration, by rule of court, of all matters in difference *between the parties in the cause*, is not confined to the subject-matter in the particular action then depending; but will extend to cross demands between the parties, though not pleaded by way off set-off; and the costs being to abide the event, will make no difference:(bb) But a reference of all matters in difference *in the cause between the parties*, is confined solely to the matters in dispute in that particular action. One of several *partners* cannot bind the others, by a submission to arbitration, even of matters arising out of the business of the firm.(c) And a submission to an award having been made a rule of court, between A. and B. the parties on the record, which award not having been made in time, the dispute was referred to a second arbitrator by B. and C. who were the real parties in the suit, the court would not grant an attachment against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule, to make the second submission a rule of court: And as the court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection.(d)

It was formerly holden, that a reference to arbitration was an implied stay of proceedings.(e) But, in the beginning of Queen Anne's time, a rule was made, that no reference whatsoever, of any cause depending in the King's Bench, should stay the proceedings; unless it was expressed in the rule of reference, to be agreed, that all proceedings in this court should be stayed:(f) And it has been frequently decided, that an agreement to refer all matters in difference to arbitration, is not sufficient to oust the courts of law or equity of their jurisdiction.(gg) When a reference is pending, and it has been agreed that it shall operate as a stay of proceedings, it may be made the subject of an application to the court for staying the proceedings, until an award be made.(hh) But where it appeared doubtful,

(g) Barnes, 54.

(h) *Powell v. Phillips*, E. 30 Geo. III. K. B. 3 East. 603. 2 Bos. & Pul. 444; but see 3 Str. 1178, *contra*.

(i) 1 Salk. 72. 1 Ld. Raym. 674, S. C.

(aa) 2 Chit. Rep. 40.

(c) 10 Moore, 389. 3 Bing. 101, S. C.

(e) 1 Mod. 24.

(gg) 8 Durnf. & East, 139.

(k) Barnes, 55.

(bb) 2 Durnf. & East, 645. 2 Saund. 64, (7).

(d) 2 Durnf. & East, 643.

(f) 2 Ld. Raym. 789.

(hh) *Ante*, 529.

whether arbitrators had made their award previous or subsequent to their receiving notice of a deed of revocation, the court of Common Pleas would not stay the proceedings: but left the party to plead such matter *purs darrein continuance*.(i)

There are several ways, however, in which the power of arbitrators may be legally determined; as first, by the *death* of the parties to the submission,(k) or any of them;(l) or, if either of them be a feme-sole, by her **marriage* before the award is made.(a) And the authority of an arbitrator is determined by the death of either party, before the award is made; even where the submission is by order of *nisi prius*, and a verdict is taken for the plaintiff, subject to the award.(b) But where, by an order of reference, the award was to be delivered to the parties, or if they or either of them were dead before the making of the award, to their respective personal representatives, on or before a given day, with liberty for the arbitrator to enlarge the time for making his award; and the plaintiff died before the award was made, and after his death the arbitrator enlarged the time for making the award; the court of King's Bench held, that the award made within the enlarged time was good.(cc) So, in the Common Pleas, it was holden that the authority of an arbitrator under a rule of court, which empowered him to deliver his award to the parties or their *executors*, did not determine by the death of one of the parties, before the award was executed:(d) If either party die after the award is made, judgment may it seems be entered within two terms after the verdict, by the statute 17 Car. II. c. 8. § 1:(e) but if the defendant do not enter it within that time, the court have no authority to permit it to be entered up afterwards, *nunc pro tunc*.(e) Secondly, the power of arbitrators may be determined by their death,(f) or by their not making an award within the time limited; thirdly, by their *disagreement*, and refusal to act or intermeddle any further, or by their appointing an umpire to act for them:(g) And fourthly, by the *revocation* of the parties; respecting which it is laid down, that although a man be bound in a bond to stand to the arbitration of another, yet he may countermand or revoke the power of the arbitrator; for a man cannot, by his own act, make an authority, power or warrant not countermandable, which by the law and of its own nature may be countermanded:(h) And where parties by bond agree to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the

(i) 2 Moore, 30. 8 Taunt. 146, S. C.

(k) 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287, S. C. 2 Barn. & Ald. 394. 1 Chit. Rep. 187, S. C. 3 Dowl. & Ryl. 184. 2 Barn. & Cres. 345. 3 Dowl. & Ryl. 608, S. C.; and see Caldwell, on *Arbitration*, 29, 30.

(l) *Edmunds v. Cox*, E. 24 Geo. III. K. B. 2 Chit. Rep. 432.

(a) W. Jon. 388. 2 Keb. 865, 877. 3 Keb. 9. 1 Rol. Abr. 331, tit. *Authoritie*, E. pl. 4 Com. Dig. tit. *Arbitrament*, D. 5. 5 East, 266.

(b) 2 Barn. & Ald. 394. 2 Barn. & Cres. 345. 3 Dowl. & Ryl. 608, S. C.; but see Barnes, 210. *Bower v. Taylor*, E. 56 Geo. III. K. B. cited in Cald. 30. 7 Taunt. 574, 5, *in notis*. 3 Dowl. & Ryl. 610, (a), S. C. *contra*; which latter case seems to be now overruled.

(cc) 3 Barn. & Cres. 144. 4 Dowl. & Ryl. 740, S. C.

(d) 4 Bing. 143; and see 10 Moore, 272. 3 Bing. 20, S. C. 6 Barn. & Cres. 255, S. C., *in Error*. 1 Moore & P. 147. 4 Bing. 435, S. C.

(e) 4 Taunt. 702; and see 1 Younge & J. 368.

(f) 4 Moore, 3.

(g) 1 Rol. Abr. 261, 2. 1 Sid. 428. 2 Wms. Saund. 5 Ed. 129. 1 Lev. 174, 285, 302. 3 Lev. 263. 2 Vent. 113. 1 Salk. 70, 71, 2.

(h) 8 Co. 82; and see 7 East, 608. 11 East, 367. 3 Maule & Sel. 145. 5 Taunt. 452. 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1 Dowl. & Ryl. 106, S. C.

statute 9 & 10 W. III. c. 15, to revoke by deed his submission, and notify the same to the arbitrators, before the authority is executed; and he cannot be attached for a contempt of court, in not obeying the award, if made *after* such revocation and notice, though the submission be after-
 [*824] wards made a rule of court: (a) But it seems that it would be a contempt to revoke the submission, after it has been made a rule of court. (b) It also seems, that by countermanding or revoking the power of the arbitrator, the bond is forfeited, and the obligee shall take the benefit thereof: (c) And if the plaintiff has covenanted to perform an award, and an award be made, he cannot, by revoking his authority, relieve himself from an action of *covenant*: (dd) nor will the court in such case set aside the award, because it would deprive the other party of his action. (ee) Hence it appears, that when the parties execute a deed, or enter into an agreement of reference, they may revoke the authority of the arbitrator, before the submission is made a rule of court: though the party may be liable to an action of *covenant*, for not performing the award. And accordingly, where a cause was referred to arbitration under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked the submission, and the arbitrator notwithstanding made an award, the court set it aside, although the judge's order had been made a rule of court, before any application to set aside the award. (ff) But an order of *nisi prius*, referring a cause to arbitration, not being revocable, may be made a rule of court, after notice of revocation of the arbitrator's authority. (g) The court will not set aside an award, on the ground that the party, for whose benefit the money was to be paid, had become *bankrupt*, before the making of the award, where he had previously assigned all his interest in the sum to be awarded, to a third person. (h) And where a case was referred by order of *nisi prius*, and after the reference, but before the making of the award, the plaintiff became *bankrupt*; the court of King's Bench held, that this was no revocation of the submission, and that the arbitrator might notwithstanding award a verdict for the defendant. (i)

A matter was referred by consent at *nisi prius*, to the three foremen of the jury, and before the award was made, one of the parties served the arbitrators with a *subpoena* out of Chancery, which hindered their proceeding to make the award; the court held this to be a breach of the rule, and granted an attachment *nisi*. (k) So, where the parties upon a reference consented to abide by the award, and not to bring any bill in equity, and their submission was made a rule of court, and after an award made, one of them filed a bill in Chancery against the other, the court made a rule

(a) 7 East, 608. 5 Taunt. 452.

(b) 1 Str. 593; and see 7 East, 608. 5 Taunt. 452. 2 Moore, 30.

(c) 8 Co. 82. T. Jon. 134; and see 5 Taunt. 453. 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1 Dowl. & Ry. 106, S. C. 4 Barn. & Cres. 103. 6 Dowl. & Ry. 213, S. C. 1 Car. & P. 651, 654. 1 M'Clel. & Y. 464, S. C.

(dd) 5 East, 266; and see 5 Taunt. 453. 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1 Dowl. & Ry. 106, S. C.

(ee) 5 Taunt. 453.

(ff) 1 Bing. 87. 7 Moore, 403, S. C. 1 M'Clel. & Y. 276.

(g) 1 Chit. Rep. 200. 2 Barn. & Ald. 395, S. C.; and see 1 M'Clel. & Y. 276.

(h) 2 Chit. Rep. 43.

(i) 4 Barn. & Ald. 250.

(k) 1 Salk. 73.

absolute for an attachment.(I) But where an order of reference was made *at *nisi prius* with the usual clause empowering the [*825] court to award costs "for affected delay or otherwise wilfully preventing the arbitrator from making his award," and one of the parties, after the arbitration has been entered into, revoked the arbitrator's authority, in consequence of being unable to procure the attendance of necessary witnesses, the court held that he was not liable to pay the costs of the reference.(a)

When a cause is referred at the trial, it is usual to get the witnesses sworn, before they leave the court; otherwise (if required,) they must be sworn before a judge:(b) And the order of *nisi prius* being obtained from the clerk of *nisi prius* or associate in *London* or *Middlesex*, or from the associate at the assizes, the arbitrator will make an appointment(c) in writing, of a time and place for the parties and their witnesses to attend him; which appointment should be subscribed to a copy of the order of *nisi prius*, and served therewith on the defendant's attorney: And, previous to the meeting, the arbitrators should be furnished with a state of the case, and the names of the witnesses, &c. A similar mode of proceeding is to be observed, when the reference is by agreement without suit.

The arbitration then proceeds: And it has been holden that arbitrators, having power to choose an umpire, may elect one either *before* or *after* the expiration of the time limited for making their award, so as it be within the time appointed for his umpirage;(d) and the arbitrators may elect him, before they enter upon the examination of the matter referred to them.(e) If the bond be, that if arbitrators do not make their award by a certain day, then the parties are to abide the award of an umpire to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for making their award expires.(f) The appointment of an umpire made in writing by two arbitrators, does not it seems require a stamp.(g) And where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three, or any two of them, and each of the arbitrators proposed to the other a third, who was admitted to be a fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot; the court held, that this was within their authority, and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account.(h) So, where the arbitrators had executed their authority, by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him, the court held his umpirage to be binding, notwithstanding one of the parties afterwards dissented from such appointment.(i) And where, by the terms of a reference, the arbitrators were to appoint an umpire previously to their entering on the *consideration of the matters [*826] referred, and to make their award before a certain day, or such time as they and the umpire, or any two of them, should appoint; and the

(I) 3 Bur. 1256.

(a) 2 Barn. & Ald. 395. 1 Chit. Rep. 204, S. C.

(b) Append. Chap. XXXVI. § 7.

(c) *Id.* § 8.

(d) 15 East, 556. And for the form of the appointment, see Append. Chap. XXXVI. § 9.

(e) 2 Durnf. & East, 644; and see 2 Wms. Saund. 5 Ed. 133, (7).

(f) 4 Taunt. 232.

(g) *Id.* 704.

(h) 16 East, 51.

(i) 11 East, 367.

arbitrators, before appointing an umpire, enlarged the time for making their award; and afterwards held a meeting, at which the parties attended; the court of Common Pleas held, that the parties being aware of these facts, and having afterwards attended, could not now make any objection, on the ground of the enlargement of the time having been made before the appointment of the umpire.(a) But where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person to whom the other objected, and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected; the court held, that the award made by such umpire was bad.(b) So, where a cause was referred to two arbitrators specially named, together with a third, to be chosen by them, and the award of any two was to be binding; and they agreed that each should name one person, and that the right of selecting one of those so named should be determined by lot; the court held, that this mode of appointing the third arbitrator was bad, and a sufficient ground for setting aside the award.(c)

If the arbitrators cannot make their award within the time limited by the rule of court, or order of *nisi prius*, a rule may be obtained, by *consent*, but not otherwise,(d) for enlarging it; or where the submission is by agreement without suit, the time may be enlarged by *consent* of the parties:(e) And if an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once.(f) Where the parties by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission, to which it has reference, and amongst others, that the submission for such enlarged time shall be made a rule of court; and consequently the party is liable to an attachment, for non-performance of an award made within such enlarged time, under the statute 9 & 10 W. III. c. 15.(g) And where a cause was referred under a judge's order, with a *proviso* that the arbitrator should make his award on or before a day certain, but if he should not be then prepared, that the time should be enlarged from time to time as he might require, and a judge of the court might think reasonable and just; the court of King's Bench held, that the time for making the award was duly enlarged, by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the

judge's order granting such further time, was not obtained until a [*827] day subsequent:(h) But where, in a similar case, the *indorsement was dated on a day subsequent to the expiration of the time originally given for making the award, that court discharged a rule *nisi* for an attachment, for non-performance of the award.(a) An objection, however, that the time for making an award has not been duly enlarged, is it seems waived, by proceeding on the reference, with a knowledge of that fact.(b) The rule or order for enlarging the time for making an award, when neces-

(a) 8 Taunt. 694; and see Ry. & Mo. 17.

(c) 3 Barn. & Cres. 407. 5 Dowl. & Ryl. 263, S. C.

(d) *Teasdale v. Atkins*, M. 21 Geo. III. K. B.

(f) 1 Taunt. 509. 4 Taunt. 658, S. P. 2 Chit. Rep. 45.

(g) 5 East, 189; but see 8 Durnf. & East, 87, *contra*; and see 8 East, 13.

(h) 1 Maule & Sel. 1.

(a) *Good v. Wilks*, H. 56 Geo. III. K. B.

(b) 2 Barn. & Ald. 218.

(e) Append. Chap. XXXVI. § 10.

(b) 1 Younge & J. 16.

ary, is drawn up by the clerk of the rules in the King's Bench, (c) or secondaries in the Common Pleas, on a brief or motion paper, signed by the counsel or serjeants on both sides, and a copy of it served, with an appointment thereon; but before this rule can be obtained, a motion must be made, for making the order of *nisi prius* or agreement a rule of court.

It will next be proper to consider the *award*, (d) or *umpirage*; and the mode of enforcing it, by the party in whose favour it is made, or of setting it aside by the opposite party. When a cause is referred to three persons, and they, or any two of them, are empowered to make an award, an award made by two of them is good, if the third had notice of the meetings, &c.; but otherwise such award is bad. (e) And where a submission was to two, so as they made their award on or before a day certain, but if they did not by the time aforesaid make their award, then to an umpire, provided he made his award on or before a subsequent day, and the arbitrators finally disagreed before their time expired, and declared they would not make any award, and did not make any; the court of King's Bench held, that the *umpirage* might be made after the final disagreement of the arbitrators, before the time allowed them had expired: (f) And it need not state that the arbitrators had disagreed. (gg) But an award made by arbitrators and an umpire jointly, on a reference to them severally, is bad. (hh) An award which is required to be made in writing, &c. and *ready to be delivered* at a particular time, is complete, if made in writing, and *ready to be delivered* by the arbitrator within the time, though not actually delivered. (i) But an arbitrator or umpire, having once made his award, is *functus officio*: Therefore, after an award made under the hand of an umpire, and ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void; but the award was held to be good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere stranger, without the privity or consent of the party interested. (k) Where an arbitrator, who had made his award in the plaintiff's favour, was supposed to have made a mistake in calculating the sum which the *plaintiff had a [*828] right to recover; the court of King's Bench would not refer it back to the arbitrator, to correct the mistake without the consent of the defendant. (l) And the court of Common Pleas would not interfere, to alter the terms of an award, in order to make them consist with the submission, even where the submission to arbitration gave minute directions for the course to be pursued by the arbitrator. (b) The award of an umpire however is not vitiated, by the two arbitrators, who were *functi officio*, nor by a stranger's, joining in it. (cc)

It was not formerly necessary that an award in writing, though under seal, should have a deed stamp, unless it was delivered *as a deed*; for if it was only delivered as an *award*, it was sufficient if it had the award stamp of ten shillings. (dd) But this distinction is now rendered immaterial: for,

(c) Append. Chap. XXXVI. § 11.

(d) For the forms of *Awards*, see Append. Chap. XXXVI. § 12, &c.

(e) Willes, 215. Barnes, 57, S. O.

(f) 3 Maule & Sel. 559; and see 6 Dowl. & Ryl. 15.

(gg) 5 Maule & Sel. 193.

(hh) 9 Price, 612.

(i) 4 East, 584. 6 East, 310.

(j) 6 East, 309. 2 Smith R. 400, S. C.; and see 8 East, 54. 11 East, 369.

(k) 7 Dowl. & Ryl. 774.

(l) 4 Taunt. 232.

(b) 2 Bing. 476.

(cc) 4 East. 584.

(dd) 4 East. 584.

VOL. II.—8

by the last general stamp act,(e) an award, whether under hand and seal or under hand only, is subject, like a deed, to the stamp duty of 1l. 15s.; and where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words, being thirty common law sheets, or upwards, then for every entire quantity of 1,080 words, or fifteen common law sheets, contained therein, over and above the first 1,080 words, a further *progressive* duty of 1l. 5s. Where several underwriters on a policy, however, enter into an agreement to refer the cause to arbitration, that agreement and the award require each but one stamp; there being a community of interest between the parties in the subject-matter.(f)

The general requisites of an award are, that it be certain, mutual, and final.(g)[A] And an award that A. or B. shall do an act, is void for uncer-

(e) 55 Geo. III. c. 184. *Sched.* Part. I.; and was the statute 48 Geo. III. c. 149. *Sched.* Part. II. § III.

(f) 6 Taunt. 171. 1 Marsh. 525, S. C.

(g) See Bac. Abr. tit. *Arbitrament*; Kyd on Awards; and 1 Wms. Saund. 5 Ed. 327, a. (2).

[A] An award must be certain. *Gibson v. Powell*, 5 Smedes & Marsh. 712. *M'Ken v. Oliphant*, 3 Harr. 442. *Lee v. Onstott*, 1 Pike, 206. *Gonzales v. Deavens*, 2 Yeates, 507. *King v. Cook*, Charl. 288. *Grier v. Grier*, 1 Dall. 173. *Purdy v. Delavan*, 1 Caines, 304. *Duburg v. Clifton*, Cook, 329. *Carter v. Ross*, 2 Root, 507. *Parkhurst v. Powers*, 1b. 531. *Hazlitt v. Smith*, 3 Verm. 535. Thus, a report finding "that the sum of \$75 was due the third of March last," which period was several months before the meeting of the referees, was set aside for uncertainty. *Young v. Reuben*, 1 Dall. 119; but see *Wood v. Earl*, 5 Rawle, 44, where this case is denied. And an award that the defendant should "give security" for the payment of certain sums of money to A., or her agent, if required, is void for uncertainty. *Barret v. Gilson*, 3 S. & R. 340. S. P. *Jackson v. De Long*, 9 Johns, 43. Or an award directing a party to deliver "a certain bond bearing date, February 17th, 1821," without stating by whom the bond was made or to whom given; for what penalty, or upon what condition, is void for uncertainty. *Sheppard v. Stiles*, 2 Halst. 90. But an award which directs one party to pay to the other a certain sum, within a certain time after the date of the award, with interest till paid, is sufficiently certain. *Steele v. Chickering*, 7 Met. 316. Or an award for a sum certain and "the costs," was held certain to a common intent, and good. *Brown v. Warnock*, 5 Dana, 492. Or an award that two of three partners should pay the third a certain sum, that the third should be entitled to a certain sum out of this amount, the rest to be applied by him to paying the partnership debts, and the remainder, if any, to be equally divided between the three partners, was held sufficiently certain and final, on demurrer. *Case v. Ferris*, 2 Hill, 75. So too, an award that one party shall pay a specific sum to the other, being written on the back of the submission bond, must be taken to settle all matters therein submitted, and is, therefore, sufficiently final and certain. *Doolittle v. Malcom*, 8 Leigh, 608. Or an award for the plaintiff for "the amount of the note," in controversy, is sufficiently certain. *Coze v. Gent*, 1 M'Mullan, 302. An award is not the less certain and final because the arbitrators refer to a report previously made by a commissioner in chancery, and declare, (in general terms) their concurrence with it, instead of specifying the particulars, or substance thereof, in the award itself; nor because they submit to the court the propriety of their award in point of law, and as a guide for the court in deciding upon it, state the grounds and reasons thereof. *Brickhouse v. Hunter*, 4 H. & M. 363. C., as agent of O., entered into a submission with A., to refer certain matters under the statute. The arbitrators made an award in favour of A., without stating against whom. Held, that judgment could not be rightly rendered against C. *Callahan v. M'Alexander*, 1 Ala. 366. An award, that A. should make and execute a deed of all the lands he holds by a certain conveyance from B., is not void for uncertainty. *Whitcomb v. Preston*, 13 Verm. 53. Where arbitrators determined that a party "shall cause the planks of his mill-dam to be taken down so as to reduce the quantity or head of water therein, eleven inches perpendicular measure lower than the same was on the 27th day of December, 1839, when the said dam was examined by the said arbitrators herein, which is to be done in twenty days from the date hereof," it was held that it was void for uncertainty. *M'Donald v. Bacon*, 3 Scam. 428. Or an award to finish the house or to pay for the stove, without stating what house, or what stove, is void for uncertainty. *Schuyler v. Vandever*, 2 Caines, 235. So an award to deliver books, papers, and accounts, and a small chest of wearing apparel, is too indefinite to be sustained. *Thomas v. Molier*, 3 Ham. 266. Or one determining "certain matters and ac-

tainty.(h) But certainty to a common intent is sufficient:(i) And an award that two persons shall pay a debt, in proportion to the shares which they held in a certain ship, the *ratio* of their shares not being a subject of dispute, is sufficiently certain.(kk) An award that money shall be paid to a stranger, for the use of one of the parties to the submission, is good:(l) And an order of *nisi prius*, referring an action of *debt* on a money bond, (where the issue was payment by a co-obligor,) and all matters in difference to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the court refused to set aside an award, directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum the verdict and judgment should be entered, and execution taken out, without proof that there *were [*829] other matters in difference between the parties.(aa) Where a cause and all matters in difference were referred by order of *nisi prius*, and the arbitrator by his award found, that "nothing is due to the plaintiff;" the court held, that this must be considered as a finding, that the plaintiff had no right to recover in the action.(b) And an award which settles the costs on both sides, is final:(c) as is also an award that certain actions be *discontinued*, and each party pay his own costs; this being in effect an award of a *stet processus*.(d) So, where an action of *covenant* was referred, with all matters in difference, to arbitration, and the costs of suit were directed to abide the event; the court held, that an award that the plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or

(h) 1 Younge & J. 16.

(i) 1 Bur. 274. 2 Ken. 553, S. C.; and see 7 Durnf. & East, 76. Ry. & Mo. 17, in which latter case, an award, in the form of an opinion, was holden to be in substance sufficient. See also 4 Dowl. & Ryl. 814. M'Clel. 367.

(kk) 6 Taunt. 254.

(l) 2 Chit. Rep. 43.

(aa) 3 Dowl. & Ryl. 224; and see 2 Barn. & Cres. 170.

(b) 5 Barn. & Cres. 528. 8 Dowl. & Ryl. 285, S. C.

(c) Forrest, 73; and see 2 Dowl. & Ryl. 222.

(d) 9 East, 497.

counts now in dispute and undetermined between the parties," without further description, is void for uncertainty. *Turpin v. Banton*, Hardin, 312.

An award must also be mutual. *Weed v. Ellis*, 3 Caines, 256. *Gordon v. Tucker*, 6 Greenl. 247. *Gaylord v. Gaylord*, 4 Day, 422. *Gibson v. Powell*, 5 Smedes & Marsh. 712. *McKee v. Oliphant*, 3 Harr. 442. Thus, on a submission by A. and B., an award that A.'s children are entitled to a certain sum is valid, as not being open to the objection that it is not between the parties to the submission. *King v. Cook*, T. U. P. Charl. 286. Or an award of payment of a specific sum by one party to another, is mutual and sufficient without directing a release or other act by the latter. *Doolittle v. Malcom*, 8 Leigh, 608. If an award directs the performance of acts by both parties, and is void as to the acts to be done by one of the parties, and the void part is the consideration or recompense of the thing awarded on the other side, the whole award fails for want of mutuality. *Nichols v. Renaissance Ins. Co.*, 22 Wend. 125. But the doctrine by which awards are required to be mutual, is not applied in the strict sense in which it was formerly taken. *Harrel v. M'Alexander*, 3 Rand. 94.

An award must also be final. *Manuel v. Campbell*, 3 Pike, 324. *Lee v. Onstott*, 1 Pick. 206. *McKee v. Oliphant*, 3 Harr. 442. *King v. Cook*, Charl. 289. *Grier v. Grier*, 1 Dall. 173. *Purdy v. Delavan*, 1 Caines, 304. *Gonsales v. Deavens*, 2 Yeates, 539. *Archer v. Wilkinson*, 2 Harr. & Gill, 67. *Young v. Shook*, 4 Rawle, 304. An award is final if it is within the reference, and the subject-matter is brought before the arbitrators; or if it is so decided by consent though not included in the rule. *Aliter*, if there is no consent. *Alexander v. Westmoreland Bank*, 1 Penn. State Rep. 395. Where a submission to arbitrators of all claims between parties is under seal, the parties cannot, by a parol consent at the hearing, withdraw a certain claim. The award will be, nevertheless final. *Howard v. Cooper*, 1 Hill, 44. So an award of arbitrators upon matters in dispute, in an action of trespass that one of the parties shall pay to the other a certain sum, cannot be objected to as not final. *Dickerson v. Tynes*, 4 Blackf. 253.

on any other account whatsoever, was final, although the suit was not in terms put an end to.(e) And an arbitrator, to whom all actions and causes of action, and all matters in difference in two actions between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration; but an award made by him, in reference to the two actions only, is final.(f) But notwithstanding the award be final, as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred.(g) If the submission be *conditional*, so as the award be made "of and concerning the premises,"(h) or, "on or before a particular day,"(i) the arbitrator must adjudicate upon each distinct matter in dispute, of which he has notice,(k) or the award will be invalid: But if the submission be *general*, without any condition annexed to it, an award extending to some of the matters in difference only, without noticing others, will be good; provided no such connection exist between the latter, and the things decided, as to leave any uncertainty upon the face of the award.(l) So, if the award be otherwise good, it cannot in general be set aside, on account of the arbitrator's having in some particular instance exceeded his authority.(m) And, unless the matter awarded to be done on one side go to the whole justice of the case, and be the entire consideration, so that the other matters [*830] cannot consistently with justice be *separately performed, an award may be good in part, and bad in part:(a) But if, by the nullity of the award in any part, one of the parties cannot have the advantage intended him, as a recompense or consideration for that which he is to do to the other, the award is void in the whole.(bb) An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be *waste* upon the estate of the lessor, is bad.(c) And where an arbitrator, to whom a cause, before being at issue, was referred by rule of court on motion, awarded thus, "I award and direct, that a verdict in this cause be finally entered for the plaintiffs, with ——— damages;" the court held, that he had exceeded his authority, in directing the entry of a verdict; and that as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due, and to be paid; and that therefore the award could not be supported, either by attachment or action.(d) [A]

(e) 5 Barn. & Ald. 861; and see 8 Taunt. 697. 2 Barn. & Cres. 170. 3 Dowl. & Ry. 434, S. O. 9 Moore, 381. 2 Bing. 199, S. O. in Error.

(f) 7 Taunt. 644. 1 Moore, 403, S. O.; but see 16 East, 58. 2 Moore, 723.

(g) 4 Durnf. & East, 146. 4 Esp. Rep. 180; but see Willea, 268. 7 Mod. 349, oct. ed. S. O. 1 Barn. & Ald. 106.

(h) 7 East, 81; and see 16 East, 58.

(i) Willea, 268, 270.

(k) Cald. 100.

(l) *Id.* 103; and see Rol. Abr. tit. *Arbitrament*, L. Willea, 62, 66. 8 East, 445. 1 Taunt. 549.

(m) Forrest, 73; and see 8 East, 13. 8 Taunt. 697.

(a) 1 Taunt. 552; and see Com. Dig. tit. *Arbitrament*, E. 8, 19. Willea, 62, 66. 2 Willea, 267, 293. 8 East, 13, 445. 9 Moore, 381. 2 Bing. 199, S. O. M'Clel. 253. 13 Price, 533. S. O. M'Clel. 367. 13 Price, 367; S. O. Cald. 116, &c.

(bb) 1 Rol. Abr. 259, pl. 9, 10; and see Com. Dig. tit. *Arbitrament*, E. 19. 2 Willea, 267, 293, 303. Willea, 248, 253. 8 Taunt. 698.

(c) 5 Taunt. 454.

(d) 1 M'Clel. & Y. 200; and see 7 Dowl. & Ry. 221.

[A] Arbitrators appointed by a submission at common law, have no authority to award

When a cause is depending, the submission is either silent with regard to costs, or they are directed to abide the event of the award, or else to be in

concerning costs, unless it be expressly given by the submission. *Peters v. Pierce*, 8 Mass. 399. *Alling v. Munson*, 6 Conn. 696; but that part of the award in which costs are so allowed, may be set aside without invalidating the residue. *Porter v. Buckfield Branch Rail Road*, 32 Maine, (2 Red.) 539. The power of awarding the costs of arbitration, in New York and New Hampshire, is incident to the authority of the arbitrator to determine the principal matter submitted, unless by the terms of the submission that power is clearly withheld. *Chase v. Strain*, 15 N. H. 535. *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 125. But the submission of all matters in variance, though there be no mention of costs, authorizes arbitrators to award concerning them. *Young v. Shook*, 4 Rawle, 302. *Strang v. Ferguson*, 14 Johns, 161. Where, upon a reference of a suit the award settles the rights of the parties but is silent as to the costs, each party is liable for his own, as for work and labour done. *Arrington v. Battle*, 1 Car. Law Repos. 109. So too, where an award requires conditions to be performed by each party, and is silent about costs, each party must pay his own costs. *Arrington v. Battle*, 2 Murph. 246. Where an action had been referred, by rule of court, and the referees awarded "that the plaintiff recover nothing . . . each party shall pay his own costs up to this time, and that each party shall pay half the referees' fee for this hearing . . . taxed at \$11.00," and the award was accepted. The defendant paid to the referees the whole of their fees and the court ordered judgment to be entered on said report in favour of the defendant for one half the fees paid by him (\$5.50); to which the plaintiff excepted and the exceptions were overruled. *Anonymous*, 31 Maine, (1 Red.) 581.

Where the parties by mutual consent, withdraw a cause from the court, before hearing, for the purpose of settlement by arbitrators, and on certain terms, one of which was, that "the question of costs, in the chancery suit being original and cross-suits should be submitted to the chancellor," the court will not decide mere questions of costs, but leave each party to pay his own costs. *Eastburn v. Kirk*, 2 Johns, Ch., 317. An award of costs is good although the sum awarded would not carry costs, if found by a jury, provided the authority of the referees is not limited by a special agreement. *McLaughlin v. Scott*, 1 Binn. 616; *Sed vide, Stuart v. Harkins*, 3 Binn. 323, *per Tugman*, C. J., where the referees reported in favour of the plaintiff for a sum within the jurisdiction of the court, who directed judgment to be entered without costs. *Post v. Sweet*, 8 S. & R. 391. *Lindenburgher v. Unruth*, 1 Browne, 194. *Heath v. Atkinson*, *Ibid.* 231. Referees, in New England, have jurisdiction of the question of costs, and an award concerning them cannot be altered by the court; the judgment must conform to the award. *Nelson v. Andrews*, 2 Mass. 164. *Bacon v. Crandon*, 15 Pick, 79. *Buckland v. Conway*, 16 Mass. 396. *Alling v. Munson*, 6 Conn. 694. And costs may be allowed, even where the report of referees is set aside for irregularity. *Browner v. Kingsley*, 1 Johns, Cas. 334.

If it appear clearly that the referees allowed the costs of the action, or the expense of the reference, in the sum given in damages, the award will be erroneous. *Buckley v. Ellmaker*, 13 S. & R. 78. Or if an award be silent as to costs, a judgment for costs is erroneous. *Hamilton v. Wort*, 7 Blackf. 348. A submission, however, of matters in dispute to arbitrators, authorizes them to include in their award the costs of a suit previously instituted by one of the parties, upon the subject-matter of the dispute; but the costs of such a suit do not follow an award of damages as an incident. *School District v. Aldrich*, 13 N. H. 139. If arbitrators should award costs, without designating the amount, or prescribing any mode by which the amount is to be ascertained, that part of their award would be void for want of certainty, *Id.* Referees under a rule of court if not restricted by the rule, have authority to award costs. And in such a case, if the title to real estate was in question, the costs will not be limited because a small sum was awarded to the plaintiff. *Brown v. Matthes*, 5 N. H. 229. *Long v. Simpson*, 2 N. H. 179. In Pennsylvania, referees cannot award costs, where the law says they shall not be given. *Lewis v. England*, 4 Binn. 5.

Where a submission to arbitration, under the statute, makes no provision for costs, the arbitrator has no power to award that one party shall pay the costs and expenses of the other; and where he so awards, the court may strike out so much of the award that one party shall pay the arbitrators' fees and expenses; and where he omits to mention the expenses, it seems that the prevailing party may tax them on entering judgment. *Per Beardsley, J., Matter of Vandever*, 4 Denio, 249. But where the whole cause is referred, the referee has the right, and it is his duty to decide upon the question of costs. And costs being in the discretion of the referee, the court will not supervise his decision in respect to them, unless upon some manifest error. *Ludington v. Taft*, 10 Barb. Sup. Ct. 447. So where a cause is submitted to arbitration or reference out of court, with an agreement to make the submission and award, a rule of court, unless costs are awarded they cannot be recovered. *Anon*, 1 Penning. 228.

To entitle the plaintiff to recover upon an award, which provides that the defendant shall pay the taxable "costs" of a suit which had been pending in court, he must aver in his de-

the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to withhold costs from the party who is in the right: But that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election.^(e) Therefore, where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs, the court held, that the arbitrator had power over the costs of the cause, being a matter in difference, though not mentioned in the submission.^(f) Upon a submission by bond, however, of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs, as between attorney and client:^(g) and it has been decided, that arbitrators cannot award the costs of the reference, unless power be expressly given to them for that purpose.^(h) So, where

(e) 2 Durnf. & East, 644, 5. Forrest, 77; but see Willes, 62.

(f) 1 Barn. & Cres. 277.

(g) 12 East, 165; and see 2 Chit. Rep. 157; but see Forrest, 73, *sem. contra*.

(h) Willes, 62. Forrest, 73. 2 Chit. Rep. 157. 1 Barn. & Cres. 277.

claration that the taxable costs amounted to a certain specified sum, of which the defendant had notice before suit brought; and if this averment is omitted, the declaration is bad upon demurrer. *Wright v. Smith*, 19 Vt. (4 Washb.) 110. Where a reference fails because of the non-attendance of the referees, the prevailing party is, notwithstanding, entitled to charge, as costs, an attorney's fee, and his costs for witnesses. *Willard v. Harbey*, 3 Denio, 260. And where arbitrators in a case submitted by the parties, ordered the costs of suit to be taxed and they were taxed *ex parte* by a commissioner, the court, on a motion for retaxation, held that as the cause was out of court they had no control of the costs on a summary application, but that the taxation would not be conclusive in an action on the bond or the award. *Van Alstyne v. Wimple*, 4 Cow. 547. Though an action on an arbitration bond will not lie if the award is not made within the time specified in the condition, and the parties have, by a new agreement, extended the time for making the award, yet, where the declaration sets forth the bond, the agreed extension of time, an award within that time, and a failure to perform it, a good cause of action is shown. *Myers v. Dixon*, 2 Hall, 456. An award made under a parol submission, out of court, and not confined to matters in variance in the cause, can be enforced only by action, judgment cannot be entered on it. *Richardson v. Cassidy*, 3 Watts, 320. *White v. Shriver*, 2 Watts, 471.

When a matter not pending in court, is submitted to arbitration, by an agreement *in pais*, dan not pursuant to Mass. Rev. Stats. c. 114, and no provision concerning costs is made in the agreement, the arbitrators have no authority, by the common law, or by the revised statutes, to award costs of arbitration. *Vose v. How*, 13 Met. 243. *Shirley v. Shattuck*, 4 Cush. 420. The practice in most if not all the states is much regulated by statute; thus, in Indiana, judgment cannot be rendered on an award before it is recorded and a rule served on the defendant to show cause why it should not be made the judgment of the court. *Nelson v. Hinesley*, 3 Blackf. 432. And such an award as to the costs should distinctly show whether it applies to the costs in the circuit court; and the arbitrators should state the cost of the witnesses examined before them, and also the sum due to them for their own service. *Jacobs v. Moffit*, 3 Blackf. 400. In Missouri, arbitrators may award costs to either party, in their discretion, unless prohibited by the terms of the submission. *McClure v. Shroyer*, 13 Mis. 104. By the Maine Statute of 1831, c. 59, § 30, full costs are taxed upon the reports of referees where the plaintiff is the prevailing party, however small the amount recovered may be, unless the referees otherwise direct. And the rule is not affected in the case of reference on appeal by the statute of 1839, regulating appeals from the court of common pleas. *Brown v. Keith*, 2 Shep. 396. Under the statute of Indiana, arbitrators may award costs of reference, although the agreement to submit be silent upon the subject. *Dickerson v. Tynes*, 4 Blackf. 253. A plaintiff who is nonsuited, after an appeal by the defendant from an award of arbitrators, must refund the costs of the appeal which the defendant had paid on appealing; and this is the case although the plaintiff sues as administrator. *Penrose v. Rawling*, 8 Watts & Serg. 379. A judgment on an award exceeding \$5.33 and each party to pay his own costs, is bad in Delaware, because the award carries costs. *Benson v. Dodd*, 3 Harr. 7.

all matters in difference are referred to arbitration, except the costs of the *action*, and no notice is taken of the costs of the *reference*, the latter are not in the discretion of the arbitrator.(i) A rule having been obtained for setting aside an inquisition before the sheriff for excessive damages, *the matter was referred, nothing being said about the costs of [*831] the application ; and the arbitrator by his award having reduced the damages, it was holden, that the plaintiff was not entitled to the costs of the application.(a) If no directions be given respecting the costs of an award, they are to be paid by both parties equally.(b)

When the costs are directed to abide the *event*, that must be taken to mean the *legal* event : Therefore, where an action of *trespass* was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants pleaded not guilty to the whole declaration, and justified as to all the counts but one, under different rights of way ; and the arbitrator awarded a right of way to the defendants, different from any of those set forth, and gave *five* shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way, negatived by the arbitrator ; the court held, that the plaintiff could recover no more costs than damages, the award of the arbitrator not being tantamount to a judge's certificate, under the 22 & 23 Car. II. c. 9.(c) So, where the arbitrator found no damages for the plaintiff, in an action of *trespass* to land, and directed both parties to pay their own costs, it was holden that the plaintiff was not entitled to costs, because the legal event of the reference would not carry them.(d) So, where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them, if it appear by the award, that the plaintiff's demand was originally under *forty* shillings, and he might have recovered it in a court of conscience :(e) But where the arbitrator in such case awards something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs ; although the arbitrator do not award a verdict to be entered for him.(f) And an arbitrator, under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause ; although all matters in difference are referred : but the award is not to be set aside entirely on that account, but only that part which is incorrect.(g) If a cause be referred to arbitration, under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff for a certain sum, as a security for what shall be awarded to be paid to him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff *without costs* ; because, by the terms of the order he was precluded from entering at all into the question concerning costs :(h) And where, by the rule of reference, *the costs are to abide the event of the award, that in- [*832]

(i) 1 Taunt. 213. 2 Marsh. 524, S. C.

(a) 2 Barn. & Cres. 620. 4 Dowl. & Ry. 129, S. C.

(b) 1 Taunt. 165. 2 Chit. Rep. 157, (a) ; but see 8 Moore, 211. 1 Bing. 269, S. C.

(c) 3 Durnf. & East, 138.

(d) 1 Chit. Rep. 183.

(e) 3 Durnf. & East, 139. *Butler v. Grubb*, H. 23 Geo. III. K. B. *Watson v. Gibson*, H. 33 Geo. III. K. B. *Harrison v. Slater*, T. 44 Geo. III. K. B. ; and see 13 East, 161. 1 Marsh. 234, 5. 5 Maule & Sel. 196. 2 Chit. Rep. 156. 6 Barn. & Cres. 193. And for the form of the rule, see 2 Chit. Rep. 157.

(f) 1 Smith R. 426 ; and see 1 Barn. & Ald. 670.

(g) 1 Chit. Rep. 526 ; and see 8 Taunt. 526, 7. 10 Moore, 198. 6 Barn. & Cres. 193.

(h) Say. Costs. 177.

cludes the costs of the reference, as well as of the cause.(a) An action of *ejectment* was referred to arbitration, the reference stating, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in a court of law: and the arbitrator having, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent, during the time the defendant held possession; the court of Common Pleas, on a motion for an attachment for non-payment of the costs and sum awarded to the plaintiff, held that the award was in that respect good, although the arbitrator did not find in terms, that the plaintiff had any cause of action.(b) But where, by the order of reference, costs were to abide the event of the award, in an action against two defendants, one of whom did not attend before the arbitrator, or take any part in the proceedings before him; and the master taxed the whole costs of the cause and the reference, in one sum, to the other defendant, by whom payment was demanded of the plaintiff; the court refused to grant an attachment for non-payment of those costs.(c)

When the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid for costs;(d) or he may award that one of the parties shall pay to the other, costs *to be taxed by the master or prothonotaries*;(e) or he may award costs *generally*, in which case the master or prothonotaries will tax them;(f) And when an arbitrator, authorized to tax costs in a cause, has allowed an *item* which it is insisted ought not to have been charged, the court of King's Bench will not refer it to the master.(g) But he cannot award that one of the parties shall pay to the other, such costs as two persons named in the award, but not officers of the court, shall appoint; for this is an improper delegation of his authority.(h) And where a special jury having been obtained, on the motion of the defendant, the cause was referred, and by the order of reference the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator; the court held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury.(i) A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion; the arbitrator having found that the plaintiffs were entitled to recovery, and ordered the defendants to pay the costs of the cause, the court held that the plaintiffs were not entitled to the costs of the first trial. 7 Barn. & Cres. 57. If an arbitrator award costs, to be taken by the master, such costs shall be taxed as between party and party, and not as between attorney and client:(k) And it is settled, that an arbitrator cannot award any other than the common costs, as between party and party, unless he be expressly *authorized so to do.(aa) Under a submission to arbitration of two assaults, for one of which the defendant had been

(a) 9 East, 436; but see Barnes, 123. Pr. Reg. 103, S. C. *semb. contra*. In that case, however, it does not appear that the costs were expressly directed to abide the event of the award.

(b) 8 Taunt. 697.

(cc) 5 Barn. & Cres. 528. 8 Dowl. & Ryl. 285, S. C.

(dd) Cas. temp. Hardw. 53.

(e) 1 Salk. 75, 6 Mod. 195, S. C. 7 Durnf. & East, 77; and see 2 Dowl. & Ryl. 222.

(f) 2 Str. 737. Say. Rep. 240. 2 Ken. 557. Barnes, 56, 58; and see Hullock, on Costs, 2 Ed. 420, 21; S. C. Willes. 62.

(g) 1 Chit. Rep. 38; and see M'Clel. 12.

(h) Cas. temp. Hardw. 181. 2 Str. 1025, S. C.

(i) 1 Barn. & Ald. 663.

(k) Cas. temp. Hardw. 161.

(aa) Cowp. 127. Cas. Pr. C. P. 69, 70. 2 Blac. Rep. 953. 12 East, 167; but see Forrest, 73, *temp. contra*.

indicted and convicted at the Quarter sessions, and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator having awarded a payment in satisfaction of all costs incident to the indictment, and *previous* as well as subsequent proceedings thereon, &c. the court of Common Pleas held, that he had not thereby exceeded his authority: (b) And, on a submission to arbitration under an order of *nisi prius*, the arbitrator may award costs *subsequent* to the order; but where the submission is by bond, he cannot award subsequent costs. (c) If an arbitrator appointed under an order of *nisi prius*, only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit: (d) Neither will an award that one party shall pay to the other, the costs by him sustained in the action, include the costs of the reference. (ee) An arbitrator cannot it seems, without authority, charge a certain sum for his own expenses. (ff) If he award an excessive sum to be paid to himself, the court of Common Pleas will refer it to the prothonotary to reduce it: (g) And where he directs the payment of the costs of the award generally, without fixing the amount of them, it is doubtful whether the award is bad in that respect for uncertainty, or whether the amount may not be taxed by the officer of the court. (h) When the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*. (i) [A]

(b) 7 Taunt. 422. 1 Moore. 120, S. C.

(c) Pr. Reg. 45. Barnes, 58. Forrest, 73; but see 9 East, 436. 12 East, 167. And if arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day; Willes, 62. 12 East, 438; and if he do not, the *plaintiff* it seems may proceed to have them taxed *ex parte*. 1 Campb. 253.

(d) Barnes, 123. 1 H. Blac. 223. 1 Bos. & Pul. 34.

(ee) 1 H. Blac. 223.

(ff) 8 East, 13; and see 4 Esp. Rep. 47. 2 Chit. Rep. 157; but see Gow, 7, 8, and the cases there cited, by which it seems, that an arbitrator may recover a compensation for his trouble.

(g) 3 Taunt. 461. 5 Taunt. 342.

(h) 4 Taunt. 658.

(i) 5 Bur. 2694. Say. Costs, 179, S. C. *Sparrow v. Turton*, T. 7 Geo. III. C. P. Say. Costs, 2 Ed. 178; but see Cas. Pr. C. P. 138. Pr. Reg. 103. Barnes, 123, S. C. Doug. 437. 3 Durnf. & East, 507. 6 Durnf. & East, 71, 131, 144. 1 H. Blac. 639.

[A] In cases of bonds to perform awards there are two remedies: 1st, at law upon the bond, in which a plea that arbitrators made no award would if true, defeat the plaintiff's action; 2nd, if any act be awarded to be done for which a complete remedy cannot be had at law (such as to make a conveyance,) a bill in equity for the specific performance of the award is common and proper; but the court cannot decree specific performance when no award has been or can be made. *Smallwood v. Mercer*, 1 Wash. 290. No action lies on the penalty of an arbitration bond for the non-performance of an award, where the award is not made within the time specified in the condition of the bond, though the parties by an agreement under their hands and seals had enlarged the time for making the award, and the award was made within such enlarged time. The proper remedy is on the submission implied in the agreement to enlarge the time. *Freeman v. Adams*, 9 Johns, 115. *Peters v. Johnson*, 3 Har. & J. 291.

In Pennsylvania, an action may be maintained upon an arbitration bond, although the award was given in an action instituted by agreement before a justice of the peace, and was for a sum exceeding his jurisdiction, and although his judgment upon the award has been reversed by *certiorari*. *Slocum v. Taylor*, 8 S. & R. 399. But to an action of debt on bond, for the payment of money, generally, the defendant cannot set up the bar of an award in a suit upon the same bond before a justice of the peace for a sum beyond his jurisdiction. *M'Killip v. M'Killip*, 2 S. & R. 489, as stated and explained by Tilghman, C. J. in *Slocum v. Taylor*, 8 S. & R. 401, 402.

Misconduct of an arbitrator cannot be pleaded or set up as defence to an action at law upon an arbitration bond. The same rule prevails with respect to error or mistake of law or fact in making an award which does not appear on the face of it. *Sherron v. Wood*, 6 Halst.

7. An action of debt will lie on an award of money without regard to the penalty of the

The mode of enforcing an award, by the party in whose favour it is made, is by *action*: or, when the submission is made a rule of court, by *attachment*; (k) and, if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. Upon a submission being made a rule of court, it was formerly holden, that the party might proceed both by action and attachment, at the same time; (l) but a different doctrine has been since laid down: (m) and accordingly, in a late case, the court of Common Pleas would not grant an attachment for non-performance of an award, pending an action brought upon it; nor would

[*834] *allow the plaintiff to waive the action, in order to apply for an attachment. (a)

When the submission is by deed with a penalty, and the award is made within the time limited, an action of *debt* lies upon the deed, for the non-performance of the award; and that, whether the award be for the payment of money, or the performance of a collateral act. But where, in an arbitration bond, a time was limited for the arbitrator to make his award, and such time was afterwards enlarged by mutual consent, it was holden that no action could be maintained on the bond to recover the penalty for not performing the award, made after the time first limited: (b) in such case, the plaintiff should have proceeded by action of *debt* or *assumpsit*, on the submission implied in the agreement, to enlarge the time. In a subsequent case, however, where, in *debt* on bond, conditioned for the performance of an award, to be made within a limited time, the declaration, after setting out the condition, stated that before that time expired, the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time, and alleged non-performance; the court held, upon demurrer, that the action was maintainable upon the bond. (c) An action of *debt* also lies upon a submission by deed, without a penalty, or upon a submission in writing without deed, or by *parol*, when the award is for the payment of money; but when it is for the performance of a collateral act, the plaintiff should proceed by action of *covenant* upon the deed, or, if the submission be without deed, by action of *assumpsit*. (d) And when matters in dispute are referred to arbitration without bond, and the arbitrators award a certain sum to be due, it may be recovered under a count on an *insimul computassent*. (e) Two several tenants of a farm agreed with the succeeding tenant, to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to per-

(k) 1 Salk. 83.

(l) *Id.* 73.

(m) Andr. 299, Cas. temp. Hardw. 106.

(a) 1 Bos. & Pul. 81.

(b) 3 Durnf. & East, 592, *in notis*. In that case, however, it did not appear, that the consent to enlarge the time was by deed. 2 Barn. & Cres. 185, 188.

(c) 2 Barn. & Cres. 179. 3 Dowl. & Ryl. 446, S. C.

(d) 2 Ld. Raym. 1040.

(e) 1 Esp. Rep. 194; but see *id.* 377.

bond, the penalty being important only to enforce payment of damages for a revocation, in which case the bond must be made the direct foundation of the action, *Ex parte Nallis*, 7 Cow. 522. Awards made under the Pennsylvania act of 1705, and confirmed by the court, have the same effect as the verdict of a jury, and no more. *Williams v. Craig*, 1 Dall. 314. *Duer v. Boyd*, 1 S. & R. 203. An award furnishes no ground of action unless it is published to the parties. *Kingsley v. Bill*, 9 Mass. 195. In New Hampshire, this rule holds only where it is stipulated in the submission that the award shall be notified to the parties. *Parsons v. Aldrich*, 6 N. H. 264. If a report of referees under a rule of court be lost, judgment may be rendered on a copy of it. *Little v. Gardner*, 5 N. H. 415. And parol proof is admissible to show the contents of a lost award and submission. *Brown v. East*, 5 Monr. 408. *Assumpsit* will not lie on an award made under a submission under seal. *Tullis v. Sewell*, 3 Ham. 513.

form the award; the arbitrator awarded each of the two to pay a certain sum to the third; and the court held, that they were *jointly* responsible for the sum awarded to be paid by each.(f) In an action on an award, made under a judge's order, to prove the order, it is sufficient to put in an office copy of the rule, making it a rule of court.(g) But on a reference by bonds of arbitration, the execution of the submission by all the parties must be proved, 7 Barn. & Cres. 427.

When the submission is by rule of court originally, or by order of *nisi prius* or agreement, which is afterwards made a rule of court, the party disobeying an award is not only liable to an action, but also to an attachment, as for a contempt.(h) And where the original award was lost, the court, on a proper affidavit, granted an attachment upon a copy of it.(i) The court of Common Pleas will grant an attachment against a party, *for non-performance of an award, which has been made [*835] a rule of court, though he reside out of the jurisdiction of the court.(a) But an attachment cannot be granted against a peer of the realm, or member of the house of commons, for non-payment of money pursuant to an award.(b) If an arbitrator award, among other things, that each party shall pay a moiety of the costs of arbitration, and of making the submission a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole, it seems that he may have an attachment against the other party, if he refuse to pay his moiety.(c) But if, upon the reference of an action in the Common Pleas, the arbitrator award the costs of a nonsuit to be paid by one party, and a larger sum to be paid as a debt by the other, the party awarded to pay the smaller sum is entitled to a set off, without motion; and if payment of the smaller sum be enforced by attachment, the court will set it aside.(d)

The party having a remedy by action on the award, it is discretionary in the courts, whether or not they will enforce it by attachment: And therefore, where there was a contrariety of evidence, they would not determine it upon affidavits in a summary way.(e) So, where the defendant was a *bankrupt*, and incapable of paying the sum awarded, the court refused an attachment for non-payment of it:(ff) And where a party was taken upon an attachment for not performing an award, after which he became bankrupt and obtained his certificate, the court ordered him to be discharged; for this was a demand for which *debt* would lie, and the act(gg) says, he shall not be arrested, *prosecuted* or impleaded, for any debt due before the bankruptcy: It would therefore be hard to keep him in custody, when the duty is discharged.(hh) A feme *sole* having agreed to a reference, was awarded to deliver up two notes, and pay a sum of money: she married, and the husband refusing to pay it, it was doubted if the court could grant an attachment against both or either of them.(ii) And where

(f) 7 Durnf. & East, 352.

(g) 4 Camp. 17.

(h) 1 Salk. 83; and see 1 Wms. Saund. 5 Ed. 327, c.

(i) 1 Str. 526.

(a) 1 Bing. 378. 8 Moore, 424, S. C.

(b) 7 Durnf. & East, 171, 448. *Ante*, 192.

(c) 1 Bos. & Pul. 93. *Stokes v. Harris*, M. 45 Geo. III. 2 Smith R. 12, S. C.

(d) 4 Taunt. 632.

(e) 1 Str. 695. 1 Wms. Saund. 5 Ed. 327, c.; and see 2 Dowl. & Ryl. 222.

(f) *Anon.* K. B. 1 Crompt. 3 Ed. 265.

(gg) 5 Geo. II. c. 30, § 7.

(hh) 2 Str. 1152; and see 7 Price, 209; but see the case *ex parte Sneaps*, Co. B. L. 7 Ed. 11, 12. 9 East, 318. *Ante*, 210, 11.

(ii) *Anon.* 1 Crompt. 3 Ed. 265; and see 6 Durnf. & East, 161.

an arbitrator awarded, that A. should fulfil an agreement for the purchase of land of B. and should pay the purchase money on B's conveying the land with a good title, the court of Common Pleas refused to grant an attachment against A. for non-performance, on an affidavit that B. had required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed.(k) So, an attachment was refused, upon an award which found a debt, but contained no order to pay.(l)

The court of King's Bench will not grant an attachment against an *administrator*, for not performing a rule of court entered into by [*836] the *intestate* : (a) and a submission to arbitration by an *executor* or *administrator*, is not of itself holden to be an admission of assets ; and therefore, if upon such a submission, the arbitrator simply award a certain sum to be due from the testator or intestate's estate, without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can be attached for the non-payment of it.(b) So *trustees*, by submitting matters to arbitration, do not make themselves personally liable.(c) But a submission to arbitration by an executor or administrator, is in general considered as a reference not only of the cause of action, but also of the question, whether or not he has assets : and therefore if an arbitrator, under a reference between A. and B. administrator, award that B. shall pay a certain sum as the amount of A's demand, B. cannot afterwards object that he had no assets : for this is equivalent to determining, as between these parties, that he had, and therefore he may be attached for non-payment.(d) So, a reference to arbitration, of all matters in dispute, by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon them as to assets.(e) A *foreign* attachment in *London*, if properly pleaded, is a good bar to an action on an award,(f) or on a bond conditioned for its performance ; (g) but it is no answer to an attachment for non-payment of the sum awarded.(h)

Before any application is made for an attachment, or to set aside an award,(i) the submission must be made a rule of court, (kk) if not one already ; which is done on an affidavit, by one of the witnesses, of the due execution of the bond or agreement containing the submission : (ll) and if he refuse to make it, the court will compel him.(m) The motion for this purpose is a motion of course, in the King's Bench, requiring only counsel's signature ; and may be made in vacation : (n) but in the Common Pleas, the rule is moved for in court, and absolute in the first instance.(o) And where a matter is referred to arbitrators, by rule of court, and they make

(k) 6 Taunt. 561. 2 Marsh. 276, S. C. (l) 3 Bing. 634.

(a) Willes, 315.

(b) 5 Durnf. & East, 6 ; and see 4 Dowl. & Ry. 814.

(c) 3 Esp. Rep. 101 ; but see 2 Chit. Rep. 40.

(d) 7 Durnf. & East, 453 ; and see 1 Durnf. & East, 691. 4 Dowl. & Ry. 814.

(e) 2 Rose, 50.

(f) 1 Sid. 327.

(g) 1 Ld. Raym. 636. 3 Salk. 49, S. C.

(h) 4 Durnf. & East, 312. *Grant v. Harding*, *Id.* 313, *in notis.* 1 Crompt. 3 Ed. 265. 4 Taunt. 473. 2 Dowl. & Ry. 193.

(i) 2 Str. 1178 ; and see 3 Moore, 64.

(kk) Append. Chap. XXXVI. § 19.

(ll) *Id.* § 6.

(m) 1 Str. 1. 10 Mod. 322, S. C. Barnes, 58. 1 Price, 308. 1 Chit. Rep. 743, (b). *Ante*, 554.

(n) 5 Barn. & Ald. 217.

(o) *Ante*, 485, 486.

their award, the courts will compel a performance of it, as much as if the award were part of the rule; so that a new rule is needless.(p)

In order to proceed by attachment, there must be *personal* notice of the award, and a demand of the money, or other thing awarded:(q) which demand may be made by the party himself, or by a third person under a power of attorney: And, at the time of demanding it, a copy of the rule *must be served on the opposite party, and of the master's or prothonotary's *allocatur* thereon, if the demand be of taxed costs, and also a copy of the award, and of the power of attorney, if the demand be made by a third person;(a) the original rule and *allocatur*,(b) and also the award and power of attorney,(c) if there be one, being at the same time produced and shown. But personal knowledge of an award, and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.(d) After a demand and refusal of the money or other thing awarded, the court, upon an affidavit of the due execution of the award(e) and power of attorney, which should, it seems, state the time when the award was executed,(f) and another, of *personal* service or knowledge of a copy of the rule and award, and of the demand and refusal,(g) &c. will in ordinary cases, when the time for making the award has not been enlarged, grant a rule for an attachment *nisi*,(h) which they will afterwards make absolute, on an affidavit of service, if no sufficient cause be shown to the contrary. But the court will not infer personal service of an award, to bring a party into contempt.(i) And where an award appears to have been made out of the time originally given to the arbitrator by rule of court, but which rule reserved to him the power of enlarging the time, it is not enough, for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement, when served with the rule of court.(k) So, where a cause is referred by a judge's order, made by consent of the parties, and the time for making the award is afterwards enlarged by a judge's order, on moving for an attachment for not performing the award, it must be shown, that the order enlarging the time was made by consent.(l) But where the arbitrator had power to enlarge the time for making his award, by indorsement on the order of reference, and that order, together with two indorsements enlarging the time, was made a rule of court; it was holden, that on moving for an attachment, for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.(m) The notice

(p) 1 Salk. 71.

(q) *Id.* 83. 12 Mod. 257, 312. *Per* Lord *Kenyon*, E. 35 Geo. III. K. B. 1 Bos. & Pul. 394. 8 Moore, 510, 610. 1 Bing. 410, 464, S. C. 2 Wms. Saund. 5 Ed. 186, (1).

(a) *Per* Lord *Kenyon*, H. 38 Geo. III. K. B.; but see 2 Blac. Rep. 990. 8 Moore, 44, C. P.

(b) 3 Durnf. & East, 351. 7 Dowl. & Ryl. 612. *Ante*, 500.

(c) 13 Price, 208. M'Clell. 72, S. C.; but see 8 Moore, 44, *semb. contra*.

(d) 1 Barn. & Cres. 264.

(e) Append. Chap. XXXVI. § 20; and see Imp. K. B. 10 Ed. 684, 5. Imp. C. P. 6 Ed. 698, 9.

(f) 6 Taunt. 251. 1 Marsh. 580, S. C.

(g) Append. Chap. XXXVI. § 21, 2. And for the form of the affidavit in the Exchequer, see Forrest, 80.

(h) Append. Chap. XXXVI. § 23.

(i) 5 Taunt. 813; and see 1 Chit. Rep. 170.

(j) 15 East, 97; and see 8 East, 13. 1 Marsh. 66. 6 Taunt. 251. 1 Marsh. 579, S. C.

(k) 5 Barn. & Cres. 390. 8 Dowl. & Ryl. 151, S. C.

(m) 5 Barn. & Cres. 528. 8 Dowl. & Ryl. 285, S. C.

of enlargement, when necessary, and rule for making the order of reference a rule of court, should be *personally* served; and therefore on a motion for an attachment, for filing a bill in equity contrary to an order of [*838] reference, *an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c. is not sufficient.(aa) The rule *nisi* for an attachment must also be *personally* served;(b) and the court of King's Bench will not grant a rule, that service on the defendant's attorney shall be sufficient, although it be sworn that repeated attempts have been made to serve the defendant personally with a copy of the award, but he was not to be found, and although it be suggested that he keeps out of the way, to avoid being served.(c)

In the King's Bench, when the submission to arbitration is by rule of court, or by order of *nisi prius*, there being a cause then depending, the affidavit for an attachment, for disobeying the award, must be entitled in the cause:(d) and if an affidavit be put into court, without any title, the court cannot take notice of it, though the adverse party is willing to waive the objection.(e) But when the submission is made a rule of court under statute, there being no cause depending, the affidavit for an attachment need not be entitled:(f) or it may be entitled "*In the matter*, &c.:"(g) though, such rule must be entitled "*The King against* ———."(h) The affirmation of a *Quaker* is, it seems, sufficient to ground an attachment, for the non-performance of an award.(i)

When a cause is referred at the trial, and a verdict taken for the plaintiff's security, and an award is afterwards made in his favour, the plaintiff may make his election, either to proceed on the award, by action or attachment, or on the verdict; and in the latter case, he is entitled to sign judgment, and to take out execution for the money awarded, without first applying to the court for leave.(k) And when an arbitrator awards damages, without any mention of costs, and directs that execution shall not be taken out for the damages, but that they shall be set off against a counter-demand of the defendant, the plaintiff's attorney may nevertheless take out execution for the costs, which by the rule of reference were to abide the event of the award.(l) But if either party die after the verdict, and before any award is made, the submission is determined, and the arbitrator cannot afterwards proceed to make an award; the death of the party operating as a [*839] revocation of his authority.(m) And, in the *Common Pleas, where a verdict has been found subject to a reference, and an award is made in vacation, whether before or after the return of the *habeas*

(aa) 1 Marsh, 66.

(b) *Denman v. Golding*, M. 59 Geo. III. K. B.

(d) 5 East, 21, (a). 12 East, 166, (a).

(f) 1 Smith R. 358. 5 East, 21. 12 East, 166, (a).

(h) 3 Durnf. & East, 601. 5 East, 21, (a). 12 East, 165. *Ante*, 480, 81; 493.

(i) *Per Bayley, J.*; and see the cases of *Powel v. Ward*, cited in Andr. 200, and *Taylor v. Scot*, cited in Cowp. 394. 1 Durnf. & East, 266; and the several cases referred to by Mr. Durnford, in a very elaborate note on the subject, in Willes, 292. 1 Dowl. & Ry. 121, 124. *Ante*, 88, 9; 178; but see 1 Str. 441. Willes, 291, *contra*.

(k) 1 East, 401. 1 Bos. & Pul. 97, 480. 3 Bos. & Pul. 244; and see 10 Moore, 110; but see 1 Salk. 84. Barnes, 58, *contra*.

(l) 2 Barn. & Ald. 597. 1 Chit. Rep. 325, S. C.; and see 10 Moore, 198. 6 Barn. & Cres. 193.

(m) 1 Marsh. 366. 7 Taunt. 571. 1 Moore, 287, S. C. 2 Barn. & Ald. 394. 1 Chit. Rep. 187, S. C. 3 Dowl. & Ry. 184. 2 Barn. & Cres. 345. 3 Dowl. & Ry. 608, S. C.; and see *Caldw. on Arbitration*, 29, 30. 4 Taunt. 702. 1 Younge & J. 368; but see Barnes, 210. *Bower v. Taylor*, E. 56 Geo. III. K. B., cited in *Caldw.* 30. 7 Taunt. 574, 5, *in notis*. *Ante*, 822, 3.

(c) 1 Chit. Rep. 170.

(e) 2 Durnf. & East. 643.

(g) 12 East, 166, (a).

corpora juratorum, final judgment should not be entered up till after the first *four* days of the term next ensuing the date of the award, in order that the party dissatisfied therewith may have an opportunity of taking the judgment of the court upon it.(a) When a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by an order of *nisi prius*, he cannot award a greater sum than that for which the verdict was taken;(b) and the court will not give leave to increase the sum in the declaration, and rule of reference, on an affidavit that a larger sum will probably be proved before the arbitrator.(c) If a greater sum be awarded than that for which the verdict was taken, no *assumpsit* by implication will it seems arise, to pay even to the extent of the verdict:(d) But if judgment in such case be entered for the whole, and it appear that a part of the sum is covered by a counter-demand, which was not a subject of dispute, so that only a balance, less than the amount of the verdict, is ultimately to be paid over to the plaintiff, the court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due.(e) And although an arbitrator cannot in his award go beyond the amount of the damages in the action, yet when all matters in difference are referred to him, he may it seems make his award for a larger sum as to the additional matters; for which, though the party cannot proceed on the verdict, he may have a remedy under the award.(f)

Where a cause is referred by order of *nisi prius*, a motion to set aside the award must be made, in the King's Bench, within the time allowed for moving for a new trial, unless a sufficient reason for delay be shown.(g) So, in the Common Pleas, if a verdict be taken for the plaintiff's security, and the award be made before the term, the defendant can only impeach it within the first *four* days of term:(h) and personal service of the award is not necessary to warrant the issuing of execution, if the attorney for the defendant has been served with a copy of the award.(i) It has been questioned, whether judgment for a sum of money directed to be paid by an award, reducing a verdict, can be entered before the day on which the payment of the sum is awarded.(k) But however that may be, execution ought not to be issued for it, before the day of payment:(k) And in the Common Pleas, if the plaintiff recover a verdict for *five* pounds, subject to an order of reference at *nisi prius*, whether such verdict should *stand, or be reduced to *twenty* shillings, and the arbitrator re- [*840] fuse to make an award, the court will not allow a verdict to be entered for the lesser sum, until such order be made a rule of court.(aa) But where a verdict was found for the plaintiff at *nisi prius*, for the damages in the declaration, subject to the award of an arbitrator, who declined proceeding in the reference, the court of King's Bench ordered, that the plaintiff should have judgment and execution forthwith, unless the defendant would consent to refer the damages to another arbitrator.(bb) The court of King's Bench rejected an application to amend the entry of a

(a) *Wilkinson v. Stewart*, 59 Geo. III. C. P. 10 Moore, 111.

(b) 5 East. 139; and see 1 Taunt. 151.

(c) 1 Maule & Sel. 675.

(d) 5 East, 139.

(e) 1 Taunt. 151.

(f) 1 Maule & Sel. 675.

(g) 6 Barn. & Cres. 629.

(h) 3 Bos. & Pul. 244. 10 Moore, 110.

(i) 3 Bos. & Pul. 244; and see 3 Taunt. 45, where the court of Common Pleas permitted judgment to be entered up, though the award was lost, upon an affidavit of its contents.

(k) 4 Taunt. 319.

(aa) 8 Taunt. 733. 3 Moore, 64, S. C.

(bb) 1 Barn. & Cres. 68. 2 Dowl. & Ry. 158, S. C.

verdict, according to the notes of an arbitrator to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them.(cc) And, where a cause has been referred to arbitration, the court cannot interfere to enter a nonsuit against the arbitrator's direction; but the party objecting to the award must move to set it aside.(dd) An agreement, however, to refer the *quantum* of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action, after the arbitrator has made his award.(e)

At common law, where the submission to arbitration was by rule of court, which was often the case, the conduct of the arbitrators, and of the parties to the submission, might, as it still may, be examined into; and if, on examination, it appeared that the arbitrators had been partial and unjust, or had mistaken the law, the court would not enforce a performance of the award.(f)[A] But where the submission was by bond or other writing, or by *parol*, there was no other way of impeaching the award, for the misbehaviour of the arbitrators, than by filing a bill in equity.(g) This was remedied by the statute 9 & 10 W. III. c. 15, § 2, which enacts, that "any arbitration or umpirage, procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such *corruption or undue practice* be made, in the court where the rule is made for submission to such arbitration or umpirage, *before the last day of the next term* after such arbitration or umpirage made and published to the parties."(h) But this statute does not extend to such awards as are made in pursuance of an order of *nisi prius*,(i) nor to *parol* awards,(k) which therefore remain as at common law. And, in the Common Pleas, where a verdict was taken for the plaintiff at *nisi prius* by consent, with [*841] leave for the defendant to move to set it aside; and a rule *having been obtained accordingly, the court ordered the verdict to

(cc) 1 Chit. Rep. 283. *Ante*, 713, (i).

(dd) 1 Marsh. 238.

(e) 2 Dowl. & Ry. 461.

(f) 1 Salk. 71, 73, 83. 1 Mod. 21. 2 Bur. 701. 1 Wms. Saund. 5 E. 327, c.

(g) 1 Wms. Saund. 5 Ed. 327, c.; and see 2 Madd. Chan. 714, 15, for the grounds of setting aside an award in Equity.

(h) Cowp. 23. Barnes, 55.

(i) 1 Str. 301. 2 Bur. 701. 1 Wms. Saund. 5 Ed. 327, c. 8 East, 466. 6 Barn. & Cres. 630.

(k) 7 Durnf. & East, 1. 1 Wms. Saund. 5 Ed. 327, c. *Ante*, 821.

[A] Courts construe awards with great latitude, and according to the intention collected from the words of the whole. *Grier v. Grier*, 1 Dall. 174. *Innes v. Miller*, 1b. 188. *Kuckle v. Kuckle*, 1b. 365. *Gonsales v. Deavens*, 2 Yeates, 539. *Midder v. Cravat*, 2 Bay, 370. *Sumpter v. Murrell*, 1b. 450. *Joy v. Simpson*, 2 N. H. 179. And therefore the terms "heirs at law," in an award respecting personal estate, may be construed to mean all a testator's children living, and the child or children of any of them who died in his lifetime. *Smith v. Smith*, 4 Rand. 95. Neither are arbitrators bound to employ technical words in their report, and their language is to be interpreted according to their obvious meaning. *Coze v. Lundy*, Coxe, 255. Everything is to be presumed, and every reasonable intendment made, in favour of an award. *Richards v. Brockenbrough*, 1 Rand. 449. *Coupland v. Anderson*, 2 Call, 106. *King v. Cook*, Charl. 287. *Archer v. Williamson*, 2 Harr. & Gill, 67. *Smith v. Minor*, Coxe, 16. *Karthauss v. Ferras*, 1 Pet. 222. *Fryeburg Canal v. Frye*, 5 Greenl. 38. Words written in the margin of an award by the arbitrators, in a distinct sentence, are to be considered as part of the award, and to receive the same construction as if inserted in the body of it. *Platt v. Smith*, 14 Johns. 368. Where, in a copy or counterpart of an award delivered to one of the parties, the word "dollars" was omitted, but in the other part, which was shown to the party at the same time, it was properly inserted, the omission in the copy was held to be immaterial. 1b.

stand, and the amount of the damages to be referred to an arbitrator, who made his award in vacation; the court held, that an application to set aside the award must be made within the first *four* days of the next ensuing term.(a) But where an award was made after the *essoins* day, but before the *quarto die post*, the court held that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term next following.(b) The court, we have seen,(c) will not entertain an application for setting aside an award, founded upon an indictment at the assizes, for not repairing a road, though the question in dispute be of a *civil* nature. And a rule was refused on motion, to set aside an award, on the ground that the *submission* had been obtained by fraud: the application should have been, to set aside the order of reference.(d)

The *grounds* upon which an application may be made to the courts, for setting aside an award, are that there is some objection to its legality, appearing on the face of the award itself, or from the reasons given by the arbitrators in support of it;(e) or else that there has been some irregularity, as want of notice of the meeting,(f) or collusion or gross misbehaviour of the arbitrators:(g) And if the application be made in due time, every ground of relief in equity, against an award, is equally open in a court of law.(h) If a mistake in point of law be made out by clear evidence on one side, which is not denied by the other, the court will set aside the award:(i) and a mistake in the judgment of the arbitrator is considered as a mistake in point of law.(j) But partiality and improper conduct in an arbitrator, in making his award, without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the court, to set aside the award.(k) And the court of King's Bench will not set aside an award, on the ground that the arbitrator was mistaken in point of law, unless the principles of law upon which he has decided appear on the face of the award:(l) nor will they refer the matter back again to the arbitrator, on an affidavit that the party had procured new evidence since the reference; unless it be sworn, as in the case of a new trial on the same ground, that there was **some* [*842] surprise, and that it was not such evidence as a reasonable man might have anticipated, or due diligence could have procured.(aa)

It is also a rule, that if the award be good on the face of it, the courts will not enter into the merits at large upon which it is founded; for if they did, no person, it is said, would ever undertake to be an arbitrator:(bb) And, in an action to recover the sum awarded, the defendant cannot dispute the

(a) 10 Moore, 110.

(c) *Ante*, 821.

(e) 3 East, 18; and see 6 Taunt. 255. 8 Taunt. 637. 2 Moore, 713, S. C. 1 Chit. Rep.

614. (a).

(f) 1 Salk. 71; and see 2 Chit. Rep. 44, (a). 8 Taunt. 694. 4 Moore, 148; but see 3 Atk. 529.

(g) 3 Atk. 529. 2 Bur. 701. *Sturt v. Moggeridge*, E. 43 Geo. III. K. B.

(h) 3 Bur. 1258, 9.

(i) *Wade v. Hunley*, T. 28 Geo. III. K. B.

(k) 8 East, 344; and see 1 Wms. Saund. 5 Ed. 327, b. (3). 6 Durnf. & East, 161. 2 Chit. Rep. 44, (a). Ry. & Mo. 17. 3 Bing. 137. 5 Barn. & Cres. 534. 8 Dowl. & Ry. 295, S. C.

(l) 3 Barn. & Ald. 237. 1 Chit. Rep. 674, S. C.; and see the cases referred to in Caldwell, on Arbitration, p. 53, &c.

(aa) 2 Chit. Rep. 42.

(bb) 1 Salk. 71. 1 Str. 301. 3 Atk. 529. 1 Ken. 393. 2 Bur. 701. 1 Wms. Saund. 5 Ed. 327, a. M'Clel. 253.

validity of the award; his proper course being to apply to the court to have it set aside.(c) It is not sufficient, in order to impeach an award, upon the face of which no objection appears, to state facts from which it may be inferred that the award was founded upon an incorrect notion of the law of the case.(d) And if the terms of an award be clear upon the face of it, the court will not admit an affidavit of one of the arbitrators to explain their intention.(e) So where a cause, involving a question of law, was referred to a barrister under a rule of court, to settle all matters in difference between the parties, and he made his award thereupon, but the question of law did not appear upon the face of the award; the court, considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law, upon the construction of a contract between the parties.(f) And though an arbitrator, on a mixed question of law and fact, has allowed transactions apparently illegal, as *premiums* of insurance on a voyage to an hostile port, the court will not set aside the award.(g) So where an arbitrator, to whom the question of the right of two rectors to the tithe of certain lands was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute; the court of Common Pleas held, that he did not exceed his power, by awarding undivided moiety of the tithes to the two rectors.(h) Even where matter of law alone, and no matter of fact is referred to a barrister, the court will not set aside an award by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award.(i) And an arbitrator is not bound by a rule of practice, adopted by courts of law for general convenience; Therefore where, on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, when it would not have been allowed by a court of law or equity, the court refused to set aside the award on that ground.(k) By submission to arbitration, [*843] it was agreed between A. and B., *who carried on the business of surgeons and apothecaries at H., to dissolve partnership, and that all matters in difference between them, and the terms and conditions on which the co-partnership should be dissolved, should be referred to an arbitrator; and the arbitrator having determined, that it should not be lawful for B. during the lifetime of A., to carry on the profession or practice of a surgeon, &c. at H., or within *thirteen* miles thereof; the court held, that the arbitrator had not exceeded his authority.(a) But where an arbitrator, to whom a cause was referred at *nisi prius*, found that the plaintiff was entitled to a right of way for carriages, which he had at first claimed by his declaration, but afterwards abandoned; this was holden to be an excess of jurisdiction, and the award was set aside *pro tanto*.(b)

(c) Gow, 5.

(d) 1 Taunt. 48.

(e) 3 Moore, 241.

(f) 13 East, 357. 1 Maule & Sel. 105. 5 Maule & Sel. 504. 1 Dowl. & Ry. 366, *accord*; but see 1 Brod. & Bing. 80.

(g) 6 Taunt. 254; and see 9 Moore, 666.

(h) 3 Taunt. 426; and see 1 Stark. Nl. Pri. 209. 1 Moore, 187. M'Clel. 253.

(i) 1 Bing. 104. 7 Moore, 434, S. O.

(k) 2 Barn. & Ald. 691; and see 9 Moore, 666.

(a) 5 Dowl. & Ry. 317; and see 1 M'Clel. & Y. 393.

(b) 1 M'Clel. & Y. 509.

Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside; because such suit must fail.(c) But where a cause is referred by order of *nisi prius*, and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered for the defendant; although such award be void, the court will set it aside, for otherwise, the party in whose favour it is made, would have judgment upon the verdict, without any new proceeding to enforce the award.(c)

By an order of *nisi prius*, a cause was referred to an abitrator, with liberty for him, if he should think fit, to examine the parties to the suit; and the court held, that the arbitrator might examine the plaintiff to a point upon which no other evidence could be adduced on the same side.(d) So it has been holden, that the courts will not set aside the award of an umpire, because he received evidence from the arbitrators, without examining the witnesses, unless he was required to re-examine them, before the making of his umpirage.(e) And where an arbitrator, having by mutual agreement of the parties closed his examination, refused the application of the defendant's attorney for another hearing, and made his award; the court of Common Pleas would not set it aside, on the affidavit of the defendant's attorney, that he was in possession of evidence which would repel that on which the award was founded.(f) So, where it was stipulated that, in case of the breach of an agreement, the sum of *one hundred* pounds should be received as a stipulated debt, binding on each party as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only *ten* pounds damages; the court held, that in order to entitle the party to move to set aside the award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it.(g) But all the witnesses of the party against whom an award is made, should regularly be examined, and in his presence, if he require *it, or it will be a [*844] ground for setting aside the award.(a) Arbitrators are bound by those rules of evidence, which govern the courts of law.(b) And an award, in an action for not repairing, made by arbitrators upon view of the premises, without calling the parties before them, may be set aside.(cc) If an award be made on an improper stamp, and no application be made to enforce the award, the court will not set it aside:(dd) And if an objection to the stamp be not alleged as a ground for obtaining a rule to show cause to set aside an award, the court will not suffer it to be relied upon afterwards, when cause is shown.(ee) On a motion respecting an award of commissioners under an inclosure act, the court of King's Bench said: "We may punish upon this, if there be any corruption; or enforce its execution by *mandamus*: but we are not to interpret or set aside these awards, upon complaint of their obscurity,(ff) &c." And if, upon a reference, either party is precluded by the terms of the rule from going into evidence of that

(c) 5 Barn. & Cres. 384. 8 Dowl. & Ryl. 100, S. C.

(d) 3 Barn. & Cres. 590. 5 Dowl. & Ryl. 301, S. C.

(e) 4 Durnf. & East, 589; and see 1 Bos. & Pul. 91, 175. 1 Bing. 384.

(f) 1 Marsh. 404; and see 7 Price, 636.

(a) 4 Price, 232.

(cc) 2 Chit. Rep. 44.

(ee) *Liddell v. Johnstone*, H. 38 Geo. III. K. B.

(ff) Case on the *Over-Kellet* inclosure act, H. 38 Geo. III. K. B.; but see 7 Dowl. & Ryl. 221.

(g) 2 Barn. & Ald. 704.

(b) 1 M'Clel. & Y. 160.

(dd) 7 Durnf. & East, 95.

which he is desirous to try, his remedy is by moving to set aside the rule of reference; but he cannot impeach the award.(gg)

The mode of setting aside an award is by application to the court in which the action was depending, when the reference is by rule of court, or order of *nisi prius*; or, if there be no action depending, in the court of which the submission is made a rule under the statute. This application is usually made by the unsuccessful party; but it may be made by the party in whose favour the award is, if it appear that a sum has been omitted therein by mistake.(h)

It has been determined, however, that a party, after receiving the costs of the reference and award, which by the terms of the rule of reference were to be paid by the other party, cannot move to set aside the award.(i) And, unless the application be founded on some objection to the legality of the award, appearing on the face of it, there must be an *affidavit*, stating the grounds upon which it was made; and it is usual to have an affidavit of facts, in answer to the application. When the reference is by rule of court, or order of *nisi prius*, there being a cause then depending, the affidavits in support of or in answer to the rule for setting aside an award, must be *entitled* in the cause;(k) but when the submission is made a rule of court under the statute, there being no cause depending, it is not necessary that the affidavits should be entitled:(l) or they may be entitled, *In the matter*, &c.(m) In the King's Bench, it is a rule that "when a rule to show cause is obtained to set aside an award, the several objections thereto, [*845] intended to be insisted upon at the *time of making such rule absolute, must be stated in the rule to show cause:"(aa) which rule has been adopted in the Exchequer.(b) But where a cause, and all matters in difference, were referred to arbitration, and a motion was made to set aside the award, upon the ground that the arbitrator had not decided upon certain matters in difference; the court of King's Bench held, that it was not necessary to state those matters in the rule; inasmuch as they were specified in the affidavit upon which the rule was obtained.(c) In practice it is usual, when a rule for an attachment is moved for, to oblige the party who complains of the award, to move to set it aside, unless the objections appear on the face of it; and then both rules come on together.(d) This gives the other side an opportunity of answering the allegations, on which the objections to the award are founded. If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs.(e)

The courts, we may remember, will not, on the last day of term, hear a motion for a rule *nisi* to set aside an award;(f) nor can counsel be heard on that day, to show cause against such a rule, but the same must be enlarged, and made peremptory for the next ensuing term.(f) And when

(gg) 3 Taunt. 378.

(h) 2 Chit. Rep. 44; and see 6 Taunt. 111, by which it appears that the rule should be, either to set aside the award, or to send back the case to the same arbitrator, or to amend the award, by including the sum omitted.

(i) 2 Barn. & Cres. 801. 4 Dowl. & Ry. 272.

(k) 5 East, 21, (a). *Ante*, 493, 838.

(l) *Id.* 21. 1 Smith, R. 358. *Ante*, 493.

(m) 12 East, 166, (a). *Ante*, 838.

(aa) R. E. 2 Geo. IV. K. B. 2 Barn. & Ald. 539. 2 Chit. Rep. 376.

(b) 11 Price, 57. 1 M'Clel. & Y. 394.

(c) 6 Barn. & Cres. 629.

(d) 6 East, 310.

(e) 2 Chit. Rep. 43.

(f) *Ante*, 498.

the submission is by bond or other writing under the statute, the application to set aside the award must be made before the last day of the next term after it is made.^(g) So, where the application is to refer back the award to the same arbitrator to re-consider it, on the ground that he had not sufficient materials before him, it must be made within the same time; although the arbitrator be not charged with corruption or undue practice.^(h) But the limitation of time prescribed by the 9 & 10 W. III. for applications to the court to set aside awards, applies only to cases where an original authority is given to the court by that act:⁽ⁱ⁾ And though the court will in general adopt the same rule, in cases where their authority exists independently of the act, yet when they see sufficient reason for their interference, they will interpose their authority, though the time prescribed should have elapsed.^(k)

The courts will not set aside an award, though for defects appearing on the face of it, after the expiration of the time limited by the statute:^(l) And a party cannot, in showing cause against an attachment, impeach the award for any intrinsic matter.^(m) But, upon an application for an attachment, for non-performance of an award, it is competent to the parties to object to the award, for any illegality apparent on the face of it, although the time limited by the statute, for applying to the court to set aside the award, is expired:^(a) The reason is, that upon a [*846] motion for an attachment, the party would be without remedy, if the attachment were granted, notwithstanding the illegality of the award; whereas if the party were left to his remedy, by bringing his action on the award, it would be competent to the defendant to take advantage of any illegality appearing on the face of it.^(bb)

*CHAPTER XXXVII.

[*847]

Of TRIALS at NISI PRIUS, and their INCIDENTS.

IN the present chapter will be considered, as incidents to the trial at *nisi prius*, pleas *puis darrein continuance*; withdrawing the record; challenging and swearing the jurors, and *talesmen*; the order in which counsel are heard at the trial; withdrawing a juror; bills of exceptions, and demurrers to evidence; the nonsuit, or verdict; and, if the verdict be given for the plaintiff in ordinary cases, or for the defendant in *replevin*, the damages found by the jury; special verdicts, special cases, and points reserved; and lastly, the *postea*.

When the cause is called on, the defendant may plead any matter of defence arising after the *last* continuance, or, as it is called in French, *puis*

(g) *Ante*, 840.

(h) 2 Durnf. & East, 781.

(i) *Ante*, 840.

(k) 6 Taunt. 111. 1 Marsh. 471, S. C.; and see 6 Barn. & Cres. 629.

(l) *Per* Powell, J. Andr. 297. 1 Ken. 118. 1 East, 276; and see Barnes, 55.

(m) 6 Durnf. & East, 161. 3 Bing. 167; but see 1 Ken. 118.

(a) 7 Durnf. & East, 73; and see 1 Wms. Saund. 5 Ed. 327, c. Barnes, 56, 7. 1 Ken. 118. 11 East, 368, 9.

(bb) 1 East, 277, 8, *per* Lawrence, J.

darrein continuance, or in Latin, *post ultimam continuationem*; and such a plea may be pleaded, after the jury are gone from the bar; but not after they have given their verdict.(a) The last continuance, previous to the sittings or assizes, is the day of the return of the *venire facias*, from whence the plea is continued, by the award of the *distringas* or *habeas corpora*, to the next term, unless the chief justice or judges of assize shall first come on the day of *nisi prius*:(b) And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded by the defendant; as that the plaintiff has given him a release, or is bankrupt,(c) outlawed, or excommunicated; or that the defendant has become bankrupt, and obtained his certificate;(d) or an award made on a reference after issue joined.(e) So, in an action against an executor or administrator, a judgment recovered against the defendant, after plea pleaded, for a debt due from the testator or intestate, may be pleaded after the last continuance:(f) And it is no answer to such a plea, that the judgment was obtained in an action of *debt*. on simple contract, or by confession of the defendant.(g)

So it may be pleaded, that a *feme* plaintiff is married, or, [*848] *in *debt* by an administrator, that the plaintiff's letters of administration are revoked, *puis darrein continuance*.(aa) But in *ejectment*, the defendant is not allowed to plead a release by the lessor of the plaintiff.(bb) And where a landlord, with the permission of his bailiff, who had made a distress for rent, commenced an action in the bailiff's name, against the sheriff, for taking insufficient pledges, and the bailiff afterwards, without the landlord's privity, released to the sheriff, who pleaded it *puis darrein continuance*, the court of Common Pleas, we have seen, set aside the plea, and ordered the release to be delivered up to be cancelled.(cc) So, where husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R. M. commenced an action on a promissory note, against defendants, in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*; the court, on application, ordered the plea to be taken off the record, and the release to be given up to be cancelled.(dd) So, a plea *puis darrein continuance*, of a release by one of several plaintiffs in *assumpsit*, was set aside by the court of King's Bench, without costs, on the terms of indem-

(a) *Doc. pl.* 177. *Pearson v. Parkins*, H. 3 Geo. I. Bul. Ni. Pri. 310.

(b) Bul. Ni. Pri. 310; and see Dyer, 361. 2 Lutw. 1143. 1 Blac. Rep. 497, for the time to which the plea is continued.

(c) *Capper v. Stewart*, H. 28 Geo. III. K. B. 15 East, 622; and see 4 Barn. & Cres. 920. 7 Dowl. & Ryl. 409, S. C.

(d) But this it seems must be pleaded *specially*, and not in the *general* form prescribed by the statute 6 Geo. IV. c. 16, § 126. 6 East, 413. 2 Smith, R. 659. 1 M'Clel. & Y. 350, S. P.; but see 2 H. Blac. 553. 9 East, 82. *Ante*, 647, 8.

(e) 2 Esp. Rep. 504.

(f) 5 Taunt. 333. 1 Marsh. 70, S. C.

(g) 5 Taunt. 665. 1 Marsh. 280, S. C.; and see 7 East, 53. 3 Barn. & Cres. 317. 5 Dowl. & Ryl. 175, S. C.

(aa) Bul. Ni. Pri. 309; and see Com. Dig. tit. *Abatement*, T. 24.

(bb) 4 Maule & Sel. 300. 2 Chit. Rep. 323, S. C.; and see 7 Taunt. 9.

(cc) 7 Taunt. 48. *Ante*, 677.

(dd) 4 Barn. & Ald. 419.

nifying the plaintiffs, who had released the action, against the costs of it, although their consent had not been obtained before action brought; it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person.(e) But unless a very strong case of fraud be made out, the court of Common Pleas will not control the legal power of a co-plaintiff to execute a release.(f)

If any matters pleadable after the last continuance happen after plea, and before the return of the *venire facias*, they must be pleaded in *bank*.(g) But matters arising after the return of the *venire facias*, may be pleaded either in *bank* or at *nisi prius*:(h) And where the defendant had obtained his certificate under a commission of bankrupt, after plea pleaded, and then pleaded it in *bank*, as a matter arising after the last continuance, but in fact another continuance had intervened between the certificate and the plea, the court of King's Bench permitted him to plead it *nunc pro tunc*:(i) on payment of costs:(k) But matters arising after the trial, and before the day in *bank*, *cannot be pleaded *puis darrein continuance*.(a) [*849] And where, in an action against a member of parliament, two persons became sureties in a bond, conditioned for the payment of such sum as should be recovered, with costs; and the cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt; but having suffered a term to elapse after obtaining his certificate, without pleading it, the court refused to let him plead it as of the former term, *puis darrein continuance*, except on condition of dismissing his bill in equity, and paying all costs at law, and in equity, as between attorney and client.(b) So where notice of trial had been given for the sittings after *Trinity* term, but which was afterwards continued to the first sittings in *Michaelmas* term, and again to the sittings after that term, when the cause was tried, and the defendant had obtained his certificate in the preceding *Trinity* vacation, the court held, that it was too late to plead his certificate *puis darrein continuance*; and they refused to receive such a plea, on the terms of his paying the costs of the trial.(c) So, where a continuance was entered from *Trinity* to the first day of *Michaelmas* term, and matter arising during the interval was pleaded after the first day of *Michaelmas* term, by way of plea *puis darrein continuance*, the court ordered the plea to be taken off the file.(d) A plea of *bankruptcy* in the defendant, after the last continuance, was set aside, as having been pleaded after the proceedings had been stayed in an action on the bail bond.(ee) And where a person who has become bankrupt, is sued for a cause of action arising before his bankruptcy, and pending the suit, and before trial, obtains his certificate, he must plead it *puis darrein continuance*; and if he neglect to do so, and judgment is obtained against him, he cannot plead his certificate, to an action on such judgment.(ff) In an action however, which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea *puis*

(e) 1 Chit. Rep. 390. *Ante*, 677, 8.

(f) 7 Taunt. 421. *Ante*, 678.

(g) For the form of a plea *puis darrein continuance* in *bank*, see Append. Chap. XXXVII. § 1.

(h) 5 Taunt. 333. 1 Marsh. 70, S. C. For the form of a plea *puis darrein continuance* at *nisi prius*, in a town cause, see Append. Chap. XXXVII. § 2.

(i) *Copper v. Stewart*, H. 28 Geo. III. K. B.

(k) 2 Smith R. 396.

(a) *Richards v. Hinton*, E. 22 Geo. III. K. B.

(b) 3 Barn. & Ald. 577.

(c) 1 Dowl. & Ry. 521. 5 Barn. & Ald. 852, S. C.

(d) 3 Barn. & Cres. 612. 5 Dowl. & Ry. 621, S. C.

(ee) 4 Barn. & Ald. 249.

(ff) 6 Barn. & Cres. 105. 9 Dowl. & Ry. 171, S. C.

darrein continuance of the defendant's bankruptcy and certificate, the certificate having been obtained since the term, is admissible. 1 Moody & M. 122.

These pleas are twofold; in abatement, (g) and in bar. (h) If any thing happen pending the writ, to abate it, this may be pleaded *puis darrein continuance*, though there be a plea in bar; for this only waives all pleas in abatement that were in being at the time of the bar pleaded, and not subsequent matter; but though it be pleaded in abatement, yet after a former bar pleaded, it is peremptory, as well on demurrer as on trial, because after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over. (i) After a plea in bar, if the defendant plead a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall afterwards be taken of it: (k) Nor can the plaintiff afterwards proceed on the former plea. (l)

[*850] *The great requisite of these pleas is *certainty*: (a) and it is not good pleading to say generally, that *after the last continuance* such a thing happened, but the time and place must be precisely alleged. (b) The form of the plea, if at the assizes, is as follows: *And now at this day, that is to say, on, &c. comes the said C. D. by E. F. his counsel, and says (if in bar,) that the said A. B. ought not further to maintain this action against him, the said C. D.: because he says, that after the — day of — last past, from which day until the — day of —, in — term next, (unless the justices of our lord the king, assigned to hold the assizes of our said lord the king, in and for the county of —, should first come on the — day of —, at — in the said county of —,) the action aforesaid is continued, to wit, on &c. at &c. the said A. B. by his deed, dated, &c. did release, &c.; and so show the particular matter.* (cc) In *abatement*, the plea concludes, by praying judgment of the writ, and that the same may be quashed; (dd) or, if the writ is abated *de facto*, by praying judgment if the court will further proceed: (e) In *bar*, the conclusion of the plea is, *that the plaintiff ought not further to maintain his action, and not that the former inquest should not be taken*: because it is a substantive bar of itself, and comes in place of the former, and therefore must be pleaded to the action. (f)

There are likewise some pleas which may be pleaded at *nisi prius*, that cannot properly be termed pleas *puis darrein continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance; as in *trespass*, that the plaintiff was outlawed for felony: (gg) So the defendant may plead, that a *feme* plaintiff was *covert* on the day of the writ purchased; but he cannot plead that she took *baron* pending the writ, without pleading it after the last continuance: The diversity seems to be, between such things as disprove the writ in fact, and such as disprove it in law. (hh)

(g) For the form of a plea *puis darrein continuance*, in *abatement*, see Append. Chap. XXXVII. § 4.

(h) Gilb. C. P. 105. Aleyn, 66.

(k) 1 Salk. 178.

(a) Yelv. 141. Cro. Jac. 261. Freem. 112.

(b) Bul. Ni. Pri. 309.

(cc) Gilb. C. P. 105. 2 Lutw. 1143.

(dd) 3 Lev. 120. Bul. Ni. Pri. 311.

(e) Cro. Eliz. 49. 2 Lutw. 1143. Bul. N. Pri. 310; but see Dyer, 361, *in marg.*

(gg) Theol. Dig. 204.

(i) *Id. ibid.* Freem. 252.

(l) *Capper v. Stewart*, H. 28 Geo. III. K. B.

2 Lutw. 1143. 2 Salk. 519. 2 Wils. 139.

(cc) *Id.* 310. Append. Chap. XXXVII. § 3.

(hh) Bro. Abr. tit. *Continuance*, pl. 57. Bul. Ni. Pri. 310.

Pleas after the last continuance being productive of delay, are subject to the same sort of restraints as pleas in abatement; they must be verified on oath, before they are allowed; (i) and they cannot be amended after the assizes are over: (k) There can be but one plea *puis darrein continuance*; (l) and such a plea cannot it is said be pleaded after a demurrer. (m) But if a plea *puis darrein continuance* be filed, and verified on oath, the courts *cannot set it aside on motion, but are bound to receive [*851] it: (a) A plea *puis darrein continuance*, may be put in at *nisi prius*, upon paper; and it is the duty of the associate afterwards to transcribe it on the *nisi prius* record. (b) An affidavit to verify a plea *puis darrein continuance* at the assizes, if sworn at the assize town, on the commission day of the assizes, before a commissioner for taking affidavits, is not good; it should be sworn before one of the judges of assize; but the judge at *nisi prius* will allow it to be resworn before him. *Per Park, J.* after conferring with Mr. Baron Vaughan, in *Bartlett v. Leighton*, Oxford Spring Ass. 1828. And an affidavit, referring to the plea, need not be entitled in the cause. (c)

When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there; for the judge has no power to accept of a replication, nor to try it, (d) but ought to return the plea as parcel of the record of *nisi prius*; (ee) and if the plaintiff demur, it cannot be argued there. (ff) When a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant, on the expiration of a rule given for him to join in demurrer, refuse to do so, the plaintiff may sign judgment: (g) And, in order to prevent vexatious delay, the court of King's Bench will order a demurrer to such a plea, to stand for the first paper day in term. (h) In *covenant* against executors, the defendants pleaded *plene administraverunt*, and a retainer by one of them, with the assent of the other, for a debt due to himself: at the assizes, they put in a plea *puis darrein continuance*, to which the plaintiff replied, and the defendants demurred to the replication: judgment having been given for the defendants on the demurrer, the court of King's Bench held, that they were entitled to the costs incurred after the plea *puis darrein continuance*, but not to the costs of the whole cause. (ii)

(i) Freem. 252. 1 Str. 493. 2 Smith, R. 396. 1 M'Clell. & Y. 350. Append. Chap. XXXVII. § 5.

(k) Yelv. 181. Freem. 253. Bul. Ni. Pri. 309; but see the case of *Hartley v. Dixon*, M. 29 Geo. III. K. B. 2 Smith, R. 659, S. C., where a plea *puis darrein continuance* was amended upon terms.

(l) Bro. Abr. tit. *Continuance*, pl. 6, 41. Jenk. 160. Gilb. C. P. 105.

(m) 1 Str. 493, cites Moor, 871; and see 1 Ld. Raym. 266. 6 Mod. 9; but see Hob. 81, *contra*. Com. Dig. tit. *Abatement*, I. 24. 1 Chit. Pl. 4 Ed. 573.

(a) 2 Wils. 137. 3 Durnf. & East, 554. 5 Taunt. 333. 1 Marsh. 70, S. C. 1 Stark. Ni. Pri. 62; but see Jenk. 159; Yelv. 180; Bul. Ni. Pri. 309, where it is said to be in the breast of the judge, whether he will accept such plea or not, that is, whether he will or will not proceed in the trial: And in Say. Rep. 268, a plea *puis darrein continuance* was set aside, because the matter of it arose before the last continuance.

(b) Ry. & Mo. 404.

(c) 5 Taunt. 333. 1 Marsh. 70, S. C.; *Sed quare*; and see 3 Price, 200, 261, *semb. contra*.

(d) *Copper v. Stewart*, H. 28 Geo. III. K. B.

(ee) Yelv. 180. Cro. Jac. 261, S. C. Freem. 252. 2 Mod. 307, S. C.

(ff) 2 Mod. 307. 1 Stark. Ni. Pri. 62.

(g) Freem. 252. Bul. Ni. Pri. 311. And see further, as to pleas *puis darrein continuance*, when necessary, and the time and mode of pleading them, 1 Chit. Pl. 4 Ed. 569, &c. Steph. Pl. 81, &c.

(h) 1 Stark. Ni. Pri. 62.

(ii) 4 Barn. & Cres. 117. 6 Dowl. & Ryl. 81, S. C.

So, in the Common Pleas, where the defendant, an uncertificated bankrupt at the time of his arrest, put in bail, pleaded the general issue, and afterwards delivered a plea of his bankruptcy, and certificate *puis darrein continuance*, on which the plaintiff withdrew the record, and countermanded notice of trial, and the defendant, after a rule to reply, signed judgment of *non pros*, and taxed his costs; the court ordered the proceedings on the judgment to be stayed without costs. 1 Moore & P. 138.[A]

[A] *Puis darrein continuance* must in general be pleaded before a continuance has intervened; but the court may, for special reasons, allow it after such continuance. *Hosider v. Kaufman*, 11 S. & R. 146. And it requires extreme certainty—the day of continuance should be specified. *Vicary v. Moore*, 2 Watts, 451. It should also conclude “that the plaintiff ought not farther to maintain his action.” *M’Gowan v. Hoy*, 4 J. J. Marsh, 223.

Where matter of defence has arisen after the commencement of a suit, it cannot be pleaded in bar of the action generally, but if it arises before plea or continuance, must be pleaded as to the further maintenance of the suit. *Yeaton v. Linn*, 5 Pet. 224. A court may allow for special reasons, a plea to be put in *nunc pro tunc*, and a plea *puis darrein continuance*, though a continuance has intervened. *Lyon v. Marclay*, 1 Watts, 271. *Nettles v. Swaza*, 1 Mis. 100. It may even be admitted after the cause has been remanded from the court of appeals. *M’Gowan v. Hoy*, 4 J. J. Marsh, 223.

A general release, given after the commencement of an action, need not be pleaded *puis darrein continuance*, unless a plea has been before filed in the action. Such a release may also be pleaded in bar generally, and need not be in bar of the farther maintenance of the action. *Kimball v. Wilson*, 3 N. H. 96. An affidavit to the truth of the fact it contains, must, in South Carolina, accompany a plea *puis darrein continuance*. *Morrow v. Morrow*, Const. Rep. 455. No matter of defence after action brought can be properly pleaded generally, but should be pleaded in bar *puis darrein continuance*. *Elmo v. Beers*, 3 M’Cord, 1. A plea of *puis darrein continuance*, that the plaintiff had become an insolvent debtor, is bad on demurrer. *Turner v. Roberts*, 1 Mis. 416. After several continuances of a cause commenced by a *feme sole*, but previously to any other plea, the defendant pleaded in abatement that the plaintiff pending the writ viz. on, &c., had married, and that her husband was still living. The plea was verified by affidavit, and the day on which the coverture was averred to have taken place, was subsequent to the last continuance. Held, that the plea could not be rejected on motion for not expressly alleging the coverture to have taken place, *puis darrein continuance*. *Templeton v. Clary*, 1 Blackf. 288. A plea *puis darrein continuance*, in bar of an action is a waiver of all former pleas. *Aliter*, where the matter of the plea affects the remedy only and not the right of action. *Culver v. Barney*, 14 Wend. 161. Matter arising after issue joined, and which may be pleaded by way of plea *puis darrein continuance*, must be so pleaded without delay. *Jackson v. Rich*, 7 Johns, 144; and cannot be given in evidence unless pleaded. *Ibid.* A plea *puis darrein continuance* of a discharge under the act abolishing imprisonment for debt in New York, in certain cases, is not a waiver of a plea in bar before put in; and the plaintiff cannot confess the plea, and take judgment, but must proceed and try the former issues. *Rayner v. Dyett*, 2 Wend. 300. And such a plea in bar as of a discharge under an insolvent act pleaded *puis darrein continuance*, need not be verified by affidavit, unless tendered at the circuit or sittings; nor then if probable cause of its truth be shown to the judge, who may receive it without oath or not, in his discretion. *Bancker v. Ash*, 9 Johns, 250. *Morgan v. Dyer*, 10 Johns, 161. A plea *puis darrein continuance*, although not pleaded in due time, the plaintiff cannot treat it as a nullity but must reply, or apply to the court to set it aside. *Morgan v. Dyer*, 10 Johns, 161.

A declaration on promissory notes alleged that the defendant did not pay the sums of money in the notes mentioned, &c., and the defendant pleaded *puis darrein continuance*, that he paid the plaintiff the several sums of money mentioned in the plaintiff’s declaration. On demurrer the plea was held good, being as broad as the declaration, plainly meaning that the defendant had paid the amount of the note, and that, if they were notes bearing interest he paid the interest also. *Chew v. Wooley*, 7 Johns, 399. If the defendant pay the plaintiff’s demand during an impurance he may afterwards plead regular plea of payment, and need not plead it *puis darrein continuance*. *Tillotson v. Preston*, 3 Ib. 229. And he need not plead payment of interest and costs. *Ib.* A plea *puis darrein continuance* cannot be interposed after a verdict or a *relicta* and *cognovit*. *Palmer v. Hutchins*, 1 Cow. 42. A plea *puis darrein continuance* need not, in general, although the practice is not uniform, be verified by affidavit, and on such a plea the defendant may, as in other cases, enter a rule of course to reply or that the plaintiff be *non-prossed*. *Jackson v. Peer*, 4 Ib. 418.

In ejectment, as in other actions, matters of defence arising after issue joined, should be pleaded *puis darrein continuance*. *Jackson v. M’Michael*, 3 Cow. 75. But where the defendant in ejectment had purchased the lands at a sheriff’s sale before the action was brought but

Previously to swearing the jury, or afterwards by consent of the defendant's counsel, the plaintiff may *withdraw* the record, and by that means prevent the cause from being tried: But this cannot be done by the plaintiff's counsel, until a brief has been delivered to him; (k) a retainer in a cause, without a brief, not being sufficient. (l) If the record be not withdrawn, the trial proceeds; and as the jury are called, they may be challenged.

Challenges are of two kinds; first, to the *array*, (m) and secondly, to the *polls*. Challenges to the *array* are at once an exception to the whole panel, in which the jury are arrayed, or set in order by the sheriff in his *return*; and they may be made on account of partiality, [*852] or some default in the sheriff, or his under-officer who arrayed the

(k) 2 Camp. 487.

(l) 3 Taunt. 225.

(m) Append. Chap. XXXVII. § 6.

did not take a deed until after issue joined, it was held that the deed related back to, and in judgment of law was executed at the time of sale, and need not be pleaded *pais darrein continuance*, but might be given in evidence under the general issue. *Ib.* And after judgment a plea *pais darrein continuance* cannot be withdrawn and the party allowed to plead over any previously existing matter. *Turner v. Roberts*, 1 Mis. 416.

Defences arising after the commencement of an action or after plea filed, should be pleaded *pais darrein continuance* or against the further maintenance of the suit. *Semmes v. Maylor*, 13 Gill & Johns, 358. *Longworth v. Flagg*, 10 Ohio, 300. In Alabama, if a matter of defence arises after issue joined, it must be pleaded *pais darrein continuance*; if it arises pending the suit but before issue joined, it is pleadable in bar to the further maintenance of the suit. *Barnes v. Hindman*, 7 Ala. 531. Matter arising pending a suit but before plea pleaded is an original plea pleadable with other pleas in bar in Alabama under the statute allowing several pleas. *Sadler v. Fisher*, 3 Ala. 200. The filing of a plea *pais darrein continuance* waives all prior issues. *Spafford v. Woodruff*, 2 M'Lean, 191. *Scott v. Brokaw*, 6 Blackf. 241. *Dea v. Sanderson*, 3 Harr. 426. *Sadler v. Fisher*, 3 Ala. 200. And this, whether the plea last pleaded goes to the whole or part only of the plaintiff's declaration. *Sanderlin v. Danbridge*, 3 Humph. 99. *Aliter*, in Florida. *Parkhill v. Union Bank*, 1 Branch, 110. In New Hampshire, a special plea in bar *pais darrein continuance* is receivable in the discretion of the court, although a term has intervened between the time when the matter of the plea arose and the time of plea pleaded, and in such case the plea should be pleaded *nunc pro tunc*. *Rangely v. Webster*, 11 N. H. 299. Where a plea *pais darrein continuance* is pleaded by one of several defendants, containing matter affecting himself and not the others, the plaintiff may confess the plea at once and enter a *nolle prosequi* as to that defendant and proceed to trial as to the others. *Beekman v. Peck*, 5 Hill, 513.

Matter of defence arising after issue joined, should regularly be pleaded at or before the time of the next continuance; a *bona fide* plea subsequently put in will be sustained on satisfactory excuse. *Tuffy v. Gibbons*, 19 Wend. 639. On demurrer to a plea *pais darrein continuance* it cannot be objected that it is not verified by affidavit, nor that it is accompanied by another plea; such questions can only be raised on motion. *Nicholl v. Mason*, 21 Wend. 339. In all actions in Pennsylvania, a defence arising during the pendency of the suit may be pleaded after the last continuance in bar of the plaintiff. *Brownfield v. Braddee*, 9 Watts, 149.

In South Carolina, generally, a plea *pais darrein continuance* without an affidavit of the fact it sets forth, and that such a fact occurred since the last continuance, is inadmissible. But, the affidavit is to inform the court and not to give validity to the plea; where, therefore, such a plea has been filed with leave of the court, it will be presumed that satisfactory proof had been given to the court, or that it was consented to by the opposite party. *Morrow v. Morrow*, 3 Brevard, 394. In Missouri, it is in the discretion of the court to receive the plea *pais darrein continuance* after more than one continuance from the time the matter arose. *Thomas v. Vandozer*, 6 Mis. 201. So also, in Tennessee. *Wyatt v. Richmond*, 4 Humph. 365. In Kentucky, a plea offered before issue joined or plea pleaded which did not contain matter that accrued after a continuance, though it was in form a plea in bar of the further prosecution of the suit, was held not to be a plea *pais darrein continuance*. *Clark v. Fox*, 9 Dana, 193. It was held, also, that such a plea filed with others could not have the effect of superseding them nor be considered as a waiver of other pleas, the right to file it being given by a statute which allowed a defendant to file as many pleas as he wished. *Ib.* In Illinois, the plea of *pais darrein continuance* may be filed at any time before trial. *Robinson v. Burkell*, 2 Scam. 278.

panel.(a) And generally speaking, the same reasons that before awarding the *venire*, were sufficient to have directed it to the coroner or elisors, will be also sufficient to quash the array, when made by an officer of whose partiality there is any good ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he array the panel at the nomination or under the direction of either party, this is good cause of challenge to the array. But it is no ground of objection to the array, for an un-indifferency on the part of the sheriff, that his officer has neglected to summon one of the *twenty-four* special jurymen, returned on the panel.(b) Where, upon a challenge to the array for un-indifferency in the sheriff, on the trial of an indictment for a misdemeanour, the jury panel was quashed; the court held, that the proper course for obtaining a trial of the cause, was to direct new jury process to the coroners of the county, at the instance of the prosecutor, but not without applying to the court specially for that purpose:(c) And the *venire facias* in such case was afterwards holden to be properly awarded to the coroner, although two of the special jurymen appeared and were sworn on the former occasion.(d) There can be no challenge to the array, on the ground of un-indifferency in the master of the Crown office, he being the officer of the court expressly appointed to nominate the jury: The only remedy in such a case, is to apply to the court by motion, to appoint some other officer to nominate the jury; nor is it any objection to the conduct of the master of the Crown office, that, in striking the jury, he selected the names of the jurors, and did not take them by chance from the freeholders' book; or that he took those only whose names had the addition of *Esquire*, or of some higher degree; or included some persons who were in the commission of the peace. By the statute 6 Geo. IV. c. 50,(e) "no challenge shall be taken to any panel of jurors, for want of a *knight's* being returned in such panel; nor any array quashed, by reason of such challenge." And where, in a writ of right, the sheriff returned that he had summoned four lawful knights; to wit, A. B. esquire, C. D. esquire, E. F. esquire, and G. H. esquire, the court of Common Pleas, we have seen,(f) held, on demurrer to a challenge by the tenant, on the ground that they were not true *knights*, but only *esquires*, that this return could not be traversed.(g)

Challenges to the *polls, in capita*, are exceptions to particular jurors; and according to Sir *Edward Coke*,(h) they are of four kinds; first, *propter honoris respectum*, as if a lord of parliament be impanelled on a jury, in which case he may challenge himself, or be challenged by either party.

Secondly, *propter defectum*, as if a jurymen be an alien born, [*853] or a slave *or bondman. All incapable persons, as infants, idiots, and persons of *nonsane* memory, are likewise excluded upon this ground:(aa) And, by the statute 6 Geo. IV. c. 50,(bb) "if any man shall be returned as a juror for the trial of any issue, in any of the courts thereinbefore mentioned, who shall not be qualified according to that act, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge, if the court shall be satisfied of the fact; and that if

(a) Cowp. 112.

(b) 4 Barn. & Ald. 471.

(c) 1 Dowl. & Ry. 145.

(d) 2 Barn. & Cres. 104. 3 Dowl. & Ry. 311, S. C.

(e) § 28; and see stat. 24 Geo. II. c. 18, § 4.

(f) *Ante*, 748.

(g) 3 Bing. 393.

(h) Co. Lit. 166.

(aa) Gilb. C. P. 95.

(bb) § 27; and see stat. 4 & 5 W. & M. c. 24, § 15.

any man returned as a juror for the trial of any such issue, shall be qualified in other respects according to that act, the want of freehold shall not, on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or by the party, nor as cause for discharging the man so returned, upon his own application, any law, custom or usage to the contrary notwithstanding; provided that nothing therein contained shall extend in any wise to any special juror." A third ground of challenge to the polls is *propter affectum*, as that a jurymen is of kin to either party, within the ninth degree; (c) that he has been arbitrator or declared his opinion on either side; that he has an interest in the cause; (dd) that there is an action depending between him and the party: that he has taken money for his verdict, or even ate and drank at either party's expense: that he has formerly been a juror in the same cause; that he is the party's master, servant, tenant, (ee) counsellor, steward, or attorney, or of the same society or corporation with him. All these are *principal* causes of challenge: Besides which there are challenges to the *favour*, where the party objects only an account of some probable grounds of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of *triers*, who, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest. (f) Fourthly, a juror may be challenged *propter delictum*, as for a conviction of treason, felony, perjury, or conspiracy; or if, for some infamous offence, he has received judgment of the pillory, tumbrel, or the like, or to be branded, whipped or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunerie*, or forgery. A juror may himself be examined on his *voire dire*, with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. (g) And it is not competent to ask jurymen, whether *special* jurymen, or *talesmen*, if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the [*854] polls on that ground; but such expressions must be proved by extrinsic evidence.

By the statute 6 Geo. IV. c. 50. (a) "in all inquests to be taken before any of the courts thereinbefore mentioned, wherein the *king* is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisitions, as it shall be found, if the challenges be true or not, after the discretion of the court." And in a late case (b) it was determined, after special argument, by the

(c) Finch. L. 401.

(dd) 3 Bur. 1856.

(ee) Gilb. C. P. 95.

(f) Co. Lit. 158.

(g) For more of *Challenges*, see Co. Lit. 156, &c. Gilb. C. P. Chap. VIII. Bac. Abr. tit. *Jurors*, (H). 3 Blac. Com. 353, &c.

(a) § 29; and see stat. 33 Edw. I. stat. 4.

(b) 4 Barn. & Ald. 471.

court of King's Bench, that no challenge can be taken, either to the array or to the polls, until a full jury have appeared: and therefore, where the challenges are previously taken, they are irregular. It was also determined in the above case, that when a challenge is made, the adverse party may either demur,^(c) which brings into consideration the legal validity of the matter of challenge; or counterplead, by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge; or he may deny what is alleged for matter of challenge, and it is then, and then only, that triers are to be appointed: and therefore, where the grounds of challenge were not put on the record, the defendants were holden not to be in a condition to ask the opinion of the court, as a matter of right, upon their sufficiency.^(b) Lastly, it is a rule, that the disallowing of a challenge is not a ground for a new trial, but for what is strictly and technically called a *venire de novo*.^(b)

The time and mode of *summoning* jurors having been treated of in a former chapter,^(d) it will here be proper to consider the method of *balloting* for and *swearing* them at the trial. By the statute 6 Geo. IV. c. 50,^(e) "the name of each man who shall be summoned and impanelled in any court of assize, or *nisi prius*, or for the trial of issues in the civil courts of the counties palatine or great sessions, with the place of his abode and addition, shall be written on a distinct piece of parchment or card, such pieces of parchment or card being all as nearly as may be of equal size, and shall be delivered unto the associate or prothonotary of such court, by the undersheriff of the county, or secondary of the city of *London*, and shall, by direction and care of such associate or prothonotary, be put together in a box to be provided for that purpose: And when any issue shall be brought on to be tried, such associate or prothonotary shall, in open court, draw out *twelve* of the said parchments or cards, one [*855] after another; and if any of the men whose names shall be *so drawn shall not appear, or shall be challenged and set aside, then such further number, until twelve men be drawn who shall appear, and after all just causes of challenge allowed, shall remain as fair and indifferent: And the said twelve men so first drawn and appearing, and approved as indifferent, their names being marked in the panel, and they being sworn, shall be the jury to try the issue; and the names of the men so drawn and sworn shall be kept apart by themselves, until such jury shall have given in their verdict, and the same shall be recorded, or until such jury shall, by consent of the parties, or by leave of the court, be discharged; and then the same names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties*, as long as any issue remains to be tried:^(a) Provided always, that if any issue shall be brought on to be tried in any of the said courts, before the jury in any other issue shall have brought in their verdict, or been discharged, it shall be lawful for the court to order twelve of the residue of the said parchments or cards, not containing the names of any of the jurors who shall not have so brought in their verdict, or been discharged, to be drawn in such manner as is aforesaid, for the trial of the issue which shall so be brought on to be tried:^(b) Provided also, that where no objection shall be made on behalf of the king or any other party, it shall be

(c) 3 Bing. 394.

(d) Chap. XXXIV. p. 793, 4.

(a) See stat. 3 Geo. II. c. 25, § 11.

(e) § 26.

(b) *Id.* § 12.

lawful for the court to try any issue, with the same jury that shall have previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or to order the name or names of any man or men on such jury, whom both parties may consent to withdraw, or who may be justly challenged or excused by the court, to be set aside, and another name or other names to be drawn from the box, and to try the issue with the residue of such original jury, and with such man or men whose name or names shall be so drawn, and who shall appear, and be approved as indifferent, and so *toties quoties*, as long as any issue remains to be tried."

And "if any man having been duly summoned to attend on any kind of jury, in any of the courts in *England* or *Wales* thereinbefore mentioned, shall not attend in pursuance of such summons, or being thrice called, shall not answer to his name; or if any such man, or any talesman, after having been called, shall be present but not appear, or after his appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine upon every such man or talesman, so making default, (unless some reasonable excuse shall be proved by oath or affidavit,) as the court shall think meet: Provided always, that where any viewer, having been duly summoned to attend on any jury, shall make default as aforesaid, the court is thereby authorized and required to set upon such viewer, (unless some reasonable excuse shall be proved as aforesaid,) a fine to the amount of 10*l.* at the least, and as much more as the court, under the circumstances of the particular *case, shall think proper."(a) By [*856] the same statute,(b) "every court of *nisi prius*, oyer and terminer, gaol delivery, and sessions of the peace, held for the city of *London*, shall and may fine any man duly summoned to attend upon any kind of jury, in any of such courts respectively) and making default, or any talesman or viewer making default, in the same manner, to all intents and purposes, as such respective courts in *England* and *Wales* thereinbefore mentioned." A fine for not attending as a special juror, in the court of Common Pleas at *Westminster*, having been imposed, under the above statute, upon a gentleman having a house in *London* and another in *Brighthelmstone*, but who had resided the twelve months preceding at the latter place, the court refused to remit it.(c) But where the party summoned had let his house, and was abroad, which fact was communicated to the summoning officer, the court remitted the fine.(d). So likewise, where the summons had by mistake been left at a wrong house, the court remitted the fine, but required the affidavit of the summoning officer to that fact.(d)

When a cause is tried by a *special* jury, it is provided, by the same statute,(e) that "nothing therein contained shall be construed to prevent the same special jury, however nominated, from trying any number of causes; so as the parties in every such cause, or their attorneys, shall have signified their assent in writing to the nomination of such special jury, for the trial of their respective causes: Provided always, that it shall be lawful for the court, if it shall so think fit, upon the application of any man who shall have served upon one or more special juries, at any assizes or sessions of *nisi prius*, to discharge such man from serving upon any other special jury, during the same assizes or sessions of *nisi prius*."

(a) Stat. 6 Geo. IV. c. 50, § 38; and see stat. 7 & 8 W. III. c. 32. 3 Geo. II. c. 25, § 13.

(b) § 51.

(c) 1 Younge & J. 399.

(d) *Id.* 401.

(e) § 33.

When a *view* is allowed in any case, it is provided by the same statute,^(f) that "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn; and so many only shall be added to the viewers who shall appear, as shall after all defaulters and challenges allowed, make up a full jury of twelve." And, where two sets of jurors are summoned to the assizes, "the judge before whom the cause is tried, is authorized and required, on the application of the party obtaining the order for a view, to appoint such case to be tried, during the attendance and service of that set of jurors, in which the viewers, or the major part of them, are included."^(g)

And for the ease and security of persons who have attended and served as jurors on trials at *nisi prius*, &c. it is enacted that "the sheriff, or his under sheriff, shall from time to time register alphabetically, in proper columns to be prepared in the jurors' book for that purpose, the [*857] services *of such men as shall be summoned, and shall attend to serve as jurors on trials, before any court of assize or *nisi prius*, oyer and terminer, or gaol delivery, or in the said courts of the said counties palatine or great sessions, and also the times of their services; and every man so summoned, and having duly attended or served until discharged by the court, shall (upon application by him made to such sheriff or under-sheriff, before he shall depart from the place of trial,) receive a certificate, testifying such his service; which certificate the sheriff or under sheriff is thereby required to give, on payment of one shilling: Provided always, that nothing therein contained shall extend to any grand jurors, or special jurors."^(a) And that "no man shall be returned as a juror, to serve at any sessions of *nisi prius* or of gaol delivery, in the county of *Middlesex*, who has served as a juror at either of such sessions in the said county, in either of the two terms or vacations next immediately preceding, and has the sheriff's certificate of having so served: And no man shall be returned as a juror, to serve on trials before any court of assize, *nisi prius*, oyer and terminer, or gaol delivery, or any of the said courts of the three counties palatine, or the said great sessions, who has served as a juror at any of such courts, within *one* year before, in *Wales*, or in the counties of *Hereford*, *Cambridge*, *Huntingdon*, or *Rutland*, or *four* years before, in the county of *York*, or *two* years before, in any other county, and has the sheriff's certificate of having so served. And if any sheriff, or other minister, shall wilfully transgress, in any of the cases aforesaid, the court may and is thereby required, on examination and proof of every such offence, in a summary way, to set such fine upon every such offender, as the court shall think meet: Provided, that nothing therein contained shall extend to grand jurors at the assizes or great sessions, or to special jurors."^(b)

At common law, if a sufficient number of jurymen did not appear at the trial, or so many of them were challenged and set aside, as that the remainder would not make up a full jury, there issued a writ to the sheriff, of *undecem*, *decem*, or *octo tales*, according to the number that was deficient, in order to complete the jury:^(c) And this is still necessary, on trials at bar.^(d) But now, by the statute 6 Geo. IV. c. 50,"^(e) "where a full jury

(f) § 24; and see stat. 3 Geo. II. c. 25, § 14.

(g) Stat. 6 Geo. IV. c. 50, § 22.

(a) Stat. 6 Geo. IV. c. 50, § 40; and see stat. 3 Geo. II. c. 25, § 5.

(b) Stat. 6 Geo. IV. c. 50, § 42; and see stat. 3 Geo. II. c. 25, § 4. 4 Geo. II. c. 7.

(c) Gilb. C. P. 73.

(d) 5 Durnf. & East, 457, 8; 462. *Anie*, 751.

(e) § 27; and see stat. 35 Hen. VIII. c. 6. 4 & 5 Ph. & M. c. 7. 14 Eliz. c. 9. 7 & 8 W. III. c. 32, § 3.

shall not appear before any court of assize or *nisi prius*, or before any of the superior civil courts of the three counties palatine,^(f) or before any court of great sessions,^(f) or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such court, upon request made for the king, by any one thereto authorized or assigned by the court, or on request made by the parties, plaintiff or demandant, defendant or tenant, on their respective *attorneys, in any action or suit, whether popular or private, shall command the sheriff or other minister, to whom the making of the return shall belong, to name and appoint, as often as need shall require, so many of such other able men of the county then present, as shall make up a full jury; and the sheriff or other minister aforesaid shall, at such command of the court, return such men, duly qualified,^(aa) as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel: Provided, that where a special jury shall have been struck for the trial of any issue, the *tales-men* shall be such as shall be impanelled upon the common jury panel, to serve at the same court, if a sufficient number of such men can be found; and the king, by any one so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the court shall proceed to the trial of every such issue, with those jurors who were before impanelled, together with the *tales-men* so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue." By a previous statute,^(b) the sheriff was directed to return such freeholders or copyholders to serve upon the *tales*, as should be returned upon some other panel, and then attending the court: Upon which statute it was holden, that *tales-men* could only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers.^(c) And, on the trial of an information in nature of a *quo warranto*, which had been made a special jury cause, jurors who had been summoned to try the prisoners on the crown side, were not deemed to be thereby qualified to act as *tales-men*.^(d) The plaintiff may avoid a nonsuit, by refusing to pay a *tales*:^(e) And, after a juror has been challenged on the principal panel, he ought not to be sworn as a *tales-man*.^(ff) In the King's Bench, the master may allow the sum of one guinea each to *tales-men*, on the trial of a cause by a special jury in *London* or *Middlesex*.^(g)

When the jury are sworn, the *junior* counsel for the plaintiff opens the pleadings; after which, if the proof of the issue rest on the plaintiff, as where the general issue is pleaded, the *senior* or leading counsel states his case to the jury; and after calling and examining witnesses in support of

(f) See stat. 34 & 35 Hen. VIII. c. 26, § 103. 5 Eliz. c. 25.

(aa) Before this statute, the qualification of a *tales-man*, in point of estate, was only 5l. *per annum*. Stat. 4 & 5 W. & M. c. 24, § 18.

(b) 1 & 8 W. III. c. 32, § 3.

(c) 1 Car. & P. 667; and see Bul. Nl. Pri. 305. 2 Barn. & Cres. 104. 3 Dowl. & Ry. 311, S. C.

(d) 1 Car. & P. 668.

(e) 2 Str. 707.

(f) 1 Str. 640. 2 Ld. Raym. 1410, S. C.

(g) 1 Chit. Rep. 544. And see further, as to *tales-men*, 2 Wms. Saund. 5 Ed. 349. (1).

it, the counsel for the defendant are heard; and if they call any witnesses, the plaintiff's counsel have the general reply. If a defendant prove payment to a plaintiff, by showing the particulars of demand delivered under a judge's order, in which the plaintiff has credited the defendant; this is the evidence of the defendant, and entitles the plaintiff to the reply. 1

Moody & M. 86. But when there is a rule to pay money into [*859] court, the mere production of the rule by the defendant *is not, we have seen, (a) considered as evidence on his part, so as to give the right of reply to the plaintiff. And where the general issue is not pleaded, but issue is joined on a collateral fact, as the execution of a release in *assumpsit* or *debt*, the fact of payment on a plea of *solvit ad diem*, (bb) or a right of way in *trespass*, the proof of which rests on the defendant, his counsel begin, after the pleadings are opened, and have the general reply. The same order is observed in *trespass quare clausum fregit*, if the defendant plead, as to the coming with force and arms, and whatever else is against the peace, not guilty, and as to the residue of the trespasses a justification, which is denied by the replication; (cc) and in *ejectment*, by the heir at law against a devisee, if the defendant will admit the lessor of the plaintiff to be heir. (dd) So, if the lessor of the plaintiff prove his pedigree, and there stop, and the defendant set up a new case in his defence, which is answered by evidence on the part of the lessor of the plaintiff, the defendant is entitled to the general reply: (e) which is also the case, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will. (f) On a trial at bar of a writ of *right*, the *demi-mark* having been tendered, the tenant, we have seen, (g) must begin. And, in an action of *assault* and *battery*, where there is a plea of justification only, and issue thereon, the defendant's counsel has a right to begin; the affirmative of the issue being on him; and the *onus* of proving damages not giving the plaintiff's counsel a right to begin. (h)

In *assumpsit* for goods sold and delivered, on a plea of *coverture*, if the plaintiff elect to begin, he must go into his whole case; but if the defendant admit the debt, he is entitled to begin. (i) And, in an action of *trespass*, when the general issue is pleaded, and also special pleas, alleging a clandestine removal of goods to avoid a distress, the plaintiff, it has been said, ought to go into the whole of his case in the first instance. (k) But the judge will allow the plaintiff's counsel, after he has closed his case, to recall a witness, to prove a point he had before omitted: (l) and this has been allowed, in a penal action. (m) When affirmative pleas of justification are put on the record, with the general issue, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justification, by way of anticipating the defence; or they may, if they please, content them-

(a) *Ante*, 629.

(cc) 3 Campb. 366. 2 Stark. Ni. Pri. 518.

(e) 4 Durnf. & East, 497.

(g) *Ante*, 807.

(i) 3 Stark. Ni. Pri. 178; and see 2 Car. & P. 126. Ry. & Mo. 329, S. O.

(k) 2 Stark. Ni. Pri. 81; and see 3 Esp. Rep. 105. 1 Stark. Ni. Pri. 72. 2 Stark. Ni. Pri. 519, 20; 555. 3 Stark. Ni. Pri. 8.

(l) 1 Car. & P. 118.

(bb) 1 Car. & P. 118.

(dd) 2 Stark. Ni. Pri. 519.

(f) 3 Campb. 368. 2 Stark. Ni. Pri. 520.

(h) Ry. & Mo. 293.

(m) *Id.* 120. b.

selves with proving the fact on the general issue, and then close their case, *leaving the defendant to make out his justifications [*860] as he can, and afterwards go into evidence in reply, as to the justifications: But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant, in support of the justifications, and they cannot be allowed to go beyond it.(a) In an action for a *libel*, when the general issue is pleaded, and also special pleas of justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification; or he may do so in reply to evidence produced by the defendant; but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case.(b)

When several defendants appear by separate attorneys, and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint.(c) And when there are several counsel on the same side, and a *junior* has begun to examine a witness, the leader may interpose, take the witness into his own hands, and finish the examination:(d) But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness, by another counsel on the same side.(d) And, if a *junior* counsel at *nisi prius* take a well founded objection, which his leader gives up, the court of Common Pleas will not entertain it, in discussing a rule for a new trial or nonsuit on another ground.(e) So, if the leading counsel at *nisi prius* take one line of case, contrary to the opinion of the *junior* counsel, that court will not permit the latter to obtain a new trial, upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated.(f) And if the plaintiff's counsel acquiesce in the judge's ruling at the trial, whereby the defendant takes a verdict, without going into his case, the plaintiff will not afterwards be permitted to move for a new trial, on the ground of a misdirection.(g)

In a *criminal* case, a prosecutor conducting his cause in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury, in the same manner as counsel:(h) And where a defendant, in addressing the jury, is guilty of a contempt, a judge at *nisi prius* has the power of fining him.(i) The defendant, on the trial of a misdemeanour, cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury:(k) But if *he conduct his defence himself, and any point of law [*861] arises, which he professes himself unable to argue, the court will hear it argued by his counsel.(aa) And where, upon an information for a

(a) 1 Car. & P. 447, 8, *per Littledale, J.*

(b) Ry. & Mo. 254.

(c) 4 Campb. 174; and see 6 Dowl. & Ry. 292; but see 3 Stark. Ni. Pri. 162. 1 Car. & P. 321, 322, (a).

(d) 2 Campb. 280.

(e) 3 Taunt. 531.

(f) 4 Taunt. 779.

(g) 6 Taunt. 336; and see 13 Price, 222. M'Clel. 69, S. C.

(h) 2 Barn. & Ald. 606. 1 Chit. Rep. 352, S. C.; and see *id.* 602.

(i) 2 Barn. & Ald. 329.

(k) 3 Campb. 98. Ry. & Mo. 166. 1 Car. & P. 548, S. C.

(aa) 3 Campb. 98. Ry. & Mo. 166. 1 Car. & P. 548, S. C.

misdeameanour, the defendant calls no witnesses, the counsel for the prosecution, except in the case of the attorney general, is not entitled to a reply.(b) If the counsel however for the defendant, on an indictment for a misdeameanour, open new facts in his address to the jury, and afterwards decline calling witnesses to prove the facts so opened, the counsel for the prosecution is notwithstanding entitled to a general reply.(c) On an indictment against several persons the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness.(dd)[1]

(b) Peake's Cas. Ni. Pri. 3 Ed. 310; but see the case of *Rez v. Smith, Id. (a.) semb. contra.*

(c) Dowl. & Ry. Ni. Pri. 59. 4 Dowl. & Ry. 70, S. C.; but see 1 Moody & M. 85, where it was said by Lord *Tenterden*, Ch. J. that if the defendant's counsel refused to call a witness, to establish the facts which they have undertaken to establish, the judge may, in his discretion, permit a reply; but as the strict right, the practice is clearly against it.

(dd) Ry. & Mo. 401.

[1] In the New Practice of the author, he takes up at this place—the termination of the subject of hearing counsel—the law of amendment of variances, a subject which he no where treats of at length in his ninth edition. The editor has therefore deemed it necessary to introduce this matter in a note under the same head, in this volume.

Previously to Lord *Tenterden's* act, 9 Geo. IV. c. 15, great expense was often incurred, and delay or failure of justice took place at trials, by reason of *variances* between *writings* produced in evidence, and the recital or setting forth thereof upon the *record* on which the trial was had, in matters not material to the merits of the case; and such record could not in any case have been amended at the trial, and in some cases could not be amended at any time. (Preamble to stat. 9 Geo. IV. c. 15. And for cases of *variance* between the declaration, or subsequent pleadings, and the *evidence* given at the trial of personal actions, &c., and in what cases they have been holden to be fatal, and in what immaterial, see *ante*, 434, 5, (f.) and see further as to *variance*, 1 Chit. Pl. 5 Ed. 278, &c. 3 Stark. Evid. 1 Ed. 1526, &c.:) For remedy whereof it was enacted by the above statute, that "it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of *oyer* and *terminer* and general gaol delivery, in *England*, *Wales*, the town of *Berwick* upon *Tweed*, and *Ireland*, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdeameanour, where any variance shall appear between any matter in *writing* or in *print* produced in evidence, and the recital or setting forth thereof upon the *record* whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the *postea*, and returned, together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

This statute, which authorizes a judge to order amendments of variances between written or printed evidence and the record, invests him with a discretion, which cannot it seems be revised by the court above; *Parks v. Edge*, 1 Crompt. & M. 429. 3 Tyr. Rep. 364. *Parker v. Ads*, 1 Dowl. Rep. 643, S. C. *Rez v. Archbishop of York*, 1 Ad. & E. 394. 3 Nev. & M. 453, S. C. *Dos d. Poole v. Errington, Id.* 646. 1 Ad. & E. 750, S. C. And where a judgment was stated on the record as in one court, and it appeared, by the production of an examined copy, to have been obtained in another, the judge at *nisi prius* ordered the record to be amended; *Briant v. Eicke*, 1 Moody & M. 359, per Ld. *Tenterden*, Ch. J. So where, in a declaration on a bill of exchange, the date of the bill was stated to be the 26th of *March*, when it really was the 29th, the judge, in an undefended cause, allowed the variance to be amended, under the above statute, without the payment of any costs; *Bentzing v. Scott*, 4 Car. & P. 24, per *Park, J.* And where, in an action against a defendant for not obeying a *subpoena*, the declaration stated that the plaintiff caused to be left with the defendant, a *copy of the writ of subpoena*, the court of Common Pleas held that a judge at *nisi prius* had authority, under the above statute, to allow this allegation to be amended as follows: "a copy of so much of the said writ of subpoena as related to the said defendant. *Masterman v. Judson*, 8 Bing. 224. So, in an action on a bill of exchange by indorsee against indorser, where the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to A. B., whereas it appeared in evidence to have been drawn in favour of A. B., the judge having amended the record, the court of Exchequer approved of it; *Parks v. Edge*, 1 Crompt.

It frequently happens, that persons are made defendants with others for the mere purpose of excluding their testimony: In this case, if no evidence

& M. 529. 3 Tyr. Rep. 364. *Parker v. Ade*, 1 Dowl. Rep. 643, S. C. So, in an action on an instrument declared on as a bill of exchange, the judge made an order, in an undefended cause, for the amendment of the record, by allowing the plaintiff to declare as on a promissory note, and also for the amendment of a judge's order, which had been obtained for admitting the handwriting of the defendant and the indorsers; *Meilliet v. Powell*, 6 Car. & P. 233. And a record was amended, pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it did not appear by the record, that the contract was in writing; *Lamey v. Bishop*, 4 Barn. & Ad. 479. 1 Nev. & M. 332, S. C. But in an action for a malicious arrest, an allegation that the defendants did not prosecute the suit complained of, but therein failed and made default, and their pledges were in mercy, &c., is not supported by proof of a discontinuance; and this variance was holden not to be such an error in the record as could be amended at *nisi prius*, under the above statute; it not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof; *Webb v. Hill*, 1 Moody & M. 253. 3 Car. & P. 485, S. C., per Ld. Tenterden, Ch. J. So, in *replevin*, where the defendant, in his avowry, stated that the distress was for rent in arrear, and that the plaintiff held the lands on certain terms, but, on the plaintiff's lease being put in, it appeared that he held them on other and different terms, the judge at *nisi prius* ruled that this variance was not amendable, under the statute 9 Geo. IV. c. 15; *Ryder v. Malbon*, 3 Car. & P. 594, per Park, J.; and also, that the act only applied to cases where some particular written instrument is professed to be set out or recited in the pleading; *Ryder v. Malbon*, 3 Car. & P. 594, per Park, J. And the judge, in another case, would not allow an amendment, under the above statute, when there was a variance which would not have occurred, if common care had been used in drawing the declaration; *Jelf v. Oriell*, 4 Car. & P. 22, per Ld. Tenterden, Ch. J.; but see *Parks v. Edge*, 1 Crompt. & M. 429. *Parker v. Ade*, 1 Dowl. Rep. 643, S. C.; and see *Brown v. Dean*, 2 Nev. & M. 322, per Denman, Ch. J.

The above statute being confined to such variances only as appeared between any matter in *writing* or in *print*, produced in evidence, and the recital or setting forth thereof on the record whereon the trial was pending; *Brooks v. Blanshard*, 1 Crompt. & M. 779; 3 Tyr. Rep. 844, S. C., was extended by the statute 3 & 4 W. IV. c. 42, § 23; and see 2 Rep. C. L. Com. 35, &c. 85, &c.; whereby, after reciting that great expense was often incurred, and delay or failure of justice took place at trials, by reason of *variances*, as to some particular or particulars, between the *proof* and the *record*, or setting forth on the record, or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the mis-statement of which the opposite party could not have been prejudiced, and the same could not in any case be amended at the trial, except where the variance was between any matter in *writing* or in *print* produced in evidence, and the *record*; and that it was expedient to allow such amendments as thereafter mentioned, to be made on the trial of the cause; (Preamble to stat. 3 & 4 W. IV. c. 42, § 23); it is enacted, that "it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable: and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared: and in case such trial shall be had at *nisi prius*, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea*, or the writ, as the case may be, and returned, together with the record or writ, and thereupon such papers, rolls, and other

whatever be given against the person so improperly made defendant, he may be acquitted immediately the plaintiff has closed his case, and may then

records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll, or other document, upon which the trial shall be had: provided, that it shall be lawful for any party who is dissatisfied with the decision of such judge at *nisi prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

Under this statute, the judge at *nisi prius* will in general amend any variance, which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. *Hemming v. Parry*, 6 Car. & P. 580, *per Alderson*, B.: Therefore where, in *assumpsit* on the warranty of a horse, a general warranty of soundness was declared on, and a warranty "except in one foot" was proved, the judge allowed the declaration to be amended, the real dispute between the parties being whether the horse was a roarer; *Id. ibid.* So where a contract, by which A. guaranteed to B. the amount of a debt to be contracted with B. by C. was described in pleading as a promise to pay the debt to be so contracted, the court sanctioned an amendment ordered at *nisi prius*, by substituting "guarantee" for "pay"; *Hanbury v. Ella*, 3 Nev. & M. 438. 1 Ad. & E. 61, S. C. So where, in *trespass* for breaking the plaintiff's close called *Clover Hill*, the defendants pleaded not guilty, and that the close was not the plaintiff's, and the real name of the close appeared to be *Clover Moor*, the judge ordered the record to be amended, by inserting the word *Moor* instead of *Hill*; *Howell v. Thomas*, 7 Car. & P. 342, *per Coleridge*, J. And where it appeared, on the trial of an *ejectment*, that the parish was mis-stated in the declaration, the judge allowed it to be amended, although the *ejectment* was for a forfeiture; *Doe d. Marriott v. Edwards*, 6 Car. & P. 208. 1 Moody & R. 319, S. C., *per Parke*, J. But where the declaration in *ejectment* was on a supposed joint demise by A. and B., and it appeared in evidence that A. and B. had not such an interest that they could join in a demise to the nominal plaintiff, the judge at *nisi prius* refused to amend the declaration, under the above statute, by severing the demises; *Doe d. Poole v. Errington*, 1 Moody & R. 343. 3 Nev. & M. 646. 1 Ad. & E. 750, S. C., *per Taunton*, J. So, if several defendants are sued in *debt*, and the evidence do not fix all of them, the plaintiff must be nonsuited; and the judge will not allow the declaration to be amended, by striking out the names of those defendants who are not affected by the evidence; *Cooper v. Whitehouse*, 6 Car. & P. 545, *per Alderson*, B. So, where A. covenanted to pay B. 270*l.* on the 15th December, with interest up to that time, and not having done so, B. brought an action of *debt*, laying his damages at 10*l.*, it was holden that B. could not recover any more than the principal, with the interest up to the 15th December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge at the trial would not order the declaration to be amended, by inserting a larger sum than 10*l.* as the damages; *Watkins v. Morgan*, 6 Car. & P. 661, *per Littledale*, J. So where, in an action on the case for diverting a water-course, a party who had a right to the use of running water, as an owner of adjoining lands, had appropriated it, and by his declaration claimed the right thereto as the owner of a mill not twenty years old, this was holden to be bad, and the judge at the trial would not allow the declaration to be amended; *Frankum v. Earl of Falmouth*, 6 Car. & P. 529, *per Alderson*, B. 4 Nev. & M. 330, S. C.; and see *Kirby v. Simpson*, 3 Dowl. Rep. 791. 10 Leg. Obs. 334, S. C. And even if the jury find the plaintiff's right specially, and it be indorsed on the *postea*, under the twenty-fourth section of the statute, the court above will not give judgment for the plaintiff on that finding; because, if the plaintiff had stated his right properly, the defendant might have pleaded differently; *Id. ibid.* So, in *trespass* for taking "mirrors and handkerchiefs," where the defendant justified the taking of the mirrors, but by mistake omitted the taking of the handkerchiefs, the judge held that this omission could not be amended at the trial; *John v. Currie*, 6 Car. & P. 618, *per Parke*, B. And see *Young v. Fewson*, 13 Leg. Obs. 396, *per* Ld. Denman, Ch. J. And a judge sitting at *nisi prius* has no power, under the above statutes, to order an amendment of the award of the *venire facias*, on the *nisi prius* record; *Adams v. Power*, 7 Car. & P. 76, *per Bolland*, B.

By another clause of 3 & 4 W. IV. c. 42, § 24, "the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

be examined as a witness on behalf of the other defendants; but if there be any, even the slightest, evidence to charge one defendant, he cannot be acquitted immediately, so as to enable him to give evidence for the others, but the case must go altogether to the jury: (e) And the acquittal of one of several defendants is not a matter of right, which the defendant's counsel can claim; it being discretionary with the judge at *nisi prius*, whether he will direct the acquittal of the defendants against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. (f) So, in an action against several defendants for goods sold, some of whom pleaded bankruptcy, and others the general issue, the Court of Common Pleas held, that after the plaintiff had closed his case, and the bankrupt defendants had proved their bankruptcy, one of them could not be admitted as a witness, to show a dissolution of the partnership prior to the delivery of the goods. (g) And a defendant in *trespas*, who has suffered judgment to go by default, is not it seems a competent witness for the other defendants in the same action, who have pleaded, if the jury have to assess the damages against him, as well as to try the issue as to the other defendants. (h) [1]

(e) Peake's Evid. 5 Ed. 148, 9. 1 Phil. Evid. 6 Ed. 68.

(f) Holt Ni. Pri. 275, *per Gibbs*, Ch. J.; and see 1 Stark. Ni. Pri. 98, 9, where Lord *Ellenborough* held, that a defendant against whom no evidence had been given before the plaintiff closed his case, ought not to be acquitted, before the whole case was ready for the jury. Ry. & Mo. 128, S. P.

(g) 7 Taunt. 599. 1 Moore, 332, S. C.

(h) 1 Car. & P. 577; but see 2 Esp. Rep. 552. 2 Campb. 333, 4, *in notis. semb. contra.* 1 Phil. Evid. 4 Ed. 78.

On this latter clause, where, in an action against the sheriff, for allowing a defendant to escape after he had been arrested on mesne process, it was proved at the trial, that an opportunity only had offered itself of making the arrest, but that the sheriff had not availed himself of it by arresting the party, the judge, on an application for leave to amend the declaration, directed the jury to find the facts specially, reserving the question of the plaintiff's right to amend, for the opinion of the court; *Guest v. Everest*, 9 Leg. Obs. 75; and for the decision of the court thereon, see *Geast* (or *Guest*) v. *Elwes*, 6 Nev. & M. 433. 2 Har. & W. 34, S. C. And where, in an action on the case, against the defendants, as carriers, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as *wharfingers*, upon a contract to forward, and just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which however the learned judge refused to do, but left it to the jury to say whether there was a contract to forward, or a contract to carry, and they found that there was a contract to forward, upon which the judge directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the court might proceed thereon according to the above statute; the court allowed the amendment, and granted a new trial, on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to § 23, of that statute; *Parry v. Fairhurst*, 2 Crompt. M. & R. 190. 5 Tyr. Rep. 685, S. C. So, in an action on a bill of exchange, where the defendant had omitted to state the period at which the bill became due, and at the trial of the cause at *nisi prius* the judge refused to allow the defendant to amend, and directed a nonsuit, the court set aside the nonsuit, and granted leave to amend, on payment of costs, the defendant being allowed to plead *de novo*. *Pullen v. Seymour*, 5 Dowl. Rep. 164. 12 Leg. Obs. 292, S. C. The court has no power to impose any terms upon the party for whom judgment is ordered to be entered, under this section; *Geast* (or *Guest*) v. *Elwes*, 6 Nev. & M. 433. 2 Har. & W. 34, S. C.

[1] It is sometimes deemed advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a concerted story among them, and to prevent the influence which the account given by one may have upon another: In such case it is usual to order the witnesses out of court, with notice that they will not be examined if they remain; 1 Phil. Evid. 4 Ed. 282; and see Bac. Abr. tit. *Evidence*, E. 1 Stark. Evid. 133. And either party, at any period of the cause, has a right to require that the unexamined witnesses should be out of court; *Southey v. Nash*, 7 Car. & P. 632. But the defendant's attorney, who has been subpoenaed on the part of the plaintiff, may, at the desire of his counsel, remain in court during the trial of the cause, although an order has been made

In this manner the trial proceeds, unless the parties agree to *withdraw* a juror;⁽ⁱ⁾ which is frequently done, at the recommendation of [*862] the judge, *where it is doubtful whether the action will lie; and in such case the consequence is, that each party pays his own costs. The withdrawing of a juror however, by consent of the parties, is no bar to a future action for the same cause.^(a)

In the progress of the trial, either party, if there be occasion, may tender a *bill of exceptions*, or *demur* to the evidence. To understand the nature of these proceedings, it should be observed, that in the first stage of that process under which facts are ascertained, the judge decides whether the evidence offered conduces to the proof of the fact which is to be ascertained; and there is an appeal from his judgment, by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the judge to decide, but for the jury exclusively; with which the judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in *attaint*, upon motions for new trials. When the jury have ascertained the fact, if a question arise, whether the fact thus ascertained maintains the issue joined between the parties or in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact,) is in favor of one or other of the parties, that question is for the judge to decide. Ordinarily, he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wish to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence; and the precise operation of that demurrer is, to take from the jury, and refer to the court, the application of the law to the fact.^(b) On a bill of exceptions, the case always goes to the jury; but, on a demurrer to evidence, it is otherwise.^(c)

A bill of *exceptions* then is founded upon some objection in point of law, to the opinion and direction of the court, upon a trial at bar, or of the

(i) 1 Campb. 268. 2 Campb. 442. 1 Stark. Ni. Pri. 63, 98. For the form of the *postes* where a juror is withdrawn, see Append. Chap. XXXVII. § 37.

(a) Ry. & Mo. 42.

(b) 2 H. Blac. 205, 6; and see 2 Barn. & Cres. 445. 1 Car. & P. 240, (a).

(c) 1 Car. & P. 239, 40, *per Park, J.*; and see *id.* 240, (a).

for the witnesses on both sides to withdraw; *Everett v. Lowdham*, 5 Car. & P. 91, *per Bosanquet, J.* And where a witness remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct, in disobeying the order; *Rez v. Colley*, 1 Moody & M. 329, *per Littledale, J.* *Parker v. M. William*, 4 Moore & P. 480. 6 Bing. 683, S. O. *Rez v. Wyld*, 6 Car. & P. 380, *per Parke, J.* *accord.* *Cook v. Nethercote, Id.* 741, *per Alderson, B.*; but see *Attorney General v. Bulpitt*, 9 Price, 14, *contra*, in Excheq. If a witness come into court, and hear some of the evidence, after the witnesses have been ordered out of court, it is entirely in the discretion of the judge, whether he shall be examined or not; and this is so in the Exchequer, as well as in other courts, the only difference being that it is confined in that court to revenue cases, in which the rule is strict, that such witnesses cannot be examined; *Thomas v. David*, 7 Car. & P. 350, *per Coleridge, J.* And where the witnesses had been all ordered out of court, but one of them came into court again, and heard the evidence of another witness, the witness who had so come back into court was allowed to be examined as to such facts only as had not been spoken to by any other witness; *Beamon v. Ellice*, 4 Car. & P. 585, 586, 7.

judge at *nisi prius*, either as to the competency of witnesses,^(d) the admissibility of evidence,^(e) or the legal effect of it;^(f) or for over-ruling a challenge, or refusing a demurrer to evidence,^(g) &c. In these cases it is enacted, by the statute *Westm. 2. (13 Edw. I.) c. 31*, that "if the party write the exception, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals; and if one will not, another shall: And if the king, on complaint made of the justices, cause the record to come before him, and the exception be not found in *the roll, and the party show the exception written, with the seal [*863] of the justice affixed, the justice shall be commanded that he appear at a certain day, to confess or deny his seal: and if the justice cannot deny his seal, judgment shall be given according to the exception, as it may be allowed or disallowed." This statute extends to *inferior courts*,^(a) and to trials at bar, as well as those at *nisi prius*: but it has been doubted whether the statute extends to criminal cases.^(bb) If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exceptions will lie; as if a man produce the probate of a will, to prove the devise of a term for years, and the judge leave it to the jury; because though the evidence be conclusive, yet the jury might have hazarded an *attaint* if they pleased, and the proper way would have been to have demurred to the evidence.^(cc)[A]

The bill of exceptions must be tendered at the trial;[B] for if the party

(d) 3 Durnf. & East, 27.

(e) 1 Salk. 284.

(f) T. Raym. 404. T. Jon. 146, S. C. 1 Blac. Rep. 555. 3 Bur. 1693, S. C. Cowp. 161. 2 Blac. Rep. 929, S. C.

(g) Cro. Car. 341. 2 H. Blac. 208, 9; and see Show. P. C. 120.

(a) 2 Inst. 427.

(bb) See the cases referred to in 1 Bac. Abr. 325. Willes, 535. Bul. Ni. Pri. 316; and stat. 55 Geo. III. c. 42, § 7, as to a bill of exceptions in the jury court in Scotland.

(cc) T. Raym. 404, 5. T. Jon. 146, S. C.

[A] See note [A] post, p. 865.

[B] Any decision or declaration by the court upon the law of the case made in the progress of the cause, and by which the jury are influenced, and the counsel controlled, is considered within the scope and meaning of the term instructions, from which exceptions may be taken, *Lowerwein v. Jones*, 7 Gill & Johns. 335. But comments of a judge upon evidence not involving any opinion or direction in matter of law, is not a proper ground of exception. *Davis v. Jenney*, 1 Met. 221. *Whiton v. Old Colony Ins. Co.*, 2 Met. 1. *Curl v. Lowell*, 19 Pick. 25. *Phillips v. Ringfield*, 1 App. 375. *Frankfort Bank v. Johnson*, 11 Shep. 490. *Dyer v. Greene*, 10 Shep. 464. The instruction must be in a matter material to the issue: Thus in a suit against a drawer of a bill of exchange, drawn for his accommodation, the defence was that the bill had been altered so as to be payable in sixty days, instead of six days, and the only evidence of alteration was on the face of the bill. The judge, after instructing the jury that the question was to be decided upon inspection, also instructed them to consider the probability or improbability that an accommodation bill would be made payable in six days. It was held, that no exception could be taken to the last instruction. *Davis v. Jenney*, 1 Met. 221. And in a suit against underwriters, to recover a loss of bank bills on a policy covering a certain amount of property on board a vessel, the judge instructed the jury, that in the absence of fraud, the amount insured had some slight tendency to prove the amount of bills on board. Held, that this being only a remark upon the state of the evidence, was not a ground of exception. *Whiton v. Old Colony Ins. Co.*, 2 Met. 1. In strictness an opinion expressed by the judge upon a question of fact on trial before a jury, is not open to exception; but if the party against whom it operates yields to it, and does not choose to argue against the weight of it, the court may in its discretion grant a new trial, if the opinion was incorrect. *Curl v. Lowell*, 19 Pick. 25. The decision by a single judge of a question of fact, upon the hearing of a probate appeal, may be excepted to, and may be revised by the whole court if the judge fully reports the evidence. It is, however, discretionary with the judge, to report the evidence or not. *Stevens v. Fiske*, 18 Pick. 24. The mere expression of opinion by the

then acquiesce, he waives it, and shall not resort back to his exception, after a verdict against him; when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute indeed appoints no time; but the nature and reason of the thing require that the exception should be reduced to writing, when taken and disallowed, like a special verdict, or demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing, while the thing is transacting, because it is to become a record. (d) When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned. (e) And if a party who, at the trial of a cause, has tendered a bill of exceptions, bring a writ of error, before he has procured the judge's signature to such bill, he thereby waives the bill of exceptions, and will not be permitted by the court of error, afterwards to tack or append the bill of exceptions, to the writ of error. (f)

The bill of exceptions is either tacked to the record or not: [A] If it be

(d) 1 Salk. 288, 9.

(e) 2 Chit. Rep. 272.

(f) 1 Bing. 17. 11 Price, 100, S. C.

judge in his charge to the jury upon the facts and testimony, do not furnish ground of exceptions. *Gilbert v. Woodbury*, 9 Shep. 246.

Where a judge instructed a jury that a count in an indictment described a substantive offence, independently of the intent charged in it, and that, if they were not satisfied of the intent, they should find a verdict against the defendant negating the intention, but that if they were satisfied that all the allegations had been proved, they should find a general verdict, and the jury returned a general verdict upon the whole count, finding the intent charged, such ruling becomes no further material, and is not the subject of exceptions. *Commonwealth v. Turner*, 3 Met. 19. In Massachusetts, matters within the discretion of an inferior tribunal are not grounds of exceptions under the statute. *Commonwealth v. Sackett*, 22 Pick. 394. *Feneley v. Mahoney*, 2 Pick. 212. Or in New York, *Jenkins v. Brown*, 21 Wend. 454. Or in Vermont, *Comings v. Fullam*, 13 Verm. 459. Or in Maine, *Clap v. Hanson*, 3 Shep. 345.

The granting or refusing amendments being within the discretion of the Court of Common Pleas, does not furnish matter for exception. *Foster v. Haines*, 1 Shep. 307. Or the refusal to postpone a cause cannot be reviewed on a bill of exception. *The People v. Colt*, 3 Hill, 432.

[A] A bill of exceptions must be signed by the judge who tried the cause. *Law v. Jackson*, 8 Cow. 746. Hence, where a circuit judge tried a cause, and the chief justice signed the bill, it was considered a nullity, even after argument on errors assigned. *Ibid.* A paper certified in a record transmitted on appeal, purporting to be a bill of exceptions taken at the trial of a cause, will not be treated as such if it do not appear that the seals of the judges below had been affixed to it. *Davis v. Wilson*, 2 Har. & J. 345. But exceptions taken on the trial, for the purpose of presenting to the revision of the Supreme Court of the United States questions of law decided by the circuit court, should not be taken in such a form as to bring up the whole charge of the judge in which he not only states the law on the facts, but sums up all the evidence; *Cauer v. Jackson*, 4 Pet. 80; *Ex parte Craine*, 5 Pet. 199; *Evans v. Eaton*, 7 Wheat. 426; as such a bill thus bringing up the whole matter in controversy after a trial on the general issue was held not to be admissible. *Wadsworth v. Sanford*, Kirby, 456. *McDonald v. Fisher*, Kirby, 339. The bill of exceptions should show that the court below erred; and this must be done either by stating definite law points, or by stating the whole evidence of which the legal import is embraced in the decision; and in the latter case, it seems the bill must state that no other evidence was given tending to prove the point included in the decision. *Richardson v. Denison*, 1 Aik. 210. *Stearns v. Warner*, 2 Aik. 26. *Brown v. Brown*, 7 Mis. 288. But the points relied upon as grounds for reversal must appear from the bill of exceptions itself. *Brown v. Brown*, 7 Mis. 288. *Ingram v. The State*, 1b. 293. The specific grounds of an objection to the introduction of evidence must be stated. *Fields v. Hunter*, 8 Mis. 128. Unless the bill of exceptions show that all the evidence in the case is set out therein, the presumption is that the evidence offered justified the instructions given or the refusal to give those requested. *Mason v. McCampbell*, 2 Pike, 508. *Trott v. West*, 10 Yerg. 499, S. C. 1 Meigs, 163. *Wilkins v. Gilmore*, 2 Humph. 140. *Perdue v. The State*, 2 Humph. 494. Exceptions are fatally defective if they merely show that the judge expressed an opinion that certain evidence would be inadmissible, or insuffi-

not tacked to the record, it is necessary to set out the whole of the proceedings, previous to the trial; (g) but otherwise, it begins with the pro-

(g) Append. Chap. XXXVII. § 59.

cient without showing that the evidence was offered and rejected, or received and ruled to be insufficient. *Patten v. Hunnewell*, 1 Greenl. 19. *Vasse v. Smith*, 6 Cranch, 233, note. The judgment below will be presumed to be right and will be affirmed, unless the record show error; or, if the exceptions are so defectively drawn that it cannot be ascertained whether there were error or not. *Adams v. Ellis*, 1 Aik. 24. *Eaton v. Houton*, 1 Aik. 380. In some states, as in Virginia, more liberality is allowed, as there, if the bill states a case imperfectly the cause will be remanded for a new trial. *Brook v. Young*, 3 Rand. 106. *Hanston v. Cole*, 1 Rand. 461. *Thompson v. Cumming*, 2 Leigh, 322. *Raines v. Phillips*, 1 Leigh, 493. *Barnes v. Blackiston*, 2 Har. & J. 376. *Keath v. Patton*, 2 Stew. 38. But it is not necessary to state all the evidence. *Allen v. Booker*, 2 Stew. 21.

If a motion for a new trial, on the ground that the verdict is contrary to evidence, be overruled, a bill of exceptions to the court's opinion ought not to state all the evidence given in to the jury, but only the facts appearing to the court to have been proved. *Bennett v. Hardaway*, 6 Munf. 125.

As a general rule, the court will presume the evidence was sufficient to warrant the verdict, unless the party excepting shows that all the evidence is in the bill. *Kingsley v. State Bank*, 3 Yerg. 107. But there is an exception to the rule where a point of law is raised on the construction and effect of an instrument, and the court are satisfied from the facts that no other evidence was relied on. *Ibid.* If parol evidence admitted to explain a deed be excepted to, the bill must state the evidence, so that the court above can decide whether it was admissible. *Gatewood v. Barrus*, 3 Call. 194. *S. P. King v. Kenny*, 4 Ham. 79. *M'Gougal v. Flemming*, *Id.* 388. And the burden is on the party who excepts to show in his bill what the evidence was, or the exception to it will be considered as waived. *Snowden v. Warder*, 3 Rawle, 101. The whole evidence should be shown in the bill, if it be necessary in order to the decision, that the court should see the whole. *Hodges v. Crutcher*, 1 J. J. Marsh, 504. *Gall v. Pierson*, 6 Mia. 253. *Cawthorn v. Muldrow*, 8 *Id.* 617. The bill must also distinctly show wherein the party may have been prejudiced by the decision excepted to; for the court is not bound to give an opinion on an abstract question of law not belonging or not shown by the bill to belong to the cause. *M'Dougal v. Flemming*, 4 Ham. 588. *King v. Kenny*, 4 Ham. 79. *Hamilton v. Russel*, 1 Cranch, 318. *Osburn v. State*, 7 Ham. Part 1st, 214. *Wilson v. Jackson*, Minor, 399. *Miles v. Myers*, Walker, 379. *Slitken v. State*, 14 Ohio, 586. *Watson v. Brown*, *Id.* 473. Under the Pennsylvania statute of 1806, a judge is not bound to reduce his whole charge to writing and file it of record; it is sufficient if he file his opinion on all points of law on which he was prayed to file it. *Reigart v. Elmaker*, 14 S. & R. 121. *Munderbach v. Lutz*, 14 S. & R. 125. Neither is he bound to return his notes of the evidence given on the trial. *Id.* *Bassler v. Neisly*, 1 S. & R. 431. But it seems that it would be his duty, if requested, to allow the necessary evidence to be put on record, though a bill of exceptions be not tendered. But such request should be made immediately on the delivery of the opinion, and the statement of the evidence should be prepared by counsel and exhibited to the judge as in a bill of exceptions. *Downing v. Baldwin*, 1 S. & R. 298. *Bassler v. Neisly*, 1 S. & R. 431. The judge is not bound to furnish his own notes for this purpose, though the party excepting offer to copy the evidence at his own expense. *Munderbach v. Lutz*, 14 S. & R. 125. When an opinion is filed according to the statute, it should be accompanied by a statement of such facts as are necessary to the understanding of the opinion, and it is the business of the party who objects to the opinion to see that the necessary facts are placed on the record. *Downing v. Baldwin*, 1 S. & R. 298. And whenever the opinion of the judge is filed of record according to the provisions of the statute, it is not necessary that a bill of exceptions should be taken previously to a writ of error. *Downing v. Baldwin*, 1 S. & R. 298. Although there is nothing in the statute to prevent the proceeding by a bill of exceptions, even if the opinion of the court is filed of record. *Bassler v. Neisly*, 1 S. & R. 431. The effect of a bill of exceptions is not to draw the whole matter into examination but only the points to which it is taken. *Frier v. Jackson*, 8 Johns, 495. *Van Gordan v. Jackson*, 5 Johns, 467. *Jackson v. Cadwall*, 1 Cow. 622. *Law v. Merideth*, 6 Wend. 474. *Coze v. Field*, 1 Green, 266. *Picket v. Allen*, 10 Conn. 146. *Watson v. Watson*, 10 Conn. 75. *Hackler v. Cabell*, Walker, 91. *Burnham v. Toothaker*, 1 App. 391.

A bill of exceptions is *per se*, a stay of proceedings; yet it does not prevent a rule nisi for judgment. *Rosevelt v. Heirs of Fulton*, 7 Cow. 107. *Moran v. Dawes*, 4 Cow. 22. *M'Gregor v. Cleveland*, 3 Wend. 313. *Seymour v. Slocum*, 18 Wend. 509.

The settling of a bill of exceptions is a judicial act; it is not competent for a court to direct that two papers mentioned in a bill of exceptions shall be included in the bill upon being verified by the affidavit of the party, or his counsel, to be the same papers which were

ceedings after issue joined : (h) And in either case, it goes on to state, according to the circumstances, that a witness was produced (i) to prove certain

(h) Append. Chap. XXXVII. § 61. Bul. Ni. Pri. 317.

(i) 3 Durnf. & East, 27.

offered in evidence on the trial of the cause. *Emmerson v. Clark*, 2 Scam. 489. The specific mode of correcting the refusal of a court to sign a bill of exceptions pointed out in the Alabama statute of 1826, (Digest 254, § 5,) is not conclusive of a party's rights in a case where a judge of the county court holds a bill tendered him for approval until after the adjournment of the court, on the promise to seal it. *Etheridge v. Hall*, 7 Port. 47. A defective bill of exceptions will not preclude the court from examining the rest of the record, to ascertain if there be error irrespective of the bill. *Rankin v. Holloway*, 3 Smedes & Marsh, 614. In examining a record to ascertain whether a jury has been misled by the instructions of the court, the whole record should be looked into, in order to ascertain the effect of the instructions and what must have been understood by the jury. *Sand v. Samuel*, 14 Ohio, 592. On exceptions to the refusal of a motion for a new trial by a circuit court, in Mississippi, where no charge was asked or given, and the bill of exceptions embraces the whole evidence, the statute of jeofails does not preclude the court above from examining the case and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves v. Dennis*, 6 Smedes & Marsh, 89.

The party taking exceptions is confined to the points excepted to, though all the evidence given at the trial is contained in the bill. The court can take notice of nothing not specifically stated as ground of exception. *Allen v. Smith*, 7 Halst. 160. *Whitese v. Jackson*, 1 Wend. 418. *Miller v. Miller*, 7 Pick. 138. *Wyman v. Hook*, 2 Greenl. 337. *Spaulding v. Alford*, 1 Pick. 37. *Neusum v. Neusum*, 1 Leigh, 86. *Commonwealth v. Stephens*, 14 Pick. 370. *Dean v. Gridly*, 10 Wend. 254. *Coze v. Field*, 1 Green, 222. *Putnam v. Dutton*, 8 Verm. 496. *Pickett v. Allen*, 10 Conn. 146. *Doans v. Cummins*, 11 Conn. 159. *Hinde v. Longworth*, 11 Wheat, 199. It is, however, said in the case of *Phoenix Ins. Co. v. Pratt*, 2 Binn. 308, that error may be assigned in an opinion on any matter material to the issue apparent on the bill, though it is not particularized in stating the exceptions. And in Virginia, a superior court will inspect the whole record and reverse the judgment for any error, though the court below decided rightly on the point to which exceptions were taken. *Murdock v. Hurdon*, 4 H. & M. 200. But they will not receive extraneous evidence of what passed at the trial. *Spaulding v. Alford*, 1 Pick. 37. And the court will confine themselves to, and decide only on the evidence stated in the bill; and every bill must be considered as presenting a distinct substantive case, which if defective in any material point cannot be supplied by any intentment of the court. *Dunlop v. Monroe*, 7 Cranch, 270. *Colgin v. Henley*, 6 Leigh, 85. *Barrett v. Wills*, 4 Leigh, 114. *Horn v. Gartman*, Branch, 63. *Cowan v. Wheeler*, 11 Shep. 79. *Irvine v. Thomas*, 6 Shep. 418. *Williams v. Shepperd*, 1 Green, 76. *Drezel v. Man*, 6 Watts & Serg. 343. *Maine v. Davis*, 10 Shep. 403. *Bone v. McGinley*, 7 How. (Mis.) 671. *Abbott v. Hackman*, 2 Smedes & Marsh. 510. *Burgess v. The State*, 12 Gill & Johns, 64. *Allen v. Thrall*, 10 Verm. 255. *Slater v. Rawson*, 1 Met. 450, 458. *Commonwealth v. Kneeland*, 20 Pick. 206. And all the evidence upon the point must be set out in a bill. *Gall v. Pearson*, 6 Mis. 253. *Hamilton v. Moore*, 4 Watts & Serg. 570. *Cawthorn v. Muldrow*, 8 Mis. 617. The court cannot decide upon the weight and effect of the evidence contained in the bill of exceptions, but they are to consider it as legally proved and to take it for granted that the facts are such as the bill of exceptions hypothetically supposes. *French v. Bancroft*, 1 Met. 502. *Barnacoat v. Six Casks of Gunpowder*, 1 Met. 225. The exceptions themselves must be confined strictly to matters of law. It cannot be properly stated in a bill of exceptions, that certain facts were proved; nor can the court consider the evidence stated in a bill with a view to set aside a verdict, nor can they find any decision on facts there stated, and not embraced in the issue or otherwise appearing on the records; but they will lay out of the case all the evidence detailed in the bill and look only at the finding of the jury. *Id.* The presumption is after verdict, that all necessary and proper instructions, in matter of law, for the aid and information of a jury were given; and it must of necessity be presumed that such instructions were legally correct where no exceptions have been taken and no points reserved. *The Commonwealth v. Kneeland*, 20 Pick. 206.

A bill of exceptions need only state so much of the case, as is necessary to show error; and, if error is shown, a reversal will not be withheld, because in another aspect of the case, the error complained of would be immaterial. *Seawall v. Henry*, 6 Ala. 226. *Hare v. Harrington*, Wright, 260. Unless a bill of exceptions shows that illegal testimony has been received, the decision of a court in permitting an illegal question to be asked, cannot be assigned for error. *Russel v. Martin*, 2 Scam. 492. It is not the proper office of a bill of exceptions to bring up the whole case. *Shelton v. Hoadley*, 15 Conn. 535. *Riley v. The State*, 16 Conn. 49. *Lyme v. East Haddam*, 16 Conn. 394. *Sharp v. Curtiss*, 15 Conn. 526. Therefore, when an action of book-debt was brought to the county court to which the general

facts; the particular evidence offered, (k) or given to the jury, in support of the whole or a part of the case; or that a challenge was made, or

(k) 1 Lutw. 905. 1 Salk. 284.

issue was pleaded, and upon the trial the question was whether upon the facts proved by plaintiff, which were admitted by the defendant, the former was entitled to recover, the court found the issue for the defendant, and rendered judgment accordingly, it held, that the plaintiff could not bring up the case for revision in the Superior Court by bill of exceptions, and a writ of error founded thereon. *Shelton v. Hoadley, supra.* Regularly, exceptions should be signed by the party excepting, or by his counsel; but if they are omitted and the exceptions are allowed and signed by the judge, *Smith v. Frye*, 2 Shep. 4, and sealed by the court or a majority of them, no advantage can be afterwards taken of the omission. *Darling v. Gill*, Wright 73. It must also appear from a bill of exceptions that the court erred to the prejudice of the party excepting. *Holmes v. Gayle*, 1 Ala. 582. *Stone v. Stone*, 1 Ala. 582. *Stephen v. The State*, 14 Ohio, 380. Where a bill of exceptions states two points as having been made in the Circuit Court, both of which were overruled and thereupon the defendant excepted to the decision of the court, this is a sufficient exception as to each of the points overruled. *Fletcher v. Weisman*, 1 Ala. 602. Or where a party submits a variety of distinct prayers, which are refused by the court, and excepts to such refusal collectively, the court will regard the refusal in the same light as if each prayer had been separately determined, and formed the subject of an independent exception. *Planters' Bank v. Bank of Alexandria*, 10 Gill & Johns. 346.

Exceptions to an amendment made by leave of court, must be presented to the court granting the same, before its adjournment, and if not so presented, the court will not reconsider the question of the legality of the amendment as regularly before them. *Sutherland v. Kuykendall*, 1 App. 424. If exception to the form of action is not taken in the court below, none can be taken in the Supreme Court, where the case is carried by exceptions for other causes. *Emons v. Lord*, 6 Shep. 351. In New Hampshire it is too late after verdict to take an exception, which the other party might have obviated by evidence if it had been taken at the trial. *Worth v. Crowell*, 11 N. Hamp. 261. In Vermont a party will be entitled to a bill of exceptions at usual time, under the rule for filing exceptions to a report of auditors, after a motion to commit the report has been disposed of. *Cummings v. Fallon*, 15 Verm. 787. In New Jersey a bill of exceptions must be drawn up and sealed at the time of the trial, and a bill will be afterwards sealed without the mutual consent of the attorneys, or unless settled by judges who tried the cause in pursuance of an agreement made at the trial in open court that effect. *Agnew v. Campbell*, 2 Harr. 291. But in some States, if taken at the time, may be drawn up and signed afterwards. *Wilcox v. Mitchell*, 4 How. (Miss.) Rep. 272.

An objection to a witness or to any part of evidence must be taken in the court below and embraced in a bill of exceptions. *Ludlam v. Brodriek*, 3 Green, 269. *Coze v. Fie*, 25 Green, 25. In Pennsylvania, a bill of exceptions to a charge of the court, if taken after verdict, is in time if it be sealed up by the court and sent up with the record. *Do Hart*, 7 Watts. & Serg. 172. In Georgia and in Maine, exceptions must be taken during trial, and it is not sufficient to take them and reduce them to writing on the succeeding day. *Low v. Goldsmith*, R. M. Charl. 288. *Stockwell v. Craig*, 7 Shep. 328. In Mississippi objectionable matter must be excepted to when it arises, to be available in an appeal to the Court, and it must so appear from the bill. *Wilson v. Owens*, 1 How. (Miss.) 126. Motions made *ore tenus* must be excepted to at the time, or they cannot afterwards be taken upon the record. *Green v. Robinson*, 3 How. (Miss.) 105. *DeCoach v. Walker*, 7 How.

A bill of exceptions in that State, taken to the overruling a motion for a new trial, must show that exceptions were taken pending the trial. The statute provides in such cases that the evidence may be embodied after the trial is concluded and the motion overruled. *Robins v. Pinckard*, 5 Smedes & Marsh. 51. In Arkansas, all bills of exceptions must be tendered at the trial, but they need not be reduced to form until afterwards, and unless taken they will not be considered a part of the record. *The Governor v. Evans*, 1 Pike, 14. *Leno v. Pike*, 2 Pike, 14. And the exceptions to the opinion of the court must be reserved during the trial, and the bill of exceptions must state that the transaction occurred at the trial. *Id.* But the bill may be signed after judgment, during the term. *Byrd v. Pike*, 3 Pike, 451. Where it appears from the bill of exceptions, that they were taken during trial, and on overruling a motion for a new trial, they are a part of the record, and the fact that they were so taken cannot be controverted, although they were not reduced to writing until nine days afterwards. The time is not unreasonable for reducing them to writing. *M'Donald v. Foulkner*, 2 Pike, 472. In Tennessee, where an appeal is taken, the bill of exceptions must be made out before the adjournment of the court, and no order can be made that it be taken at a subsequent term, whether general or special. *Staggs v. The State*, 3 Humph. 372.

mutter to evidence tendered; the allegations of counsel, respecting the competency of the witness, the admissibility of the evidence, or the legal effect of it, &c.; the opinion and direction of the court or judge [*864] thereon; the verdict *of the jury; and the exception of the counsel, to the opinion given.(a) And where the bill of exceptions respects the legal effect of evidence, the conclusion is as follows: "And inasmuch as the said several matters, so produced and given in evidence for the party objecting, and by his counsel objected, and insisted on, do not appear by the record of the verdict aforesaid, the said counsel did then and there propose their aforesaid exception to the opinion of the judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced, and given in evidence for the party objecting as aforesaid, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the party objecting, did put his seal to this bill of ex-

(a) For precedents of bills of exceptions, as to the legal effect of the *whole* of the evidence, see Brownl. 129. *Money & others v. Leech*, Bul. Ni. Pri. 317; and *Fabrigas v. Mostyn*, XI Stat. Tri. 187, 8. Append. Chap. XXXVII. § 59. And for precedents of a bill of exceptions, as to the legal effect of evidence in support of a *particular* fact, see Brownl. 131; and as to a witness being bound to answer a question tending to disgrace him, see Append. Chap. XXXVII. § 61.

In Missouri, exceptions to the opinion of the court must be taken in the progress of the trial, and not afterwards. *Randolph v. Alsey*, 8 Mis. 656. And they cannot be tendered and signed at a term subsequent to the trial, without the consent of the opposite party. *Pomeroy v. Selmes*, 8 Mis. 727.

In error on a bill the Supreme Court will grant a writ, ordering the judges of the court below to come in, and confess or deny their seals, and that in the meantime all proceedings by the defendant be stayed. *Pomeroy v. Preston*, 2 Caines, 373. And when the judge of the inferior court comes into the Supreme Court to confess or deny his seal, the only question that can be asked him is, "is this your seal or not, put to this bill of exceptions?" Any questions as to the proceedings below are inadmissible. *Crowell v. Byrnes*, 9 Johns, 288. Where a bill is part of the record, and comes up with it on a writ of error, it is not necessary to call the judge to acknowledge his seal to the bill; but where the bill of exceptions is not tacked to the record, such an acknowledgment may be proper. *Clarke v. Russell*, 3 Dall. 419, *note*. And the court may at any time during the term, supply a defect or omission by statement on the record. *Givens v. Bradley*, 3 Bibb, 195. A mandamus is the proper mode to compel such court to amend a bill according to the truth of the case. *Sikes v. Ransom*, 6 Johns, 279. 5 Wend. 132, *n*. It lies to a circuit judge and to the Common Pleas, to compel them in a proper case to seal a bill of exceptions. *Delavan v. Boardman*, 5 Wend. 132. *People v. Judges, &c.*, 1 Caines, 511. *Pomeroy v. Preston*, 2 Caines, 373. *State v. Todd*, 4 Ham. 351. But will not be granted if it appears from the affidavits that the bill of exceptions is untrue; and the relator shall in such case pay costs to the defendants. *Coburn v. Murray*, 2 Greenl. 338. *People v. Judges, &c.*, 2 Johns. Cas. 118. And the presentation should be regularly made; thus, where on the return to an alternative *mandamus* it appeared that the bill was not tendered to the judges at the trial, but afterwards was presented to them individually at different times after the court had adjourned, a peremptory *mandamus* was refused. *Midberry v. Collins*, 9 Johns. 345. Or if the bill was not settled on proper notice to the adverse party, no *mandamus* will lie to the court to execute it. *Shepard v. White*, 3 Cow. 32. Or if it is presented at too late a day, the court will not order a judge to sign it, he having corrected and settled a different bill as correctly as his means would allow. *Ex parte Bradstreet*, 4 Pet. 102. It is said to be a reprehensible practice, to present a bill to a judge at a distant day from the trial, or for him to settle it from memory at such day. *Ib*.

Where a judge refused to sign a bill of exceptions, and also to obey a *mandamus* from the Supreme Court, to sign the bill, and he was attached for a contempt, whereupon he resigned his office, a motion that the bill be taken and considered as true and be allowed the same effect as though signed and sealed, was granted, the correctness of the bill not being denied. *Bristol v. Phillips*, 3 Seam. 287. But where bills of exceptions have been fraudulently obtained, or sealed irregularly, improvidently, or in clear violation of a plain rule of law, the court to which the writ of error has been returned, will quash them. *Wilson v. Moore*, 4 Harr., N. J., Rep. 186.

ceptions, pursuant to the aforesaid statute in such case made and provided, on the — day of — in the — year of the reign, &c.”(b) Upon an exception taken in a bill of exceptions, in which the whole evidence was set out, that the evidence for the defendant was sufficient to entitle him to a verdict, and to bar the plaintiff’s claim; a court of error may look to the whole evidence on both sides, to see whether the verdict for the plaintiff was sustained by the evidence.(c)

On tendering the bill, if the exceptions therein are truly stated, the judges ought to set their seals, in testimony that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters wherein the party was not overruled, the judges are not obliged to affix their seals; for that would be to command them to attest a falsity.(d) If the judges refuse to sign the bill of exceptions, the party grieved may have a writ, grounded upon the statute, commanding them to put their seals, *juxta formam statuti*.(e) &c. This writ contains a surmise of an exception taken and over-ruled, and commands the justices, that if it be so, they put their seals;(f) upon which, if it be returned *quod non ita est*, an action lies for a false return, and thereupon the surmise will be tried, and if found to be so, damages will be given; and upon such recovery, there issues a peremptory writ.(g)

When the bill of exceptions is sealed, the truth of the facts contained in it cannot afterwards be disputed.(h) And judgment being entered, a writ of error is brought, to move the proceedings into the court above: for a bill of exceptions is only to be made use of upon a writ of error;(i) *and therefore, where a writ of error will not lie, there can be [*865] no bill of exceptions.(a) And a bill of exceptions being no part of the record in the court below, is not to be included in the taxation of costs there.(bb) Upon the return of the writ of error, the judge is called upon by writ, either to confess or deny his seal;(cc) and if he confess it, the proceedings being entered of record, the party assigns error;(dd) If the judge deny his seal, the plaintiff in the writ of error may take issue thereupon, and prove it by witnesses.(ee) On a writ of error from the court of King’s Bench in *Ireland*, the proper mode is to send a writ from this country to the chief-justice of that court, to take the acknowledgment of the seal of the judge at *nisi prius*.(ff)

The judgment on the writ of error, as in other cases, is either that the former judgment be affirmed or reversed. If it be reversed, a *venire de*

(b) Bul. Ni. Pri. 317.

(c) 1 Younge & J. 4. *Sed quare*, whether an objection can be raised to evidence, to which no exception has been taken by the bill? *Id. ib.*

(d) Show. P. C. 120.

(e) 2 Inst. 427. Bul. Ni. Pri. 316; but see 1 Madd. Chan. 15, 16.

(f) *Reg. Brev.* 182.

(g) 2 Inst. 427.

(h) Show. P. C. 120.

(i) But see 2 Inst. 427, by which it seems, that a bill of exceptions may be also used on a writ of false judgment from the county or hundred courts, or from the court baron.

(a) 1 Salk. 284. *Rez v. Inhabitants of Preston*, Bul. Ni. Pri. 316. 1 Blac. Rep. 679. Cowp. 501; but see 2 Lev. 236.

(bb) 1 Bos. & Pul. 32.

(cc) East. Ent. 293, b. 3 Bur. 1693. 1 Blac. Rep. 556, S. C.

(dd) 1 Lutw. 905, 6. And, for assignments of, and other proceedings in error, on bills of exception, see Append. Chap. XLIV. § 73, 4; 83, 106, 7.

(ee) 2 Inst. 428.

(ff) *Barry v. Nugent*, in Error, M. 23 Geo. III. K. B.; and see Cowp. 501.

novo issues ; which must be made returnable in the King's Bench, although the judgment was given in the Common Pleas. (*gg*)

A *demurrer* to evidence is a proceeding, by which the judges of the court in which the action is depending, are called upon to declare what the law is, upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading. (*hh*) [A] The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never appear on the record : (*ii*) And the question upon a demurrer being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection, to the pleadings. (*k*) A demurrer to evidence is not allowed in the king's case ;

(*gg*) 3 Durnf. & East, 36.

(*hh*) 2 H. Blac. 205; and see 3 Salk. 122. 4 Bac. Abr. 136. 3 Blac. Com. 372. 2 Barn. & Cress. 445. 1 Car. & P. 240, (*a*). Append. Chap. XXXVII. § 55, &c.

(*ii*) *Per Buller*, J. Doug. 134.

(*k*) Doug. 218.

[A] "A demurrer to evidence is a proceeding by which the judges, whose province it is to answer to all questions of law, are called upon to declare what the law is upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading. For if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law, upon the evidence; the effect of which is to take from the jury, and to refer to the judge, the application of the law to the fact.

"Where the court is asked to direct the jury to disregard the testimony of a particular witness, it is the duty of the court to compel a demurrer by the party so applying, or else to permit the opposite party to address the jury.

"The demurrer to evidence originally grew out of necessity, and fell into disuse only when the increasing liberality of the English judges in granting new trials, afforded a more convenient method of obtaining the judgments of the superior courts, at Westminster. With us, there is perhaps some reason why it should be retained and even encouraged, inasmuch as the opinion of the court in the last resort cannot be had on a motion for a new trial in the Common Pleas.

"As it is the peculiar province of the jury to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed by a demurrer to evidence, or any other means, to take that province from them, and draw such questions, *ad aliud examen*. The rule therefore, is, that the demurrer must admit the truth of all facts which the jury might find in favour of the other party upon the evidence laid before them, whatever the nature of that evidence may be, whether of record, or in writing, or by parol. Where the evidence is written and where, though parol, it is certain the party who offers it must join in the demurrer, or waive testimony, if the plaintiff refuse to join in demurrer, except on terms which the court disapproves, the plaintiff's evidence must be considered as withdrawn, and the jury must find a verdict for the defendant. But where the evidence is uncertain or circumstantial, the party by whom it is offered may specify the facts which he wishes to be expressly admitted before he joins in the demurrer. The judge must decide upon that matter, and every fact should be admitted, which the evidence conduces to prove, though but in a slight degree. So, if the evidence conflict, the party demurring must admit that of his adversary to be true so far as it conflicts with his own. So, if the plaintiff call several witnesses to prove the same transaction, some of whom testify unfavourably to him and others in his favour, the defendant, by demurring to the evidence, admits that the latter have told the truth, and so the court must take it, though the jury would have believed the former. So, if one fact tends to the induction of another, the last fact should also be admitted. Under these restrictions it is the right of the party demurring to insist on the demurrer being joined. Where there is parol evidence of a fact, which is not evidence of any other fact, but itself a substantive ingredient in the case, a party may be required to join in demurrer. It is the duty of the judge to be liberal in directing the admission of facts, and if he err in judgment it will be good cause for the court in bank to order a *venire facias de novo*. The court will also, on the argument of the demurrer, make every inference of fact in favour of the party offering the evidence which the evidence warrants, and which the jury might with the least degree of propriety have inferred; but they ought not to make forced inferences; or if upon consideration of the record the court should be of opinion that there are not facts sufficient to warrant a judgment, they may order a *venire de novo*." 1 Tron. & Haley's Pract. 509, 3 Ed.

and therefore if a doubt arise, upon the effect of the evidence, the judge must direct the jury to find the matter specially.(j)

If a matter of *record*, or other matter in *writing*, be offered in evidence, to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence:(m) and the reason given for it is, that there cannot be any variance of matter in writing.(n) The books also agree, that if *parol* evidence be offered, and the adverse party demur, he who offers the evidence *may* join in demurrer, if he will. But the language of the old books is very indistinct upon the question, *whether the party offering *parol* evidence shall be *obliged* [*866] to join in demurrer. In a late case,(a) which came before the House of Lords, it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence in writing to join in demurrer, applies to the first sort of *parol* evidence; but it does not apply to *parol* evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact which the circumstances offered in evidence conduce to prove, there will then be no more variance in this *parol* evidence, than in a matter in writing; and in such case the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit upon the record, every fact and every conclusion which the evidence offered conduces to prove, it is not competent for him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer;(b) though, if the party offering the evidence consent to waive the objection, and join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to:(c) And the court will, if they can, give judgment upon such evidence;(c) but otherwise a *venire de novo* must be awarded.(d)

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and control of the court, upon a trial at bar, or of the judge at *nisi prius*:(e) subject however to an appeal, by a bill of exceptions, if the demurrer be refused.(f) And where a demurrer to evidence is allowed, it is usual for the court or judge to give orders to the associate, to take a note of the

(j) Co. Lit. 72. 5 Co. 104.

(m) 2 H. Blac. 206.

(n) Cro. Eliz. 752. 5 Co. 104, S. C.

(a) *Gibson & Johnson v. Hunter*, 2 H. Blac. 187.

(b) *Id. ibid.*; and see Aley, 18 Sty. Rep. 22, 34, S. C.

(c) Doug. 119.

(d) 2 H. Blac. 209.

(e) 2 H. Blac. 208.

(f) *Id. ibid.* Cro. Car. 341.

testimony; which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*.(g) Upon a demurrer to evidence, we have seen, the damages may be assessed *conditionally* by the principal jury, before they are discharged; or they may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined:(h) And it is [*867] said to be the most *usual course, when there is a demurrer to evidence, to discharge the jury without further inquiry.(a)

The evidence being gone through, and summed up by the judge, the jury, if they think proper, may *withdraw* from the bar, to deliberate on their verdict. And they are allowed to take with them, by leave of the court, letters patent, and deeds under seal, and the exemplification of witnesses in Chancery, if dead; but writings or books which are not under seal, ought not to be delivered to the jurors, without the assent of both parties,(b) nor any evidence but what was shown to the court.(c) If the jury take with them patents, deeds, &c. without leave of the court, or writings not under seal, books, &c. which have been given in evidence, without the assent of both parties, this, however irregular, will not avoid the verdict, though they be taken by the delivery of the party for whom the verdict was given:(d) So, though one of the jury show a writing, which was not given in evidence, to his companions.(e) But if the party for whom the verdict is given, or any for him, deliver to the jury, after they are gone from the bar, a letter or other writing not given in evidence, it will avoid the verdict:(f) And so, if they examine witnesses by themselves who were examined before, though to the same evidence as was given in court.(gg) But they may come back into court, to hear the evidence of a thing whereof they are in doubt.(hh) The objection in these cases must be returned upon the *postea*, or made parcel of the record; otherwise it will not be a ground for staying judgment, or bringing a writ of error.(i)

When the jury have agreed, they return to the bar: but before they gave their verdict, it was formerly usual to *call* or demand the plaintiff, in order to answer to the amercement, to which by the old law he was liable, in case he failed in his suit;(k) and it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing evidence in support of it, or evidence arising in the proper county: And if it be clear that, in point of law, the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff, although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or on a writ of error.(l) But where the case turns on a question of fact, it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to his being nonsuited;(m) a mere tacit acquiescence not being it seems suffi-

(g) Bul. Ni. Pri. 313; and see Append. Chap. XXXVII. § 55.

(h) *Ante*, 575. Plowd. 410. 1 Ld. Raym. 60. Doug. 222.

(a) Cro. Car. 143. *Ante*, 575; and see Append. Chap. XXXVII. § 57.

(b) Cro. Eliz. 411.

(c) 2 Rol. Abr. 686.

(d) Cro. Eliz. 411; and see 2 Salk. 645.

(e) Cro. Eliz. 616.

(f) Co. Lit. 227, b.

(gg) Cro. Eliz. 411, 12.

(hh) 2 Rol. Abr. 676.

(i) Cro. Eliz. 616; and see Bul. Ni. Pri. 308.

(k) 3 Blac. Com. 376.

(l) 1 Campb. 256; and see 2 Price, 294, 298.

(m) See note (m), next page.

cient.(m) And it seems, that if the counsel for a plaintiff do not mean to *submit to be nonsuited, they should intimate their dissent [*868] to the judge, on his expressing himself of opinion that the plaintiff ought to be called.(a) The cases in which it is necessary that the evidence should arise in a particular county, are either when the action is in itself local, or made so by act of parliament, as in actions upon penal statutes, &c.; or when, upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence in the county where the action was brought:(b) And there is this advantage attending a nonsuit; that the plaintiff, though subject to the payment of costs, may afterwards bring another action for the same cause, which he cannot do after a verdict against him.

It was formerly holden, that after a plea of tender, the plaintiff could not be nonsuited;(c) and it was doubted whether there could be a nonsuit, after payment of money into court:(d) But it is now settled, that he may be nonsuited, after a plea of tender,(e) or paying money into court.(f) And though the practice was formerly otherwise,(g) yet it is now holden, that after judgment by default against one of two defendants, the plaintiff may elect to be nonsuited, upon the trial of an issue joined by the other defendant.(h) So, he may be nonsuited in *scire facias*, as well as in other actions.(i) The king, however, cannot be nonsuited; because he is supposed to be always present in court.(k) And a nonsuit, it is said, can only be at the instance of the defendant; therefore, where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attorneys, parties or witnesses appeared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called.(l) But the plaintiff it seems may be nonsuited in an undefended cause, if he do not make out a proper case, or for a variance,(m) &c. And where the cause was undefended at *nisi prius*, and the judge directed a nonsuit, with liberty for the plaintiff to move to enter a verdict, the court may order a verdict to be entered accordingly for the plaintiff.(n) When a cause is carried down by *proviso*, and the plaintiff does not appear at the trial, he should be nonsuited;(o) but where a verdict in such case was taken for the defendants by mistake, instead of a nonsuit, the court, though this was irregular, would not permit the plaintiff to set it aside, unless he would consent to a nonsuit being entered.(p) In *replevin*, where the plaintiff does not appear, the de-

(m) 9 Price, 291; and see 2 Barn. & Cres. 693. 4 Barn. & Cres. 21; but see 6 Barn. & Cres. 225.

(a) 13 Price, 222. M'Clell. 69, S. C.

(b) 2 Blac. Rep. 1036; but see 2 Durnf. & East, 281.

(c) 1 Campb. 327.

(d) *Id. in notis. Ante*, 624.

(e) 3 Bing. 290. 2 Car. & P. 85, S. C.; and see the notes on 1 Campb. 327.

(f) *Ante*, 624, 5.

(g) 3 Durnf. & East, 662; and see 1 Bur. 358. Cowp. 483. *Ante*, 459, 762.

(h) 5 Barn. & Cres. 178. 7 Dowl. & Ry. 619, S. C.; and see 5 Barn. & Cres. 768. 8 Dowl. & Ry. 592, S. C.

(i) 1 Camp. 484.

(k) Com. Dig. tit. *Pleader*, X. 3. (l) 1 Str. 267; and see 2 Str. 1117.

(m) 3 Taunt. 81. Append. Chap. XXXIX. § 26, &c.

(n) 4 Barn. & Ald. 413; and see 1 Man. & Ry. 261, (a).

(o) 2 Wms. Saund. 5 Ed. 336, b. *Ante*, 762.

(p) 1 Barn. & Cres. 110. 2 Dowl. & Ry. 221, S. C.; and see 1 Barn. & Cres. 94. 2 Dowl. & Ry. 198, S. C.

[*869] defendant cannot take *a verdict, though the record be brought down by the latter, but a nonsuit must be entered.(aa)

The plaintiff is in no case compellable to be nonsuited;(bb) and therefore, if he insist upon the matter being left to the jury, they must give in their *verdict*, which is general or special. A *general* verdict is a finding by the jury, in the terms of the issue or issues referred to them; and it is either wholly, or in part, for the plaintiff, or for the defendant. Where the declaration contained *thirty* counts, on *fifteen* bills of exchange, the judge at *nisi prius* refused to compel the plaintiff to select *fifteen* of the counts, on which to take his verdict:(c) But, on a general verdict, the court of Common Pleas will compel a plaintiff to elect, in the term after the trial, on what count he will enter it up.(d) Where an avowant stated, that the plaintiff held the premises at a certain yearly rent, and the plaintiff pleaded, first, *non tenuit*, and secondly, *riens en arriere*, and the first plea was found for the plaintiff; the court held, that the second plea thereby became immaterial, and that the proper course was to discharge the jury from finding any verdict upon it; but that if any verdict was found, it must be entered for the plaintiff.(e) So, where the declaration in *assumpsit* consisted of *twenty* counts, *twelve* of which were special, and the defendant pleaded the general issue and statute of limitations to the whole declaration, and a set off to the last *eight* counts; and it appeared by the record, that the jury found a verdict for the plaintiffs, on the *twelve* special counts, on the general issue and statute of limitations, and for the defendants on the remaining *eight* counts, on the general issue; and that the jury were discharged from giving any verdict on the plea of set off, or statute of limitations, as to the last *eight* counts; the court, considering the issues joined on these pleas as immaterial, refused to reverse, on error, the judgment for the plaintiff: although it was objected, that the discharge of the jury was not stated on the record to be with the *consent* of the parties: And as it did not appear on the record, that there was any bill of exceptions, or motion for a new trial, or in arrest of judgment, the court of error presumed, that all which was stated on the record to have been done, was rightly done.(f) In *assumpsit* against several defendants as executors, with a plea of *ne unques executors*, the plaintiff may have a verdict against the real executor, on the counts laying the promises by the testator, and the other defendants must be discharged. 1 Moody & M. 146.

On a verdict for the plaintiff, the jury should regularly assess the *damages*: And they may also be assessed on a nonsuit,(g) or verdict for the defend-

(aa) Ry. & Mo. 357.

(bb) 2 Durnf. & East, 281. 14 East, 239; and see 13 Price, 222. M'Clel. 69, S. C. 1 Man. & Ryl. 261, (a).

(c) 2 Stark. Nl. Pri. 442.

(d) 5 Taunt. 36; and see 1 Bing. 100. 7 Moore, 427, S. C. 13 Price, 499, where, in *assumpsit* on a bill of exchange, with the common money counts, the court, under particular circumstances, allowed the verdict to be entered on the latter counts only, with a view to a suggestion, to deprive the plaintiff of his costs, on the *London* court of conscience act.

(e) 2 Barn. & Ald. 546.

(f) 3 Bing. 381; and see Barnes, 54; 461, 2. 1 Wils. 44. 2 Barn. & Ald. 546. Com. Dig. tit. *Pleader*, S. 26.

(g) Comb. 11. 5 Mod. 76.

ant, in *replevin*.(h) But if the plaintiff be nonsuited on the trial of *an issue in another action, he cannot have contingent damages [*870] assessed for him on a demurrer.(a) *Damages* are a pecuniary compensation for an injury; and may be recovered in every *personal* action that lies at common law: But in an action for a penalty given by statute to a common informer, they are not recoverable;(b) nor for delay of execution, in a *scire facias* founded on the statute of *Westm. 2. c. 45.(cc)* In actions purely *real*, no damages are recoverable,(d) as in a writ of right, &c.; but damages may be recovered in actions of a *mixed* nature, as in *ejectment*,(e) or in an assize, or writ of entry in nature of an assize, of *novel disseisin*, against the disseisor:(f) And, by the statute of *Gloucester*, (6 *Edw. I.*) c. 1, § 1, damages were given in an assize, or writ of entry upon a *novel disseisin*, against the alienee, or him that was found tenant after the disseisor; and also in all cases where a man recovered by assize of *mort d'ancestor*,(g) or upon writs of *cosinage*, *aiel* and *besaiel*, or against a tenant, upon his own intrusion or act. By the statute *Westm. 2.* (13 *Edw. I.*) c. 26, *double* damages are recoverable upon a writ of *re-disseisin*; and, by the 3 and 4 *Edw. IV. c. 3, § 4*, *treble* damages may be recovered in an assize of *novel disseisin*, upon the statutes respecting the improvement of wastes,(h) &c. In a writ of *dower unde nihil habet*, the widow is entitled, by the statute of *Merton*, (20 *Hen. III.*) c. 1, to recover in damages the value of her dower, from the time of the death of her husband:(i) In *waste*, treble damages are recoverable by the statute of *Gloucester*, (6 *Edw. I.*) c. 5,(k) to which costs are super-added, by the 8 & 9 *W. III. c. 11, § 3*: And, by statute *Westm. 2.* (13 *Edw. I.*) c. 5, § 3, damages are given in writs of *quare impedit*, and *darrein presentment*. In an action of *waste*, on the statute of *Gloucester*, against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the court will give the defendant leave to enter up judgment for himself.(l)

The damages in *personal* actions are either admitted by the defendant, on a confession of the action;(m) assessed by the jury, on the trial of an issue, or execution of a writ of inquiry;(n) ascertained by the master or prothonotaries, in an action on a bill of exchange, or promissory note, &c.:(o) or increased by the court, after verdict, in an action for a *mayhem*, on view of the plaintiff.(p)

*In treating of the damages in *personal* actions, it is proposed [*871] to consider in the first place, those which are given in actions

(A) Stat. 7 *Hen. VIII. c. 4, § 3.* 21 *Hen. VIII. c. 19, § 3.*

(a) 1 *Str.* 507.

(b) 1 *Roll. Abr.* 574. 4 *Bur.* 2018, 2489.

(cc) 3 *Bur.* 1791.

(d) Booth, on *real* Actions, 74.

(e) 3 *Blac. Com.* 200, 201.

(f) 2 *Inst.* 286. 10 *Co. Plifolds* case; and see 3 *Blac. Com.* 187, 8.

(g) Damages had been before given, in an assize of *mort d'ancestor*, by the statute of *Marlbridge*, 52 *Hen. III. c. 16*, in cases where the land was recovered against the chief lord.

(h) See also the statute of *Westm. 1.* (3 *Edw. I.*) c. 24. *Westm. 2.* (13 *Edw. I.*) c. 25. 1 *Rich. II. c. 9.* 1 *Hen. IV. c. 8*; and 4 *Hen. IV. c. 8*; by which double or treble damages are given upon *disseisins* in particular cases.

(i) For the construction of this statute, and in what cases the widow is entitled to damages thereon, see *Co. Lit.* 32, 3.

(k) 9 *Moore*, 497. 2 *Bing.* 262, *S. C.*

(l) 2 *Bos. & Pul.* 86; and see 8 *Moore*, 443.

(m) *Ante*, 559, &c.

(n) *Ante*, 573, &c.

(o) *Ante*, 570, &c.

(p) *Post*, 888, 896.

upon *contracts*, and afterwards those in actions for *wrongs*, independently of contract. Actions upon *contracts* are *assumpsit*, *covenant*, *account*, *annuity*, *debt*, and *scire facias*; and actions for *wrongs*, independently of contract, are *case*, *detinue*, *replevin*, and *trespass vi et armis*. In estimating the damages in these several actions, regard must be had to the nature and object of the action, and whether it be for the recovery of damages only, as in *assumpsit*, *covenant*, *case*, *replevin* for the plaintiff, and *trespass vi et armis*; or principally with a view to some other object, as in *account*, for obtaining the settlement of an account between the parties, and payment of the sum found to be due thereon; in *annuity*, for the recovery of the arrears of an annuity, or yearly sum; in *debt*, for the recovery of a sum certain, on simple contract, specialty, or record, &c.; in *scire facias*, to have execution on a recognizance, or judgment; in *detinue*, for the recovery of goods *in specie*, or their value; and in *replevin* for the defendant, to have a return of the cattle or goods distrained.

In *assumpsit* or *covenant*, the damages are for the non-payment of money, or for the not doing or forbearing of some other act. For the non-payment of money, the measure of damages is the sum agreed to be paid to the plaintiff; or, if not ascertained by the contract, the sum proved to be due to him, at the time of bringing the action; with or without *interest*, according to the nature of the demand, and manner in which it arose. It was formerly holden that, upon an *indebitatus assumpsit*, the plaintiff could not recover less than the sum he stated to be due to him; (a) But it is now settled, that though the plaintiff cannot give in evidence a debt beyond the sum laid in the declaration, yet the jury, in assessing the damages, may divide that sum in such a manner as that the plaintiff may recover what is justly due to him. (b) Even in *debt* upon simple contract, the plaintiff may prove and recover a less sum than is stated to be due: (c) And, in an action on a policy of insurance, if the plaintiff declare for a total loss, he may recover for a partial one. (d)

Before we proceed further, it may be proper to consider in what cases *interest* is, or is not recoverable. It was formerly holden, that interest was payable on all liquidated sums, from the instant the principal became due: (e) and accordingly, interest was allowed for money lent to, (f) or paid for the defendant; (g) or, on an account stated: (h) But it was not recoverable in an action for goods sold and delivered: (i) or for work and labour. (k) And it is now settled, that interest is recoverable in *four* cases only:

[*872] *1st, Where there is a contract in writing, for the payment of money on a certain day, as on bills of exchange or promissory notes, &c.; 2dly, Where there has been an express promise to pay interest; 3dly, Where, from the course of dealing between the parties, such a promise may be inferred; or 4thly, Where it can be proved that the money has been

(a) Cro. Eliz. 292; and see Clayt. 87, *accord*.

(b) *Thompson v. Spencer*, E. 8 Geo. III. K. B. Say. Dam. 44; and see Cro. Eliz. 292, (a).

(c) 1 H. Blac. 249.

(d) 2 Bur. 904. 1 Blac. Rep. 198, S. C.; and see Park. Insur. 7 Ed. 600. Marsh. Insur. 1 Ed. 628, 9.

(e) 2 Blac. Rep. 761. 3 Wils. 205, S. C.

(f) Bunb. 119. 2 Blac. Rep. 761. 3 Wils. 205, S. C.; and see 15 East, 224, 5.

(g) 1 H. Blac. 303.

(h) 2 Blac. Rep. 761. 3 Wils. 205, S. C.

(i) Barnes, 228; and see 2 Blac. Rep. 761. 3 Wils. 205, S. C.

(k) 1 H. Blac. 303; and see 9 Price, 134.

used, and interest actually made of it: *(aa)* And therefore it is now holden, that interest is not recoverable for money lent generally, without a contract for it, expressed or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of the principal money at a given time. *(bb)* So, interest is not recoverable on an account stated. *(cc)* unless it has been paid on former balances; *(dd)* or on money had and received, unless there be some express promise to pay interest, or something from which such a promise may be inferred; or it be proved that the money has been used by the defendant, and interest made of it. *(ee)* And, in an action against an *auctioneer*, for the return of deposit money, where a good title cannot be made out according to the conditions of sale, the defendant is not liable to the purchaser for interest on the deposit money: *(f)* But, in an action against the *vendor*, when the title proves defective, the purchaser is entitled to interest on the deposit; and may recover it as damages, on alleging the special matter in his declaration. *(g)* It was determined in one case, that on a contract for the sale of goods, if any particular time were limited for payment of the price, the vendor was entitled to interest thereon from that time. *(h)* But in a subsequent case, *(i)* it was holden, that though an agreement for the sale of goods, which were afterwards delivered, give a certain day of payment for the price, interest does not run upon the sum due from that day.

In an action upon a bill of exchange, or promissory note, when interest is expressly reserved by the bill or note itself, interest is recoverable from the date of it. *(k)* And it is also recoverable from the acceptor of a bill, and maker of a promissory note, payable at a certain time after date, or sight, from the day on which it became due, allowing the days of grace, without proof of any demand; *(l)* or, if payable on demand, from the time of the demand made: *(m)* But the drawer or indorser of a bill of exchange, or indorser of a promissory note, is only liable to pay interest from the time he receives notice of the dishonour; *(n)* and not even then, in the case of an inland bill, unless it has been protested for non-payment. *(o)*

*Before the making of the statute 6 Geo. IV. c. 16, interest [*873] was not allowed to be proved under a commission of bankrupt, upon bills of exchange or promissory notes, unless it was expressly reserved in the body of them. *(a)* But now, by that statute, *(b)* "in all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, over due at the issuing the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by

(aa) 1 Campb. 50; and see *id.* 52, n. 2 Esp. Rep. 704. 5 East, 22. 1 Smith, R. 399, S. C. 4 Taunt. 298. 3 Campb. 467.

(bb) 15 East, 223.

(cc) 6 Esp. Rep. 45. 1 Campb. 52, n. *(dd)* 1 Campb. 52, n.; and see 4 Taunt. 298.

(ee) 1 Campb. 50; and see *id.* 129. 1 Bos. & Pul. 306. 2 Bos. & Pul. 467, 472.

(f) 8 Taunt. 45. 1 Moore, 481, S. C.

(g) 1 Moore, 322; and see 3 Campb. 258. 5 Taunt. 625. 1 Marsh. 258, S. C.

(h) 2 Bos. & Pul. 437; and see 5 Esp. Rep. 114.

(i) 12 East, 419. 2 Campb. 429, n. S. C. *(k)* Ry. & Mo. 381.

(l) Ves. 134. 5 Ves. 803. 1 Cowp. Chan. Cas. 29. 17 Ves. 27.

(m) Pr. Reg. 357. Cas. Pr. C. P. 42, S. C. 2 Blac. Rep. 761. 3 Wils. 205, S. C. 2 Camp. 473. 3 Ves. 134, 5. 5 Ves. 801.

(n) 5 Taunt. 240.

(o) 1 Atk. 611, 12. Chit. Bills, 5 Ed. 537.

(a) Co. B. L. 7 Ed. 186; and see 2 Barn. & Cres. 305. *Ante*, 209, 10.

(b) § 57.

the commissioners, to the date of the commission, at such rate as is allowed by the court of King's Bench, in actions upon such bills or notes."

In an action on a bill of exchange or promissory note, interest is no part of the debt, but considered merely as damages for the detention of it; so that the jury may refuse to give it, if they think proper.(c) And when goods are sold, to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time when the bill, if given, would have become due:(d) and the interest in that case may it seems be recovered, under the common count for goods sold and delivered.(e) This doctrine applies to all cases where there is a contract to pay by a bill.(ff) And, in *trover* for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill, at the time of the demand and refusal to deliver it up.(g) It was formerly usual to allow interest, in actions on *policies* of insurance;(h) but this practice having been disapproved of,(i) it is now settled, that in an action on a policy, the plaintiff cannot recover interest upon the sum insured.(k) And, in *covenant* upon a policy on the life of A. payable six months after due proof of his death, the assured is not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.(l) So, in *covenant* for the nonpayment of rent, interest it seems is not recoverable.(m)

Where money due on a balance of accounts is awarded to be paid on a certain day, and at a particular place, interest ought to be allowed from that day, if payment was then demanded at the place appointed.(n)

[* 874] In **debt* on bond, conditioned for the payment of a less sum generally, without naming any day of payment, interest may be recovered from the date of the bond, though not expressly reserved.(a) A bond conditioned for the payment of a specified sum after the death of B. and C., and the survivor of them, will bear interest after the death of B. and C. although the engagement was perfectly voluntary, and the principal was payable on a contingency:(b) And in *debt* on bond, in the penalty of 120*l.* conditioned for the repayment of the same sum with lawful interest, it was ruled at *nisi prius*, that interest was recoverable beyond the penalty, to the extent of the damages laid in the declaration.(c) In *debt* on a single bill, for the payment of money on a day certain, the plaintiff is entitled to interest, from the day when it was payable,(d) but where no day of payment was mentioned in the bill, proceedings were stayed thereon, by the court of Common Pleas, on payment by the obligor of principal and costs, without interest.(e) When an action is brought upon a *judgment*,

(c) 1 Dowl. & Ry. 16, 18, 19, 20, (a); and see 5 Taunt. 625. 1 Marsh. 258, S. C. 4 Price, 282. Chit. Bills, 5 Ed. 537; but see 4 Taunt. 334, 341.

(d) 2 Campb. 428, n.; 472, 480. 13 East, 98; and see 3 Taunt. 157. 4 Taunt. 250, 298, 9. 2 Bing. 4. 17 Ves. 27. (e) 13 East, 98; but see 3 Taunt. 157:

(ff) 4 Taunt. 250; and see Chit. Bills, 5 Ed. 537, 8.

(g) 3 Campb. 477.

(h) 1 Campb. 518.

(i) 2 Campb. 427.

(k) 1 Campb. 518.

(l) 2 Barn. & Cres. 624. 3 Dowl. & Ry. 613, S. C.

(m) 15 East, 225.

(n) 3 Campb. 478; and see 1 East, 401. 1 Maule & Sel. 169. 3 Bing. 353. *Marquis of Anglesea v. Chafey, per Abbott, J., Dorch. Spring Ass. 1818.* Man. Dig. tit. *Interest of Money*, A, (a), pl. 19.

(a) 7 Durnf. & East, 124.

(b) 1 Stark. Ni. Pri. 291.

(c) Ry. & Mo. 105.

(d) 2 Ld. Raym. 773. Say. Dam. 64, S. C. cited.

(e) 1 Bos. & Pul. 337.

the plaintiff, we have seen, (f) may have a writ of inquiry, after judgment by default, to recover interest, by way of damages, for the detention of the debt. And in debt on *judgment*, affirmed on error, the jury, by way of damages, may give interest upon the sum recovered by the judgment, from the time of signing it, where, by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance: (gg) But the plaintiff is not entitled to interest, in an action on a foreign judgment. (hh)

The rate of interest allowed on debts contracted in this country, is *five pounds per cent. per annum*, as well in courts of equity as at law: (ii) *Compound* interest, however, is not in general recoverable: Therefore, in an action by bankers for money overdrawn, the court will only allow simple interest upon the sums actually advanced; not interest upon rests or balances struck by them at stated times, where such balances are partly made up of the interest already incurred; (k) unless interest has been allowed in former settled accounts, (l) or the customer is informed and knows that such is the practice of the house. (m) When the debt is contracted abroad, interest must be paid according to the law of the country where it was contracted, and not according to that where it is sued for; (n) but in such a *case, the debtor shall be allowed the rate of exchange of [*875] the country where the debt was contracted. (a) And where a debt was contracted in *England*, but the bond taken for it in *Ireland*, to be paid at a certain time, at *seven per cent.*, it shall carry *Irish* interest; (b) but it is otherwise, if the bond was executed in *England*. (c) It was formerly the practice to compute interest only to the time of the commencement of the suit; (d) but it is now more properly computed to the day of signing final judgment. (e)

In *assumpsit* or *covenant*, when the contract is not for the payment of money, but for the doing or forbearing of some other act, the damages depend on the nature of the contract, and whether it relates to the *person*, or to *real* or *personal* property. In an action of *assumpsit* for breach of a promise of marriage, which is of a personal nature, there is no certain rule by which to estimate the amount of the damages, which must therefore be ascertained by a jury, on considering the rank in life and situation of the parties, the circumstances under which the promise was made, and on what account it was broken, &c. Special damages may also be recovered in this action: and the court will not grant a new trial, on the ground of excessive damages, unless they are so large as to induce them to infer, that the jury

(f) *Ante*, 573.

(gg) 2 Durnf. & East, 78; and see 3 Anst. 804. 7 Durnf. & East, 446. 1 Chit. Rep. 473. (hh) 4 Camp. 380. 1 Stark. Ni. Pri. 219, *accord*; and see 1 Maule & Sel. 173; but see 4 Durnf. & East, 493, *semb. contra*. See also 1 East, 436, where interest was allowed in an action on a judgment recovered in *Ireland*, on a bond, beyond the penalty; and 3 Bing. 353, where it was allowed on a judgment obtained in the court of *Admiralty* in *Scotland*.

(ii) 5 Ves. 803. Chit. Bills, 5 Ed. 540; and see 1 Bos. & Pul. 30.

(k) 2 Campb. 486, (n.)

(l) 3 Campb. 467.

(m) 1 Stark. Ni. Pri. 487. And see further as to interest, and in what cases it is recoverable, Comyn, on Contracts, 2 Ed. Chap. VIII.

(n) Lord Dungannon v. Hackett, T. 1702, cited in *Lane v. Nichols*, 1 Eq. Cas. Abr. 289, pl. 1.

(a) *Id. ib.*; and see 2 Durnf. & East, 52.

(b) 2 Atk. 382; and see Prec. Chan. 128. 1 P. Wms. 395. 2 Atk. 465.

(c) 1 P. Wms. 696. 3 Aik. 727. 1 Ves. 427; and see 3 Durnf. & East, 425. 2 Bro. Chan. Cas. 641. 2 Bridg. Dig. tit. *Interest of Money*, VII. pl. 44, 48.

(d) Pr. Reg. 357, 8. Cas. Pr. C. P. 45, 6, S. C.

(e) Chit. Bills, 5 Ed. 539.

were influenced by undue motives, or acted upon a misconception of the facts of the case.(f)

In *assumpsit*, on a contract for the purchase of a *real* estate, to which the title proves defective, without any fraud or fault of the vendor, the vendee was in one case holden to be entitled to no satisfaction for the loss of his bargain.(g) But where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; the court held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect.(h)

In an action of *covenant*, for not repairing premises, the measure of damages is the sum it will require to put them into a proper state of repair:(i) And where the tenant under a lease, containing a covenant to repair, underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered; the court held, that the damages and costs in that action, and also [*876] the costs of defending it, might be recovered as special *damages, in an action against the under-tenant, for his breach of covenant to repair.(a)

In *assumpsit*, for not delivering goods upon a given day, the true measure of damages is the difference between the contract price, and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered.(b) So, in action for not accepting goods bought, the jury are not bound to give the full value of the goods; but the measure of damages is the difference between the price which the defendant had contracted to pay, and what the goods afterwards sold for.(c) If a man purchase a horse, which is warranted sound, and it afterwards turn out to have been unsound at the time of the warranty, the buyer may, if he please, keep the horse, and bring an action for damages on the warranty; in which he will have a right to recover the difference between the value of a sound horse, and one with the defects existing at the time of the warranty; or, he may offer to return the horse, and if the vender will take it back, bring an action to recover the full money paid.(d) And where A. sold and warranted a horse to B. which the latter a few days after sold to C., and the horse proving unsound, C. recovered the price from B. in an action, of which A. had notice; the court of Common Pleas held, that B. was entitled to recover from A. not only the price of the horse, but the costs of the action by C.(e) But the purchaser of an unsound horse cannot recover for his keep, without proof of an offer to return him, before action brought.(f)

When the damages are *liquidated*, and fixed by the contract at a certain sum, the jury are bound to give the whole of the sum so fixed, in an action

(f) 1 Younge & J. 477.

(g) 2 Blac. Rep. 1078.

(h) 6 Barn. & Cres. 31. 9 Dowl. & Ry. 22, S. C. •

(i) 2 Ld. Raym. 798, 803, 1125, 6. Say. Dam. 61, S. C.

(a) 3 Barn. & Cres. 533.

(b) 2 Barn. & Cres. 624. 4 Dowl. & Ry. 160, S. C.; and see 1 Stark. Nl. Pri. 504.

(c) *Smee v. Huddleston*, T. 8 Geo. III. C. P. Say. Dam. 49.

(d) 3 Esp. Rep. 83, 4, per Ld. Eldon, Ch. J.; and see 1 Taunt. 566, *accord*.

(e) 2 Marsh. 431. 7 Taunt. 153, S. C. (f) 2 Campb. 82; and see 1 Taunt. 566, *accord*.

for the breach of contract: as on a covenant that the defendant would not marry with any other person than the plaintiff, or if he did, that he would pay her a certain sum of money, within a limited time after the marriage; (g) or, on a covenant that a tenant shall pay 5*l.* *per annum*, for every acre of land broken up, and converted into tillage; (h) or, on a bond conditioned for the payment of 1000*l.* in case the obligor resumed the business of a carrier, (i) &c. There is a difference however, which should here be noticed, between a *penalty* and *liquidated damages*; (k) [A] and also as to the mode of proceeding on covenants in general, and covenants secured by a penalty or forfeiture. (l) Where articles of agreement contain covenants *for the performance of several things, and then one large sum is [*877] mentioned at the end of the articles, to be paid upon breach of performance; (aa) or, in other words, when the sum which is to be a security for the performance of an agreement to do several acts, may, in case of breach of the agreement, be in some instances too large, and in others too small a compensation for the injury sustained; (b) that sum is to be considered as a penalty: And in one case it was determined, that if a party agree not to do some specific act, under the *penalty* of 100*l.*, such sum could not be considered in the nature of liquidated damages. (c) On the other hand, it seems to have been laid down generally by *Gibbs*, Ch. J., that where a person binds himself in an agreement to pay a certain sum

(g) 4 Bur. 2225.

(h) 6 Bro. P. C. 470.

(i) *Per Burrough*, J. at *Bridgewater*; 1817. Man. Dig. tit. *Penalty*: and see 6 Bro. P. C. 417. 2 Durnf. & East, 32.

(k) The leading case on this subject is that of *Astley v. Weldon*, 2 Bos. & Pul. 346, where all the former cases are collected and reviewed: and see 3 Bos. & Pul. 630. 1 Campb. 78. Holt. Ni. Pri. 43, 45, n. 2 Price, 200. 8 Moore, 244. 1 Bing. 302, S. C. 6 Barn. & Cres. 216. *Ante*, 173, (o.)

(l) 4 Bur. 2228; and see 3 Bur. 1345. 1 Blac. Rep. 373, 387, S. C. id. 395. 2 Bos. & Pul. 346. 1 Campb. 78. 13 East, 343, 348.

(aa) 2 Bos. & Pul. 346, 353.

(b) 6 Barn. & Cres. 223, *per Bayley*, J.

(c) 3 Bos. & Pul. 630.

[A] "On a review of the cases, the following principles seem deducible from them, as those which are to govern, whenever a question of the kind here considered is presented:

"First. That the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true intent of the parties, and to do justice between them. In England, there seems to be a readier disposition to uphold the liquidation of the damages than in this country; and I cannot but express my opinion that the courts of the United States have shown an unwise reluctance to admit the agreement as conclusive on this point. If the purpose is clear there seems no reason to hesitate in giving it full effect.

"Second. That when the agreement is in the alternative to do some particular thing, or pay a given sum of money, the court will hold the party failing, to have had his election, and compel him to pay the money.

"Third. That in case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the intent of the parties; that no particular phraseology will be held to govern absolutely; but that although the term 'liquidated damages' will not be conclusive, the phrase 'penalty' is generally so, unless controlled by some other very strong consideration.

"Fourth. That if the sum be evidently fixed to evade the usury laws or any other statutory provision, or to cloak oppression, the courts will relieve by treating it as a penalty. Consequently, whenever the sum stipulated is to be paid, on the non-payment of a less sum made payable by the same instrument, it will always be held a penalty.

"Fifth. That where, independently of the stipulation, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, there the damages will be usually considered liquidated, if they are so denominated in the instrument. * * * In addition to this summary, we may call the attention of the reader to the comments on the cases contained in *Evans' Pothier on Obligations*, Appendix No. 12, Vol. 2, p. 65; the note to *Barton v. Glover*, Holt, N. P. R., 48; and the note to *Spencer v. Tilden*, 5 Cowen, 144, 150. *Sedgwick on Damages*, p. 421, 2d Ed."

of money, in case of a breach of the terms of it on his part, and it is therein stated that the sum mentioned is to be considered as liquidated damages, the jury are bound, in an action upon the agreement, to give the plaintiff the whole money; and that such sum is not to be considered as a penalty, but as damages ascertained by the parties: (d) Accordingly, in a subsequent case, (e) where the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2300*l.*, agreed to sell to the latter the lease of a public-house, and also his goods, fixtures and effects, at a valuation; and the agreement contained the usual clauses for giving possession, and repairing or allowing for damaged windows, and clearing the rent and taxes, with the expenses of the agreement; and it was lastly stipulated, that "on either party's not fulfilling all and every part of the agreement, that he should pay to the other 500*l.*, thereby settled and fixed as liquidated damages;" the court of Common Pleas held, that this latter sum was not a mere penalty, to cover such damages as might be actually incurred by the non-performance thereof; but that, on a breach by the defendant in refusing to accept an assignment of the lease or take possession, he was liable to pay the plaintiff the full amount of that sum. (e) But, from the latest case which has been determined on the subject, (f) it may be collected, that in order to ascertain whether the sum specified in an agreement is to be considered as a *penalty* or *liquidated damages*, the court must look to the whole of the agreement; and unless it clearly appear thereby to have been intended by the parties as liquidated damages, it will be considered as a penalty only, to secure the performance of it: Therefore, where A. agreed with B. to sell to him the stock and good will of his business, and to demise to him his house in which the business was carried on, for which B. was to pay 800*l.* and to take the furniture and fixtures at a valuation; which were afterwards valued at 174*l.*: 400*l.* were paid to A. at the time of executing the agreement; and B. agreed to accept and pay two bills of exchange, one for 400*l.* payable twelve months after date, and the other for 174*l.* payable two [*878] months after date; and A. agreed not to *carry on the business within five miles of the house: and "for the true performance of the agreement, each of them did thereby bind and oblige himself to the other of them, in the penal sum of 500*l.* to be recoverable for breach of the said agreement in a court of law, as and by way of liquidated damages;" the court of King's Bench held, that this sum was a penalty, and not liquidated damages. (a) So where an agreement, not under seal, for the lease of a public house, contained a clause, that the party neglecting to comply with his part of the agreement, should pay the sum of 100*l.* mutually agreed upon to be the damages ascertained and fixed on breach thereof; Lord *Tenterden*, Ch. J. held that the party making a default, was not liable beyond the damages actually sustained. 1 *Moody & M.* 41.

Where the performance of an agreement is secured by a penalty, the party has his election, either to bring *debt* for the penalty, or proceed by action on the *covenant* for damages, if the contract was by *deed*, (b) or otherwise by action of *assumpsit*. (c) If he bring *debt* for the penalty, he

(d) *Holt. Ni. Pri.* 43.

(e) 8 *Moore*, 244. 1 *Bing.* 302, S. C.

(f) 6 *Barn. & Cres.* 116.

(a) 6 *Barn. & Cres.* 216.

(b) 3 *Bur.* 1345. 1 *Blac. Rep.* 373, 387, S. C.; and see *id.* 395. 4 *Bur.* 2228.

(c) 2 *Bos. & Pul.* 346. 1 *Campb.* 78. 13 *East*, 343, 348.

must assign breaches, on the statute 8 & 9 W. III. c. 11, § 8; and the judgment will stand as a security for future breaches.(d) In this action however, the plaintiff cannot recover more than the penalty; (e) and when that is recovered, the contract is satisfied, and he cannot maintain any further action thereon, either against the defendant or a third person:(f) But if he proceed for damages, he may bring his action *toties quoties*, as often as the contract is broken;(f) and, in such action, he may recover more than the penalty: Therefore, in an action on a charter-party, with a penalty for securing the performance of it, the plaintiff is allowed to recover more than the penalty in damages, for breach of contract.(g) So, in *assumpsit* upon a *memorandum* for a charter-party, in which the defendant, who was the ship owner, agreed to proceed with all convenient speed to a foreign port, and there load, within twenty running days, a cargo from the plaintiff's factors, and therewith return home, and in fifteen running days deliver the same, on payment of certain freight, concluding with a certain penalty for non-performance; the court held, that the plaintiff might recover damages for the breach of contract, in the defendant's not permitting the vessel to proceed on the voyage, beyond the amount of the penalty.(h) So that, where the performance of an agreement is secured by a penalty, it is in general more advisable to proceed by action of *covenant* or *assumpsit* for general damages, particularly if they are considerable, than by action of *debt* for the penalty.

In an action of *account*, against the defendant as *receiver*, to render an account, if the defendant come at the first day, and submit to account, the plaintiff, it is said, cannot recover damages; but if he plead to the action *ne unques son receiver*, he is liable to damages.(i) It is also said, that damages are not recoverable in an action of *account*, against a man as receiver of money to deliver over, or to re-deliver upon request:(k)

*but that in an action of *account* against a man, as receiver of [*879] moneys to merchandise with, damages are recoverable for the profit which has been, or might have been made of the money.(a) In this action, there are two judgments; the one *quod computet*, or that the defendant account to the plaintiff, for the time during which he was bailiff, or receiver, &c. and that he be in mercy, because he had not before accounted,(bb) &c. The other, *quod recuperet*: and under this latter judgment, if there appear to have been any delay in accounting, or unjust detention of the money in the defendant's hands, or if he plead in discharge of the account before auditors, and issue be joined thereon and found against him,(c) the plaintiff is it seems entitled to recover damages, beyond the sum found to be due on the account, or value of the goods.(d) In an action of *annuity*, the judgment for the plaintiff is, that he recover the annuity, and arrear-

(d) 13 East, 343, 348.

(e) 9 Blac. Rep. 1190. 6 Durnf. & East, 303. 1 Atk. 75. 3 Bro. Chan. Cas. 489, 496. 1 Bos. & Pul. 337. 1 Campb. 78. 1 Taunt. 220. 2 Marsh. 226. *Ante*, 541.

(f) 3 Bur. 1346. 1 Blac. Rep. 373, 387, S. C. (g) 1 Blac. Rep. 395, 6.

(h) 13 East, 343. And see further, as to damages in *assumpsit*, Say. Dam. Chap. X.; and in *covenant*, *id.* Chap. XII.

(i) 1 Rol. Abr. 575, pl. 29, 30. Noy. 134. Say. Dam. 41.

(k) Fitz. Abr. tit. *Account*, pl. 45. Say. Dam. 40; but see 2 Leon. 230, *semb. contra*.

(a) 1 Rol. Abr. 575, pl. 27. Say. Dam. 40; and see 3 Wils. 73.

(bb) 3 Wils. 88. 1 Sel. Ni. Pri. 5 Ed. 5, (9).

(c) Dal. 18, pl. 8, 12.

(d) 3 Wils. 94. And see further, as to damages in the action of *account*, Say. Dam. Chap. IX. 1 Sel. Ni. Pri. 5 Ed. 7.

ages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given, with damages and costs.(e)

In *debt*, which is principally calculated for the recovery of a sum certain, the damages, for the detention of the debt, are for the most part merely *nominal*;(f) And in general it seems, that wherever the plaintiff has evidently entitled himself to a verdict for some damages, but the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for a nominal sum.(g) When an action is brought upon a bond, or on any penal sum, for the non-performance of covenants or agreements contained in any indenture, &c. the jury, upon the trial or writ of inquiry, are, by virtue of the statute 8 & 9 W. III. c. 11, § 8, to assess not only the ordinary damages and costs of suit, but also damages for such of the breaches as the plaintiff proves; and judgment shall be entered in the common form, which shall afterwards remain as a security to the plaintiff against future breaches. This statute, we have seen,(h) is compulsory on the plaintiff, to proceed in the method it prescribes. And, on a plea of *non est factum* to a bond for the performance of certain conditions, breaches of which are assigned in the declaration, the jury who try the issue may assess the damages under the common *venire*.(i) In an action of *debt* on bond, conditioned for replacing [*880] stock, the measure of damages, in case of failure, is *the price at the day when it ought to have been replaced, or the price at the day of trial, at the option of the plaintiff.(a) The obligee of an indemnity bond, after proving the affirmative of the issue upon *non est factum*, must show the *quantum* of damage, under the statute 8 & 9 W. III. c. 11, § 8.(b) And where, in an action on a bond to indemnify B. against his obligation to C. if the money were not paid before a certain day, it was ruled at *nisi prius*, that B. though it did not appear he had been actually compelled to pay the money, was entitled to recover the amount of the penalty of the bond in damages.(cc)

In an action of *debt* on *judgment*, the plaintiff we have seen,(dd) may have a writ of inquiry, after judgment by default, to recover interest, by way of damages, for the detention of the debt;(ee) and in *debt* on judgment, affirmed on error, the jury, by way of damages, may give interest on the sum recovered by the judgment, from the time of signing it, where, by the practice of the court in which error is brought, interest is not al-

(e) Co. Ent. 50; and see Cro. Car. 436.

(f) 6 Durnf. & East, 303; but see 2 Durnf. & East, 388. 7 Durnf. & East, 446.

(g) 1 Taunt. 121; and see 4 Barn. & Cres. 465. 6 Dowl. & Ryl. 551, S. C. 2 Car. & P. 109; but see 3 Barn. & Cres. 427, where in *case* for words, imputing subornation of perjury, the plaintiff offered no evidence on the execution of the writ of inquiry, but the jury nevertheless assessed the damages at 40l.; and the court held, that it was not incumbent on the plaintiff to give any evidence, and that the jury were not, under such circumstances, bound to give *nominal* damages only.

(h) *Ante*, 584.

(i) 2 Stark. Nl. Pri. 381; and see M'Clel. 198.

(a) 2 Taunt. 257; and see 2 East, 111. 1 Car. & P. 412. 13 Price, 434. M'Clel. 377. 13 Price, 715, S. C. 1 Man. & Ryl. 491. (a.)

(b) 1 Esp. Rep. 276; and see 8 Durnf. & East, 255. 2 Wms. Saund. 3 Ed. 187, a. (2.)

(cc) 2 Stark. Nl. Pri. 167; and see Dyer, 257, *pl.* 12. See further, as to damages in *debt*, on bond, Say. Dam. Chap. XIII.

(dd) *Ante*, 573, 874.

(ee) 7 Durnf. & East, 446; and see 8 Durnf. & East, 395. 1 East, 436. 1 Maule & Sel. 171, 173. 4 Taunt. 149. 1 Chit. Rep. 473.

lowed in costs upon the affirmance: (f) But the plaintiff we have seen, (g) is not entitled to interest, by way of damages, in an action on a foreign judgment.

In an action of *debt*, for a *penalty* given by statute to a common informer no damages are given for the detention of the debt; as the plaintiff has no right to the penalty until he brings his action, and consequently can sustain no damage by its previous detention: (h) But, in an action for a penalty given by statute to the party grieved, damages are recoverable; (i) for, in this case, the penalty being given by way of compensation to the party injured, the plaintiff is damnified by the detention of it before action brought; and if it were otherwise, the remedy might prove inadequate. (k) In debt against a sheriff or gaoler, for the escape of a prisoner in execution, (which is founded on an equitable construction of the statutes of *Westm.* II. 13 Edw. I. c. 11, and 1 *Rich.* II. c. 12,) (l) the jury cannot give a less sum than the creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, with the legal fees and expenses of the execution. (m)

*In *scire facias*, no damages were recoverable at common law, for delay of execution: (a) It should be remembered, however, [*881] that by the statute 8 & 9 W. III. c. 11, § 8, "where judgment is entered in an action of *debt* on bond, or on any penal sum, for the non-performance of covenants or agreements, in any indenture, deed or writing contained, it remains as a security to answer such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture, deed or writing contained:" (b) And the statute further directs, that "the plaintiff may have a *scire facias* upon the said judgment, against the said defendant, or against his heir, tertenants, executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause, why execution should not be had or awarded upon the said judgment; (c) upon which there shall be the like proceeding, as in the action of *debt* upon the said bond or obligation, for assessing damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as therein directed; and that upon payment or satisfaction of such future damages, costs and charges, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body lands or goods, shall be discharged out of execution."

It should also be observed, as connected with the subject of damages in actions upon contract, that on a writ of *error*, no damages or costs were recoverable at common law: But, by the statute 3 Hen. VII. c. 10, (d) reciting that writs of error were often brought for delay, it is enacted, that if

(f) 2 Durnf. & East, 78; and see 3 Anst. 804. 7 Durnf. & East, 446. 1 Chit. Rep. 473. *Ante*, 874.

(g) *Ante*, 874.

(h) 1 Rol. Abr. 574, pl. 1, 4. 1 Salk. 206. 4 Bur. 2018, 2489; and see 1 Marsh. 180. (i) Cro. Car. 559, 60; and see 1 Rol. Abr. 574. Skin. 363, 367. Comb. 224. 12 Mod. 46, S. C. Carth. 230. 1 Salk. 206. Comb. 449. 5 Mod. 355, S. C. 1 Ld. Raym. 172. Willes, 440. Say. Costs, 11. 1 H. Blac. 10. 7 Durnf. & East, 267. And see further, as to damages in an action for a *penalty* on statute, Say. Dam. Chap. XV.

(k) 2 Ld. Raym. 1411. 1 Str. 650, S. C.

(l) 2 Inst. 382.

(m) 2 Durnf. & East, 126; and see 2 Blac. Rep. 1048. 2 Chit. Rep. 454.

(a) 3 Bur. 1791.

(b) *Ante*, 583, 4; and see 2 Wms. Saund. 5 Ed. 72, (c.)

(c) Append. Chap. XLIII. § 85.

(d) And see stat. 19 Hen. VII. c. 20, by which it is enacted, that the former statute shall from thenceforth be put in execution.

any defendant or tenant, against whom judgment is given, or any other that shall be bound by the said judgment, sue, before execution had,^(e) any writ of error to reverse any such judgment, in delay of execution, that then, if the same judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuited therein, the person or persons against whom the writ of error is sued, shall recover his costs and damages for his delay and wrongful vexation in the same, by discretion of the *justice* ^(f) before whom the writ of error is sued." The damages in this case, which are given for the delay of execution, will be more fully treated of in a subsequent chapter.^(g)

It will next be proper to consider the damages in actions for *wrongs*, independently of contract. These actions are *case*, for consequential damages, *detinue*, *replevin*, and *trespass vi et armis*: Actions on the *case*, for consequential damages, are for torts to *persons*, or to *real* or *personal* property. In actions for torts to *persons*, individually or relationally, ^[*882] as for malicious prosecutions, slanderous words, criminal conversation, debauching daughters, or enticing away servants, the law has not laid down any certain rule by which to estimate the amount of the damages; which is necessarily vague and uncertain, depending upon a great variety of causes, facts and circumstances, such as the estate, degree, quality, trade, or profession of the party injured, as well as of the person by whom the injury was done, &c.^(a)

In an action on the case for a *malicious prosecution*, the damages are first, for the injury to the *person* of the plaintiff, by arrest and imprisonment; secondly, for the injury to his *property*, by the expense he has been put to in defending himself; and thirdly, if the prosecution be of a criminal charge, for the injury to his *fame* or reputation:^(b) And the damages are more or less, according to the degree of malice with which the defendant has been actuated.^(c) In actions of this nature, as it is the peculiar province of the jury to determine the amount of the damages, the courts, though they have the power,^(d) will not interpose by granting a new trial, on account of their being too large, unless they be so flagrantly excessive, as to afford evidence of the prejudice or partiality of the jury; that is, unless they are most outrageously disproportionate to the wrong received, and the situation and circumstances of the parties.^(ee)

In an action for slanderous *words*, the damages depend on the nature and tendency of the words spoken by the defendant, and the manner and occasion of speaking them, &c.; and are in general influenced by the rank in life and situation of the parties. Special damages also, if proved, may be recovered by the plaintiff: and indeed, where the words are not in themselves actionable, they are the very gist and foundation of the action. If

(e) Cro. Jac. 207. Yelv. 75, S. O.

(f) The word *justice* in the singular number, is here made use of, instead of the *court*, there being no court of error consisting of but one judge. Doug. 561, n. 5. (g) Chap. XLIV.

(a) 2 Wils. 206, 248.

(b) 1 Salk. 13. 1 Ld. Raym. 374. Carth. 416. 5 Mod. 405, S. O.; and see Gilb. K. B. 185. 10 Mod. 148, 214. 1 Str. 691. 2 Str. 997. Cas. temp. Hardw. 54, S. C. 4 Durnf. & East, 247. 2 Sel. Ni. Pri. 5 Ed. 1025, 6, 7.

(c) For the nature of malice in general, see Gilb. Cas. K. B., 185. 10 Mod. 148, 214, S. C.; and for the difference between *express* and *implied* malice, see 1 Durnf. & East, 518. 9 East, 361, 363. 5 Taunt. 580, 583, 4; and see Bul. Ni. Pri. 14. 2 Phil. Evid. 114. 4 Barn. & Cres. 247. 6 Dowl. & Ry. 296, S. C. 1 Moore & P. 33. 4 Bing. 395, S. C.

(d) 5 Taunt. 277.

(ee) 2 Blac. Rep. 1328; and see Barnes, 436. Cowp. 230. 5 Taunt. 277. 1 Man. & Ry. 275.

the action be brought for words in themselves actionable, the jury, it has been said, in computing damages, ought to consider not only what the plaintiff did actually sustain before the bringing of the action, but also what it is probable he will sustain in future; because a subsequent action will not lie for the same words: But that if the words are not in themselves actionable, the jury ought only to consider the damages which are specially alleged and proved; because if any damages be sustained at a future time, a subsequent action will lie for them.^(f) It was formerly holden, that the *truth* of the words, for which the action is brought, might have been given in evidence, upon the general issue, in mitigation of *damages:^(a) But at a meeting of all the judges, upon a case [*883] that arose in the Common Pleas, a large majority of them determined not to allow the truth of the words to be given in evidence, on not guilty, for the future; but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words:^(b) and this rule extends to all sorts of words, and not merely to such as import a charge of felony.^(b) Still however the defendant, we have seen,^(c) may, on the general issue, go into evidence to show that he spoke the words *bonâ fide*, and without malice;^(d) or he may prove, in mitigation of damages, such facts and circumstances as show a ground of suspicion, not amounting to actual proof, of the guilt of the plaintiff:^(e) And where words are given in evidence, in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words.^(ff) But it is not competent for the defendant, under the general issue, to offer, in mitigation of damages, evidence that the specific facts in which the slander consists, and for which the action is brought, were communicated to him by a third person.^(g)

In an action for *criminal conversation*, or for debauching the plaintiff's daughter, *per quod consortium vel servitium amisit*, it is the peculiar province of the jury to determine the amount of the damages. In the former of these actions, it has been well observed,^(h) "circumstances of aggravation of the injury, and which may therefore operate as an inducement with the jury to give large damages, are the plaintiff's having lived happily with his wife, before the connexion with the defendant;⁽ⁱ⁾ the unblemished character, and antecedent virtuous behaviour of the wife; a provision having been made for the children of the marriage, by settlement or otherwise; and other similar topics, which the peculiar circumstances of the individual case may furnish. Proof is also frequently adduced of the defendant being a man of fortune, by his own declarations, or by calling his banker, or producing a settlement under which he may be entitled to any estate real or personal,

(f) 2 Mod. 150; and see Say. Dam. 53, 4; but see the opinion of *Atkins, J.* in the same case, *acmb. contra.*

(a) 1 Ld. Raym. 727; and see Willes, 20, 24. Com. Rep. 551. Barnes, 195. Pr. Reg. 383. S. C. Say. Dam. 54.

(b) 2 Str. 1200; and see 1 Bos. & Pul. 525. 2 Bos. & Pul. 225. (a).

(c) *Ante*, 652.

(d) 1 Car. & P. 475, 673.

(e) Peake, Evid. 5 Ed. 308; and see 2 Campb. 251. 1 Maul. & Sel. 284. Holt Ni. Pri. 299. 306, 7. 1 Car. & P. 279. 11 Price, 235.

(ff) 2 Stark. Ni. Pri. 457; and see 2 Str. 3 Ed. 1200. (1).

(g) Holt Ni. Pri. 533; and see Sel. Ni. Pri. 6 Ed. 1222. 4 Bing. 167. See also Holt Ni. Pri. 299. 2 Stark. Ni. Pri. 93. 3 Barn. & Cres. 113. 4 Dowl. & Ry. 670, S. C. Ry. & Mo. 422. 8 Moore, 467. 1 Bing. 403, S. C., as to what may or may not be given in evidence, upon the general issue, in mitigation or aggravation of damages, in an action for a *libel*.

(h) 1 Sel. Ni. Pri. 5 Ed. 25.

(i) Bul. Ni. Pri. 27.

or showing the extent of his income from business, or the like. Circumstances of extenuation on the part of the defendant, and which may tend to the mitigation or diminution of the damages, are the plaintiff's previous ill usage or unkind treatment of his wife; evidence of his intolerable ill temper,

[*884] of his having turned his wife out of his house,⁽ⁱ⁾ and refused to maintain her, &c. previously to the adulterous intercourse; gross *negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant;^(a) the wanton manners of the wife, or first advances made by her to the defendant;^(b) a prior elopement, and adulterous intercourse with another person, or having had a bastard before marriage;^(c) because, by bringing the action, the husband puts the good behaviour of his wife in issue. So, letters written by the wife to the defendant, before his connexion with her, soliciting a criminal intercourse, &c. may be given in evidence.^(d) But the defendant will not be permitted to prove acts of misconduct of the wife, subsequent to the commission of the act complained of in the action."^(e)

In an action for debauching the plaintiff's daughter, *per quod servitium amisit*, it has been usual to direct the jury, in ascertaining the amount of the damages, to have regard not merely to the injury sustained by the loss of service, a proper compensation for which might be trifling, but also to the wounded feelings of a parent,^(e) or party standing in *loco parentis*.^(f) And it is remarkable, that though the damages given in this action,^(g) and in that for criminal conversation,^(h) have been frequently large, and in some cases exemplary,⁽ⁱ⁾ there is no instance in the books, of a new trial having been granted in either, for excessive damages. In an action for enticing away the plaintiff's servants, the measure of damages is not to be ascertained by the actual loss sustained at the time; but they may be given for the injury done to the plaintiff, by causing them to leave his employment.^(k) The plaintiff, however, is not entitled to damages in this action, after he has recovered a penalty against the servant, on articles of agreement, for quitting his service.^(l)

In an action on the case, for consequential damages to *real* or *personal* property, the amount of the damages is proportionate to the injury complained of; and, where the cause of action will admit of it, they should be such as will put the plaintiff, as nearly as may be, in the same situation as he would have been in, if the injury had not been committed; or otherwise will afford him a reasonable satisfaction for the loss or inconvenience he has sustained. This rule applies equally to actions *ex delicto*, or *quasi ex contractu*; and whether they arise from *malfeasance*, or doing what the defendant ought not to do; *nonfeasance*, or not doing what he ought to do; or *misfeasance*, or doing what he ought to do, improperly. It also applies to wrongs or torts to *real* property, corporeal or incorporeal, or to *personal* property.

(i) Bul. Ni. Pri. 27.

(a) 4 Durnf. & East, 657, *per Buller, J.*

(b) *Per* Ld. Ellenborough, O. J. in *Gardner v. Jades*, Lond. Sit. 1805.

(c) Gilb. Evid. 113, Ed. 1761. Bul. Ni. Pri. 296, S. C.

(d) 2 Esp. Rep. 562, *per* Ld. Kenyon, O. J.

(e) 3 Wils. 18. 2 Durnf. & East, 166; and see 1 Sel. Ni. Pri. 5 Ed. 1073, 4; and the cases there cited, 1 Man. & Ry. 166. 7 Barn. & Cres. 387, S. C.

(f) 2 Durnf. & East, 4. 11 East, 23.

(g) 3 Wils. 18. 2 Durnf. & East, 4, 166. 11 East, 23.

(h) 1 Bur. 609. Say. Dem. 217, S. C. 4 Durnf. & East, 651, 657. 6 East, 244, 256.

(i) 3 Wils. 18.

(k) 4 Moore, 12.

(l) 3 Bur. 1345. 1 Blac. Rep. 373, 387, S. C.

*In actions for *disturbances* and *nuisances*, the plaintiff is not obliged to prove any specific injury to himself: that he has a [*885] right, and that such right has been wilfully invaded by the defendant, is sufficient; for if he were to wait until he could prove actual damage, the defendant, by repeated invasions of a right which can only depend on usage, might himself gain a title, which could not afterwards be successfully opposed. (a) In actions therefore, by a commoner against a *stranger*, proof of the plaintiff's right of common, and that the defendant's cattle were turned thereon by him, (a) or that he took away dung, (b) is sufficient; but if the action be brought against the *lord*, or a third person who puts the cattle on the common by his license, the plaintiff must also prove a specific injury, as that there was not sufficient common left; at least if the defendant prove the contrary, it will be an answer to the action. (c) In an action on the case, for diverting plaintiff's water-course, where the jury, under circumstances of aggravation, gave £8000 damages, the court granted a new trial, on the ground that the damages given greatly exceeded the amount of the injury proved. (d)

In *trover* for goods, which is properly an action for *damages* only, (e) the measure of damages is in general the value of the goods, at the time of the conversion: (f) [A] The jury, however, are not limited to the mere value of the property, at that time; but may find, as damages, the value at any subsequent time, in their discretion. (g) And, in *trover* for a bill of exchange, the damages, we have seen, (h) are to be calculated according to the amount of the principal and interest due on the bill, at the time of the demand, and refusal to deliver it up. (i) The plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the defendant's shop, (who was a goldsmith,) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket, without the stones; and, in *trover* against the master, several of the trade were examined at the trial, to prove what a jewel of the finest water, that would fit the socket, would be worth; and the chief-justice directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels, the measure of their damages; which they accordingly did. (k) So, in *trover* for title deeds of an estate belonging to the plaintiff, and of great value to him, although of little or no value to the defendant, if it should appear that the latter is in possession, of them, *and will not deliver them up, the jury would probably [*886] be directed to give liberal damages. On the other hand, if *trover* be brought by the assignees of a bankrupt against the sheriff, to try the validity of a sale under an execution, and it appear that the defendant had

(a) 2 Blac. Rep. 1233, 4. 4 Durnf. & East, 71.

(b) 2 East, 154.

(c) 4 Durnf. & East, 73; and see Peake, Evid. 2 Ed. 296.

(d) 7 Durnf. & East, 529; and see 1 Chit. Rep. 729. (a.)

(e) Oro. Eliz. 116.

(f) 1 Car. & P. 626, 7, n.

(g) *Id.* 625.

(h) *Ante*, 873.

(i) 3 Campb. 477.

(k) 1 Str. 505.

[A] See *Greenfield Bank v. Leavitt*, 17 Pick. 1. *Weld v. Oliver*, 21 Ib. 559. *Johnston v. Sumner*, 1 Met. Rep. 172. *Sanders v. Vance*, 7 Monr. 209.

a probable cause for taking the goods, and that they were fairly sold, for as much as they would probably have produced if sold under the commission, he might only be deemed answerable for the produce of the sale.

In an action on the case against the sheriff, for an escape and false return on *mesne* process, or for not taking the original defendant when he had an opportunity, the plaintiff, in order to show the amount of the damages, must prove his debt, and also the circumstances of the defendant at the time of the arrest; and that he has since absconded, or become insolvent: For, unless the debt be proved, the plaintiff has no cause of action against the sheriff; (a) and if the defendant was originally in bad circumstances, or may at any time be met with, or returned into the sheriff's custody soon after the arrest, and the plaintiff has not in fact been injured by the negligence of the sheriff, the damages arising from the delay of the plaintiff's remedy, beyond the additional expense he has been put to, are merely nominal: (b) But, in an action on the case against a gaoler, for the voluntary escape of a person in custody on *mesne* process, who has since absconded, and cannot be met with, it is said to be the duty of the jury to assess damages to the amount of the whole debt, though it be separate. (c) So, in an action on the case against the sheriff, for a false return of *non est inventus* to a *capias ad satisfaciendum*, where it was proved at the trial, that the sheriff's officer had frequently an opportunity of arresting the defendant, who afterwards absconded: it was holden, that the jury did right in assessing damages to the amount of the whole debt. (d) If the action be brought for a false return of *nulla bona* to a *feri facias*, the measure of damages, on a verdict for the plaintiff, is the value of the goods taken, or which might have been taken, by the defendant, to the extent of the sum directed to be levied. (e) And, in an action against the sheriff, for not selling the joint property of A. and B. under an execution against the goods of A., it seems that *half* the value of the goods is the proper measure of damages. (f)

In *detinue*, which is an action calculated for the recovery of goods *in specie*, (g) if the defendant come at the first day, and plead that [*887] he has at *all times been ready to deliver to the plaintiff the goods for which the action is brought, he is not liable to damages on account of the detention thereof; (aa) but otherwise the plaintiff is entitled to recover the goods, or the value of them, if he cannot have the same again, with damages for their detention, and his costs of suit: (bb) And the language of the judgment being in the alternative, that the plaintiff do recover the goods, or the value of them, it is incumbent on the jury

(a) 4 Durnf. & East, 611; and see 2 Lev. 85.

(b) Peake, Evid. 2 Ed. 390; and see Clayt. 34. 5 Durnf. & East, 37. 2 Bos. & Pul. 35.

(c) *Ravenscroft v. Eyles*, H. 6 Geo. III., C. P. Say. Dam. 56; and see Lane, 70.

(d) 2 Ld. Raym. 1411. 1 Str. 650, S. C.

(e) For the evidence in support of an action for a false return of *mesne* process, see Peake, Evid. 2 Ed. 389; and of *final* process, *Id.* 391. And for an escape, on *mesne* process, *Id.* 390. 2 Phil. Evid. 227; and on *final* process, Peake, Evid. 2 Ed. 392. 2 Phil. Evid. 231, &c.

(f) 2 Stark. Nl. Pri. 218. And see further, as to damages in actions upon the case, Say. Dam. Chap. XI.

(g) This action, being founded on a purchase, bailment, or *trover*, (*ante*, 5,) seems to be the connecting link between actions upon *contract*, and for *wrongs* independently of *contract*; as the action for criminal conversation, which is laid *vi et arms*, though it is in substance an action for consequential damages, (*ante*, 4, d.) seems to be the link which connects actions of *trespass* with actions upon the case.

(aa) 1 Rol. Abr. 745, pl. 4, 5. Say. Dam. 69.

(bb) Append. Chap. XXXII. § 89. Chap. XXXIX. § 21.

to find their value; and an omission in this respect cannot be supplied by a writ of inquiry of damages.^(cc)

In *replevin*, if the goods have not been delivered to the plaintiff on replevying them, damages are given as well for the value of the goods, as for their detention;^(d) and this is said to be better than to proceed by way of *withernam*:^(e) but if the goods have been delivered on the replevin, which is generally the case, damages are only to be recovered for the detention of them;^(f) and it seems that the amount of the damages, usually given by the jury, is four guineas, being the supposed expense of the replevin bond.^(g)

At common law, no damages were recoverable by the defendant in an action of *replevin*, or second deliverance: But, by the statute 7 Hen. VIII. c. 4. § 3, and 21 Hen. VIII. c. 19, § 3, "every avowant, and other person making avowry, justification, or cognizance as bailiff, in any *replevin* or second deliverance, for any rent, custom or service, or for *damage feasant*,^(h) upon any distress taken in any lands or tenements, if the avowry, cognizance or justification be found for him, or the plaintiff be nonsuit or otherwise barred, shall recover his damages, as the plaintiff should have done, if he had recovered therein." These statutes extend to avowries, &c. made by an *executor*,⁽ⁱ⁾ or for an *estray*:^(k) and, as it should seem, for an *amercement* by a court leet;^(l) and not to pleas of *prisel en auter lieu* upon which the writ is abated,^(m) or to pleas of *property* in the thing distrained.⁽ⁿ⁾ The damages given by the above statutes are inconsiderable, being merely such as the defendant has sustained by the delay of his remedy, in consequence of the replevin:^(o) and they are therefore frequently remitted, on a judgment by default for want of a plea in bar, in order to save the expense of executing a writ of inquiry.^(p) But the defendant is entitled to *treble* damages, by the *statutes 23 Hen. [*888] VIII. c. 5, § 11, 12, and 43 Eliz. c. 2, § 19, after verdict or nonsuit, in an action brought against him for taking a distress, or other act done, by authority of the commissioners of sewers, or for levying a poor's rate. And, on a distress for rent, the defendant in *replevin*, instead of proceeding at common law, on a nonsuit or verdict, for a return of the cattle or goods distrained, may avail himself of the statute 17 Car. II. c. 7, by which he is entitled to judgment for the arrears of rent, or so much thereof as the cattle or goods amount unto, together with his full costs;^(a) and shall have execution for the same by *feri facias*,^(b) *elegit* or otherwise, as the law requires. In case not provided for by the above statutes, the defendant is not entitled to damages, but to costs only by the statute 4 Jac. I. c. 3: and, by the statute 11 Geo. II. c. 19, § 22, if the plain-

(cc) *Ante*, 574. And see further, as to damages in the action of *detinue*, Say. Dam. Chap. XIV. 1 Sel. Ni. Pri. 5 Ed. 656.

(d) Cro. Eliz. 59. Say. Dam. 75, 6.

(e) Wilk. Repl. 85.

(f) *Id. ibid.* Gilb. Repl. 160.

(g) Wilk. Repl. 85.

(h) Comb. 11. 5 Mod. 76.

(i) 2 Rol. Rep. 459.

(k) Cro. Eliz. 330.

(l) Cro. Jac. 520; but see Cro. Eliz. 330, *semb. contra*; and see 6 Maule & Sel. 128.

(m) Com. Rep. 122. 2 Ld. Raym. 788, S. C.

(n) Hardr. 153.

(o) For the form of a judgment for a return, on a verdict for the defendant in *replevin*, with damages and costs, on these statutes, see Append. Chap. XLV. § 86.

(p) Append. Chap. XLV. § 71.

(a) For the forms of judgments in *replevin*, on this statute, see Append. Chap. XLV. § 57, 72, 75.

(b) Append. Chap. XLV. § 90.

tiff in *replevin*, upon a distress for rent, &c. shall become nonsuit, or shall discontinue his action, or have judgment against him, the defendant shall have double costs of suit.(c)

In actions of *trespass vi et armis*, damages are recoverable for immediate and forcible injuries to the *person*, or to *real* or *personal* property: and, for injuries to the *person*, they are either for an *assault* only; for an *assault* and *battery*; for an *assault*, *battery*, and *mayhem*; or for an *assault*, *battery*, and *false imprisonment*. In these actions, as in actions upon the *case* for consequential damages to the *person*, there is no certain rule by which to estimate the amount of the damages;(d) which must therefore be assessed by the jury, upon the evidence, according to the circumstances of each particular case.

In an action of *assault* and *battery*, the damages in general depend on the violence of the injury, the rank in life and situation of the parties, and the provocation given for it by the plaintiff, &c. In actions of this nature, the circumstances of time and place, when and where the battery was committed, may require different damages; as it is a greater insult for a merchant to be beaten upon the *Royal Exchange*, than in a private room.(e) Special damages also may be given in evidence, in this and other actions of trespass; and the plaintiff may recover not only for damage, which he has actually sustained, but also for such as he is likely to sustain, in consequence of the injury complained of: the reason for which is, that after a recovery in the action of *assault* and *battery*, the plaintiff cannot maintain another action for subsequent damages, occasioned by the same injury.(f) In an action for a *mayhem*, however, the damages given by the jury, if not sufficient, may be increased by the court, on view of the plaintiff.(g)

In an action of *assault* and *false imprisonment*, the damages are governed by the particular circumstances of the case, with reference [*889] to *the period of imprisonment, and manner in which it happened, and whether it was with, or without probable cause, &c. If the imprisonment was altogether authorized, and attended with circumstances of aggravation, the damages are in general considerable: And wherever an injury is done under colour of authority, as if an officer empowered to press exceed the authority given him by the warrant; or if a master of a ship abuse the power by law vested in him over the sailors under his command; or if a person be arrested by a general warrant, granted by a secretary of state, &c., the jury it has been said, in assessing damages, are not confined to the damages which have been actually sustained, but ought to assess exemplary damages.(a) Where the plaintiff had been confined by her mother, for the space of two or three hours only, and the jury gave a verdict for the plaintiff with 2000*l.* damages, a new trial was granted, on account of the excessiveness of the damages:(b) But this seems to be the only instance in the books, of a new trial being granted on that account,

(c) See further, as to damages in *replevin*, Say. Dam. Chap. XVI.

(d) 2 Wils. 206, 248. *Ante*, 888. *Post*, 890.

(e) 3 Wils. 19.

(f) 1 *Ld. Raym.* 339, 692. 1 *Salk.* 11. 1 *Mod.* 342, S. C.; and see 12 *Mod.* 519.

(g) 1 *Ld. Raym.* 176. 3 *Salk.* 115, S. C. *Barnes*, 153. 1 *Wils.* 5. 2 *Wils.* 248; and see Say. Dam. Chap. XXVIII.

(a) Say. Dam. 220, 21. 2 *Wils.* 207, S. C. It may, however, admit of doubt, whether, as the damages are intended merely as a compensation to the plaintiff, for the injury he has sustained, they ought, in any *civil* case, to be exemplary, or given for the sake of example to other persons.

(b) *Comb.* 357.

in an action for false imprisonment; and in general it is laid down, that the court will not grant a new trial in such an action, unless the damages appear at first blush to be outrageous, and such as indicate prejudice or partiality in the jury, or that their verdict was perverse, and the result of gross error and misconception of the case.(c)

In actions of *trespass*, for injuries to *real* property, the damages are proportioned to the injury complained of; which is or is not attended with an *ouster*, or eviction from the possession of the premises. In an action of trespass for the *mesne profits* and costs in *ejectment*, where the injury is attended with an *ouster*, the measure of damages is in general the value of the mesne profits, for the time the possession of the premises was withheld by the defendant, with a reasonable compensation for the plaintiff's trouble, and the inconvenience he was put to by being kept out of possession, and the costs in *ejectment*: and, in estimating the value of the mesne profits, the jury are not confined to the mere *rent* of the premises, but may give such *extra* damages as they think proper, and adequate to the injury sustained.(d) In this action, the plaintiff may proceed for and recover damages for acts of *trespass* committed by the defendant, during the time he was in possession of the premises; as by cutting down trees, or destroying or damaging buildings, &c. If the action be brought in the name of the *nominal* plaintiff in *ejectment*, he can only recover the value of the mesne profits, from the time of the demise laid in the declaration; but if it be brought, as it may be, by the lessor of the plaintiff in his own *name, he may, on proof of his title, recover the value of [*890] the mesne profits, from the time when it accrued, though before the day of the demise.(a) When the judgment in *ejectment* is against the casual ejector, for want of an appearance, the costs of the ejectment are usually included in the damages, in the action for the mesne profits: and indeed, the lessor of the plaintiff has in that case no other means of recovering them.(b) In this action, the plaintiff may recover the costs of the reversal of a judgment in *ejectment*, for the defendant, as between attorney and client.(c) So, where the *ejectment* is regularly defended, the *taxed* costs may it seems be recovered, with the mesne profits, as damages in such action;(d) but, in the latter case, the plaintiff cannot give in evidence his *extra* costs, beyond the amount of the taxed costs:(dd) And where, after a recovery in *ejectment*, and before an action of *trespass* for mesne profits, the defendant became bankrupt, and the jury did not include the costs of the ejectment in their verdict, on executing a writ of inquiry, the court refused to set aside the inquisition; because the plaintiff might have proved the costs as a debt under the defendant's commission; and as he had chosen to take the chance of recovering in an oblique way, more

(c) 2 Wils. 207. Say. Dam. 218, S. C. 2 Wils. 250. Say. Dam. 222, S. C.; and see 2 Wils. 253. Say. Dam. 227, S. C. 6 Durnf. & East, 651, 657. 6 East, 244, 256. 5 Taunt. 277, 281. 1 Younge & J. 477.

(d) 3 Wils. 118, 121. In this case it was said by Gould, J. that he had known four times the value of the mesne profits given by a jury, in this sort of action of trespass; and that if it were not so sometimes, complete justice could not be done to the party injured.

(a) *Dacosta v. Atkins*, H. 4 Geo. II. cited in Run. Eject. 2 Ed. 492; and see Bul. Ni. Pri. 87. Ad. Eject. 2 Ed. 329.

(b) 1 Esp. Rep. 358. 7 Moore, 471.

(c) 1 Man. & Ryl. 170. 7 Barn. & Cres. 404, S. C.

(dd) 1 Esp. Rep. 35. 7 Moore, 471; and see 1 Campb. 151, 2. 4 Taunt. 7. Ry. & Mo. 419. 4 Bing. 160; but see 1 Stark. Ni. Pri. 306, *semb. contra*.

than he could have recovered in a direct manner, and had failed, the court would not assist him.^(e)

In actions of *trespass quare clausum fregit*, the measure of damages is in general the sum required to repair the damage done by the defendant; but it may be more or less, according to the circumstances of aggravation or mitigation, with which the case is attended. Thus, in *trespass* for breaking and entering the plaintiff's close, and spoiling his corn, under circumstances of great aggravation, the court held that 500*l.* damages were not excessive, and refused to reduce them, although the plaintiff did not appear to have sustained any actual pecuniary damage.^(f) So, in an action of *trespass* for breaking the plaintiff's close, and laying poison upon it, with intent to destroy the plaintiff's poultry, the jury are not confined in their verdict to the actual damages proved to have been sustained, but may consider the malicious intention of the defendant.^(g) On the other hand, where an action of *trespass* is brought for a peaceable entry into land, for the purpose of trying a disputed title, the damages in general are moderate, and sometimes merely nominal.

In *trespass* for breaking and entering the plaintiff's house, many things, we have seen,^(h) may be laid and proved in aggravation of damages, for which alone *trespass* would not lie. Thus, *trespass* may be brought for entering the plaintiff's house, and beating his wife,⁽ⁱ⁾ child, or [*891] servant;^(k) and *the beating may be given in evidence to aggravate the damages; or the plaintiff may prove that the defendant came into the house, and debauched his daughter:^(a) But he cannot, it is said, in these cases, recover damages for losing the service of his wife, child or servant; as he may have a proper action for that injury.^(b) This distinction, however, does not appear to be supported by the modern practice. The rule now generally adopted seems to be, that if the special damages laid in the declaration, arise out of the trespass committed in entering the house, and the acts done by the defendant, to cause such special damages, constitute a part of one entire transaction, of which the trespass in the house was the commencement, the plaintiff will be allowed to prove them, notwithstanding they might have been a sufficient ground for a separate action. And accordingly, in a late case,^(c) where the declaration was for breaking and entering the plaintiff's house, and, without any probable cause, and under a false charge and assertion that the plaintiff had stolen property of the defendant, searching and ransacking, &c., by reason of which the plaintiff was not only interrupted in the quiet enjoyment of his house, but his credit and character were injured, &c.; the court held, that the trespass was the substantive allegation, and that the rest was laid as matter of aggravation only; and though the false charge was not to be left to the jury, as a distinct and substantive ground of damages, yet all the circumstances attending the trespass might be properly proved, and the

(e) 2 Durnf. & East, 261. And see further, as to the damages in an action for the mesne profits, Run. Eject. 2 Ed. Chap. XII. p. 491, &c. Ad. Eject. 2 Ed. Chap. XIII. p. 327, &c.

(f) 5 Taunt. 442. 1 Marsh. 139, S. C.

(g) 2 Stark. Ni. Pri. 317.

(h) *Ante*, 441.

(i) 1 Str. 61; and see Cro. Jac. 501. 1 Stark. Ni. Pri. 98.

(k) 2 Salk. 642. Holt, 699, S. C. 2 Ld. Raym. 1032. 6 Mod. 127. Holt, 699, S. C.

(a) 1 Sid. 225. 2 Ld. Raym. 1032. 6 Mod. 127. Holt, 699, S. C. 3 Bur. 1878. 2 Durnf. & East, 166. Bul. Ni. Pri. 89.

(b) 2 Salk. 642. Holt, 699, S. C. Bul. Ni. Pri. 89; but see Cro. Jac. 501.

(c) 2 Maule & Sel. 77; and see 2 Durnf. & East, 166. 5 Taunt. 442. 1 Stark. Ni. Pri. 98.

jury should take the whole together into their consideration, in estimating the damages: "It is always the practice (said Mr. Justice *Le Blanc*,) to give in evidence the circumstances, which accompany and give a character to the trespass." (d) So, in *trespass* for breaking and entering the plaintiff's dwelling house, and for a battery, the plaintiff was allowed to give in evidence that his wife was so terrified by the conduct of the defendant, that she was immediately taken ill, and soon afterwards died; but this was held to be admissible only for the purpose of showing how outrageous and violent the breaking was, and not as a substantive ground of damages. (e)

In actions of *trespass* to *personal* property, the measure of damages is in general the value of the cattle or goods, &c. (f) if converted by the defendant to his own use, or, if they have been only damaged, or detained for a time, such a sum as will repair the damage, or afford the plaintiff an adequate compensation for the detention of them; but the damages may be more or less, according to circumstances: And where they are such as naturally arise out of, or are connected with the act complained of, or cannot with decency be stated, they may, we have seen, (g) be given in evidence *under the *alia enormia*, or "other wrongs" mentioned in the declaration; but otherwise they are considered as special damages, and must be so laid in the declaration, in order to give the defendant an opportunity of answering them, or the plaintiff will not be allowed to give them in evidence at the trial. (a)

By the statute 28 Geo. III. c. 37, § 24, (b) "in case any action, indictment or prosecution, shall be commenced and brought to trial, against any person or persons, on account of the seizing of any goods, wares, or merchandize, seized as forfeited by virtue of any act or acts of parliament relating to his majesty's revenues of *customs* or *excise*, or of any ship, vessel or boat, or of any horse, cattle or carriage, used or employed in removing or carrying the same, whether any information shall be brought to trial to condemn the same or not, and a verdict shall be given against the defendant or defendants, if the court or judge before whom such action, indictment, or prosecution, shall be tried, shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled to above *two* pence damages, nor to any costs of suit; nor shall the defendant in such prosecution be imprisoned, or be fined above one shilling." But a judge's certificate, that a custom-house officer had probable cause for *seizing* goods, does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under the above statute. (c) And accordingly where, in *trespass* against custom-house officers, for taking the plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned; and the judge certified, that there was probable cause for the seizure; the court held, that the plaintiff was not precluded

(d) 2 Maule & Sel. 79; and see 2 Phil. Evid. 135.

(e) 1 Stark. Nl. Pri. 98; but see Peake's Cas. Nl. Pri. 3 Ed. 87.

(f) 2 Wils. 248.

(g) *Ante*, 441.

(a) See further, as to damages in *trespass*, Say. Dam. Chap. XVII.

(b) And see the statutes 23 Geo. III. c. 70, § 29. 26 Geo. III. c. 40, § 31. These statutes, however, were repealed by the 6 Geo. IV. c. 105; but there is a similar clause in the statute 6 Geo. IV. c. 108, § 92.

(c) 1 H. Blac. 28.

by the above statute, from taking out execution for the damages found by the jury.(d)

And, to render *justices* of the peace more safe in the execution of their duty, it is enacted by the statute 43 Geo. III. c. 141, that "in all actions which shall be brought against any justice or justices of the peace, in the united kingdom of *Great Britain* and *Ireland*, for or on account of any conviction by him or them had or made, under or by virtue of any act or acts of parliament in force in the said united kingdom, or for or by reason of any act, matter or thing whatsoever, done or commanded to be done by such justice or justices, for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty [*898] or penalties which may have been levied upon the said *plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of *two* pence, nor any costs of suit whatsoever; unless it shall be expressly alleged in the declaration, in the action wherein the recovery shall be had, and which shall be in an action upon the *case* only, that such acts were done maliciously, and without any reasonable and probable cause: And that such plaintiff shall not be entitled to recover against such justice, any penalty which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence." But this statute does in no instance extend to protect justices of peace, in the execution of their office, against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions, by virtue of any statute, &c.(a) And it seems, that the statute extends to those cases only, where the conviction has been quashed.(b) It also seems, that if a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrates, under the general issue in an action of *trespass*, as well in respect of such facts stated therein as are necessary to give them jurisdiction, as upon the merits of the conviction.(c) But a conviction on a statute, not pursuing on the face of it the provisions of the statute, nor showing that any offence has been committed, is bad; and although it has not been quashed, its invalidity may be taken advantage of on the trial of an action of *trespass*, for a distress taken under a warrant grounded thereon.(dd) In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was a want of probable cause.(e)

In actions upon the *case*, *replevin*, *trespass*, &c. the damages at common law are *single*, and proportioned to the injury complained of; but *double* or

(d) 5 Barn. & Ald. 762. 1 Dowl. & Ry. 417, S. C.

(a) 12 East, 67. 1 Man. & Ry. 211.

(b) *Id.* 78, 9. 16 East, 13, 21. 3 Barn. & Cres. 409. 5 Dowl. & Ry. 268, S. C.

(c) 16 East, 13, 21; and see 3 Moore, 294. 4 Moore, 50. 1 Brod. & Bing. 432, S. C. 3 Bing. 78.

(dd) 1 M'Clel. & Y. 469.

(e) 1 Marsh. 220.

treble damages are sometimes given to the plaintiff by statute, in cases where *single* damages were before recoverable, as upon the 2 Hen. IV. c. 11, for wrongfully suing in the admiralty court, (f) upon the 8 Hen. VI. c. 9, § 6, for a forcible entry, (g) upon the 29 Eliz. c. 4, for extortion, (h) and upon the 2 & 3 W. & M. sess. 1, c. 5, for rescuing a distress for *rent. (aa) In these cases, the single amount of the damages is [*894] found by the jury; and the court, on motion, will order them to be doubled or trebled. (b) And where a statute gives *treble* damages, the plaintiff is entitled to three times the full amount of the damages found by the jury. (c) But in an action of *debt*, on the statute 2 & 3 Edw. VI. c. 13, for not setting out tithes, the *treble* value of them must be found by the jury, on the general issue of *nil debet*; (d) or, after judgment by default, on a writ of inquiry. (e) *Treble* damages also, we have seen, (f) are given to the defendant, by the statutes 23 Hen. VIII. c. 5, § 11, 12, and 43 Eliz. c. 2, § 19, after verdict or nonsuit, in an action of *trespass*, or other action brought against him, for taking a distress, or other act done by authority of the commissioners of sewers, or for levying a poor's rate.

On a declaration consisting of several counts, the jury may either assess *entire* damages, on the whole or part of the declaration, or they may assess *several* damages on the different counts. (g) If entire damages be assessed, and any one or more of the counts be bad or inconsistent, judgment may be arrested: (h) because it must be intended, that some part of the damages was assessed upon those counts. In order to cure this defect, if there was evidence given at the trial upon such of the counts only as are good and consistent, a general verdict may be altered, from the notes of the judge, and entered only on those counts: (i) but if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for *words*, where some actionable words are laid, and some not actionable, in different counts, (k) and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended; because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them: (l) In such case therefore, the only remedy is by awarding a *venire de novo*. (m) If the jury find a verdict for the plaintiff with one penalty generally, in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another,

(f) 10 Co. 116. Dyer, 159, b. Carth. 297.

(g) Bro. Dam. pl. 70. 10 Co. 115, b. Co. Lit. 257, b. 2 Inst. 289. Cro. Eliz. 582; but see 2 Moore, 238.

(h) 2 Durnf. & East, 148; and see 2 Barn. & Ald. 393. 1 Chit. Rep. 137, S. C. 4 Barn. & Cres. 154. Append. Chap. XXII. § 90.

(aa) Carth. 321. 1 Salk. 205. 1 Ld. Raym. 19, 342. Skin. 555. Holt Rep. 172, S. C.

(b) 2 Durnf. & East, 159; and see Cro. Eliz. 582. 1 Chit. Rep. 141, (a.) M'Clel. 214. 13 Price, 476, S. C.

(c) 4 Barn. & Cres. 154. 6 Dowl. & Ryl. 1, S. C.

(d) 2 Chit. Rep. 351.

(e) 1 Bing. 182. 7 Moore, 602, S. C. Ante, 573.

(f) Ante, 887, 8.

(g) 1 Rol. Abr. 570, pl. 1.

(h) Say. Dam. Chap. XXV; but see the distinction taken in Willes, 443. 2 Wms. Saund. 5 Ed. 171, a, b, c.

(i) Barnes, 449. Doug. 376. 1 Bos. & Pul. 329. 3 Bing. 334; and see 2 Wms. Saund. 5 Ed. 171, a.

(k) Willes, 443. 2 Wms. Saund. 5 Ed. 171, b, c.

(l) 1 H. Blac. 78. 6 Durnf. & East, 691. 3 Maule & Sel. 110. 1 Barn. & Ald. 161. 7 Moore, 269.

(m) R. M. 1654, § 21, K. B., § 24, C. P. Barnes, 478. Doug. 376, 722. 1 Durnf. & East, 542. 3 Bing. 349, 50. 2 Wms. Saund. 5 Ed. 171, a, b, c.

though the former be bad in law, and though the evidence would have warranted the verdict on any other count.(n)

If there be judgment by default as to part, and an issue upon other part, or, in an action against several defendants, if some of them let
[*895] *judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue as to inquire of the damages, *tam ad triandum, quam ad inquirendum*: and the jury who try the issue shall assess the damages for the whole, or against all the defendants.(a) But if a declaration in *trespass* contain two counts, and the defendant plead to one, and suffer judgment by default on the other, and on the trial of the first, the plaintiff prove one act of trespass only, which is covered by the second count, he is not entitled to a verdict on the first count.(bb) In the case of several defendants, when those who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant*,(c) *assumpsit*,(d) &c. the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none: and therefore if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment or damages against the others, who let judgment go by default: But in actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such as shows the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default;(e) but where the plea merely operates in discharge of the party pleading it, there it shall not operate to the benefit of the other defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants.(f)

If there be a *demurrer* to part, and an issue upon other part, or, in an action against several defendants, if some of them demur, and others plead to issue, the jury who try the issues shall assess the damages for the whole, or against all the defendants: In this case, if the issue be tried before the demurrer is argued, the damages are said to be *contingent*,(g) depending upon the event of the demurrer. But when the plaintiff is nonsuited on the trial of an issue, he cannot, we have seen,(h) have contingent damages assessed for him on a demurrer.(i) And when the issue, as well as the demurrer, goes to the whole cause of action, the damages shall be assessed upon the issue, and not upon the demurrer. Where the first four counts of a declaration in *assumpsit* were on bills of exchange, and there was a demurrer and joinder to the first two counts, and the general issue to the rest of the declaration, and a *venire tam ad triandum, quam ad inquiren-*

(n) 3 Durnf. & East, 448. 5 Taunt. 2; but see 3 Bur. 1237, *semb. contra*.

(a) 11 Co. 5. 2 Bos. & Pul. 163.

(bb) 7 Durnf. & East, 727.

(c) 1 Lev. 63. 1 Sid. 76. 1 Keb. 284, S. C.

(d) Cas. Pr. C. P. 107. Prac. Reg. 102, S. C. 3 Durnf. & East, 662. 2 H. Blac. 28. Append. Chap. XXXVII, § 43; but see 1 Salk. 23, *semb. contra*.

(e) 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217, S. C.

(f) 2 Str. 1108, 1222.

(g) *Ante*, 722.

(h) *Ante*, 869, 70.

(i) 1 Str. 507.

dum, &c. and the plaintiff, at the trial, proved only two bills; it was *holden that he was not obliged to apply these to the counts [*896] demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration.(a)

When there are several defendants, who sever in pleading, the jury who try the first issue shall assess damages against all, with a *cesset executio*; and the other defendants, if found guilty, shall be contributory to those damages.(b) In *trespass* against several defendants, who join in pleading, if the jury on the trial find them all jointly guilty, they cannot assess several damages.(cc) But they may find some of them guilty, and acquit others; in which case the damages can be assessed against those only who are found guilty: Or they may find some of the defendants guilty of the whole trespass, and others of a part only;(d) or some of them guilty of part, or at one time, and the rest guilty of other part, or at another time;(e) in either of which cases, they may assess several damages. And where, in an action against several defendants, the jury by mistake have assessed several damages, the plaintiff, we have seen,(f) may cure it, by entering a *nolle prosequi* as to one of the defendants, and taking judgment against the others;(g) or he may enter a *remittitur* as to the lesser damages;(h) or even, without entering a *remittitur*, he may take judgment against all the defendants, for the greater damages.(h)

When the jury, upon the trial of an issue, have omitted to assess the damages, we have before seen in what cases the omission may be supplied by a writ of inquiry.(i) When the jury give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the surplus, before judgment;(k) or the plaintiff may amend his declaration, and have a new trial.(l) And, in an action for a *mayhem*, the damages given by the jury, if not sufficient, may, we have seen,(m) be increased by the court, on view of the plaintiff.(n)[A]

(a) Ry. & Mo. 41.

(b) 11 Co. 5. If A. recover in *tort* against two defendants, and levy the whole damages on one of them, that one cannot recover a moiety against the other for his contribution; *aliter* in *assumpsit*. 8 Durnf. & East, 186. Holt, Ni. Pri. 245.

(cc) Cro. Eliz. 860. 11 Co. 5. 1 Str. 422. 2 Str. 910. 5 Bur. 2792. 6 Durnf. & East, 199; but see 1 Str. 79. 2 Str. 1140.

(d) Cro. Eliz. 860. 11 Co. 5. Sty. Rep. 5.

(e) 11 Co. 6. Brownl. 233. Cro. Car. 54. (f) *Ante*, 682.

(g) 11 Co. 5. Cro. Car. 239, 243. Carth. 19.

(h) 11 Co. 7, s. Cro. Car. 192. 1 Wils. 30. For the cases where a *remittitur damna* is allowed, and where not, see 1 Wms. Saund. 5 Ed. 285, (5, 6,) 286, (10). 1 Marsh. 180. 4 Maule & Sel. 94. 2 Barn. & Cres. 902, &c. 4 Dowl. & Ryl. 566, &c. S. C.

(i) *Ante*, 574, &c.

(k) Yelv. 45. 2 Str. 1110, 1171. But if judgment be entered for more damages than are laid in the declaration, it is error. 2 Blac. Rep. 1300.

(l) *Ante*, 697.

(m) *Ante*, 870, 888.

(n) 1 Ld. Raym. 176. 3 Salk. 115, S. C. Barnes, 153. 1 Wils. 6. 2 Wils. 248. *Hoare v. Crozier*, E. 22 Geo. III. K.B.; and see 1 Rol. Abr. 572, 3. Say. Dam. Chap. XXVIII.

[A] The learned reader is referred to Mr. Sedgwick's elaborate and admirable Treatise on the Measure of Damages, where he will find the principles briefly touched upon or hinted at by Mr. Tidd, fully considered, and all the learning on this intricate and important branch of law gathered within a moderate compass and set forth in an intelligible manner. The succinct form of the notes of the present edition of Tidd's Practice, forbids any extended inquiry into a field of jurisprudence which, though much cultivated, is very far from being exhausted.

On a *general* verdict, if false, the jury were liable to be attainted. (o) To relieve them from this difficulty, it was enacted by the statute of [*897] *Westm.* *2, (13 *Edw.* I.) c. 30, § 2, that "the justices of assize shall not compel the jurors to say precisely whether it be *disseisin* or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say, of their own accord, that it is *disseisin*, their verdict shall be admitted at their own peril." Upon this statute it has become the practice for the jury, when they have any doubt as to the matter of law, to find a *special* verdict, stating the facts, and referring the law arising thereon to the decision of the court; by concluding conditionally, that if upon the whole matter alleged, the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. (a) In finding special verdicts, when the points are single and not complicated, and no special conclusion, the counsel, (if required,) are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment: (b) And unnecessary finding of deeds *in hæc verba*, where the question rests not upon them, but which are only derivation of title, ought to be spared, and stated shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. (b) It is also a general rule, that in a special verdict, (as nothing is to be intended,) (c) the jury must find facts, and not merely the evidence of facts: (d) And if in this, or any other particular, the verdict be defective, so that the courts are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial; (e) or otherwise they will supply the defect, by awarding a *venire de novo*. (f) [A]

(o) Gilb. C. P. 71. For the writ of *attaint* is now abolished, by the statute 6 Geo. IV. c. 50, § 60.

(a) 3 Blac. Com. 377, 8. But the form of a special verdict in *trespass*, see Append. Chap. XXXVII. § 53; and for a special verdict in *ejectment*, see Append. Chap. XLVI. § 102.

(b) R. M. 1654, § 20, K. B. R. M. 1654, § 23, C. P.; but see 2 Wms. Saund. 5 Ed. 97, c. (3).

(c) 4 Durnf. & East, 646. 4 Price, 240; and see O. Bridg. 188.

(d) 2 Ld. Raym. 1581, 2. 2 Str. 885, 6, S. C. 1 Wils. 48. 2 Str. 1185, S. C. 1 East, 111.

(e) *Ante*, 713.

(f) O. Brig. 188. 2 Ld. Raym. 1521, 1584. 2 Str. 887, S. C. *Id.* 1124. S. P. 1 East, 111

[A] "A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court, concluding conditionally, that if upon the whole matter thus found, the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant. 3 Black. 378. Boote on Suit at Law, 158. It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment according to law. 1 East, 111. Lord Raymond, 1581. And the court will not intend anything, especially any fact not found by the jury. 1 Wilson, 553. 1 Caines, 60. 20 Johns. Rep. 974. An instance of which is found in 11 Wheaton, 445. Where the assent of an executor is necessary, if the jury find a special verdict stating facts from which they might have inferred such assent, but do not find it expressly, the court cannot intend it. I apprehend there is no reported case, of any authority, where the court have gone beyond the fact found in the special verdict; for it is the province of the jury to judge of and find the facts, and the province of the court to declare the law on the fact so found. The undisputed facts ought to have been incorporated into the special verdict, and if they had omitted them by mistake, the court might, upon motion and full evidence, have amended the special verdict. *Strange*, 514. 4 Watts, 259. But the court is confined to the facts found by the special verdict. 2 Yeates, 543. 3 Yeates, 373. And when a special verdict is given, the court ought to confine its judgment to that verdict." *Per Coulter, J.*, in *Wallingford v. Dunlap*, 2 Harris, 33.

A special verdict, to enable the court of errors to act upon it, must find facts, not merely state the evidence. And where it states the evidence merely, without stating the conclusions of the jury, the court cannot act upon matters so found; but if other facts are found pro-

But it is said, that in a special verdict, the not finding of collateral matter shall be supplied; (g) and the law, which is favourable to verdicts, (h) will suppose that the jury doubted of nothing but what related to the matter in question before them. (g) So, on a special verdict with a general conclusion, the court will doubt of no more than the jury doubted of. (i) And if a special verdict, on a mixed question of fact and law, find facts, from which

(g) O. Bridg. 474.

(h) *Id.* 3, 558.

(i) *Id.* 88.

perly, and judgment in the court below be rendered contrary to the facts so properly found, the judgment will be reversed, though the evidence stated in the special verdict might have warranted a verdict and judgment the other way. *Seaward v. Jackson*, 8 Cow. 406. *Per Jones, Chancellor, La Frombois v. Jackson*, 8 Cow. 589. It should recite all the material facts found by the jury upon which the right of the plaintiff or defendant is entitled to rest; and it cannot, if defective, be aided by intendment, and thus become the subject of a judgment. *Lee v. Campbell*, 4 Port. 198. *Zumull v. Watson*, 2 Munf. 283. Neither can any inference be drawn from it. Every fact not ascertained by it is supposed not to exist. *Lawrence v. Beaubien*, 2 Bailey, 623. If the jury, in a special verdict, find facts only, the court must draw the legal conclusion from them; and if they draw conclusions against the law, upon the face of them, the court will reject the conclusion and judge upon the facts. *Butler v. Hopper*, 1 Wash. C. C., 499. And the sole duty of the court is to decide the law upon the facts stated, where a difficulty is expressed by the jury upon them. *Peterson v. United States*, 2 Wash. C. C., 36. And a special verdict which omits to state circumstances which are necessary to ascertain whether the plaintiff is entitled to the property or not, is insufficient, and a *venire de novo* will be awarded. *Robinson v. Brock*, 1 Hen. & Munf. 213. A special verdict must find facts, not the evidence of facts. *Bertrand v. Morrison*, Breese, 175. *Henderson v. Allen*, 1 H. & M. 235. *Brown v. Ralston*, 4 Rand. 504. But where a special verdict is imperfect by reason of ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a *venire de novo* ought to be awarded. *Aliter*, where the plaintiff has only stated a defective title or case. *Bellows v. Hollowell and Augusta Bank*, 2 Mason, 31. It must contain all the facts in the case. If defective or uncertain, and, not capable of amendment, judgment cannot be entered upon it, and nothing not found can be intended. So, where the court below told the jury it had been agreed that they should return a special verdict on the disputed facts, and that the court should enter judgment thereon, and on the facts not disputed, and a verdict was rendered, and judgment entered accordingly, it was reversed, and a new trial ordered. It is the duty of the plaintiff's counsel to have a verdict properly drawn up, settled and entered on the record. If the facts are reduced to writing, at the time of the trial, and have the assent of the jury, the verdict may be moulded into form afterwards, with the approbation of the court. Undisputed facts should be incorporated by the jury into the verdict; if omitted by them through mistake, the court may, upon motion and full evidence, amend the verdict. *Wallingford v. Dunlap*, 14 Penn. State R. (2 Harris), 31.

Where the jury in a special verdict, do not say that they find in one way or the other, according as the opinion of the court may be upon the law, the verdict is imperfect. *The State v. Wallace*, 3 Iredell, 195. A special verdict should find every fact essential to the plaintiff's right of recovery, in order to authorize a verdict in his favour, and cannot be aided by intendment or a reference to extrinsic facts. If the fact found show that there were others touching which there was evidence, the truth of which is not negated by the finding, the court, without rendering a verdict, should award a *venire de novo*. *Sewall v. Glidor*, 1 Ala. 52.

It is no objection to a special verdict that it was drawn up by the counsel in the case in order to show what facts must be inserted if found true, and the proper form of stating them, provided that the rights and duties of the jury, the effect of their verdict, &c., were fully explained to them by the court. *Miller v. Schakleford*, 4 Dana, 264. The special verdict, or finding of a judge in the nature of a special verdict, where trial by jury is waived, should find all the conclusions of fact, so as to leave nothing for further determination except the questions of law. *Sison v. Barrett*, 2 Comst. 406. *Hill v. Covill*, 1 Ib. 522. *Langley v. Warner*, 3 Ib. 327. *The State v. Watts*, 10 Ired. 369. *Thompson v. Farr*, 1 Speers, 93. A special verdict cannot be amended without the consent of both parties; but a *venire facias de novo* may be awarded in order to complete the verdict. *United States v. Bird*, 2 Brevard, 85. *Whitesides v. Russell*, 8 W. & S. 44. To authorize a judgment upon a special verdict, all the facts essential to the right of the party in whose favour judgment is to be rendered, must be found by the jury; finding evidence sufficient *prima facie*, to establish such facts, is not sufficient. *Blake v. Davis*, 20 Ohio, 231. *Hambleton v. Dempsey*, *Ib.* 168.

the court can draw clear conclusions, it is no objection to the verdict, that the jury have not themselves drawn such conclusions, and stated them as facts in the case.(k)

If there be a special verdict, the plaintiff's attorney generally gets it drawn from the minutes taken at the trial, and settled by his counsel or serjeant, who signs the draft. It is then delivered over to the op-
[*898] posite *attorney, who gets his counsel or serjeant to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* or associate in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, the cause entered with the clerk of the papers or secondaries, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a demurrer.(a) In the King's Bench, a special verdict must be set down in the paper for argument, within *four* days,(b) and cannot be set down afterwards, without leave of the court:(cc) and in the Common Pleas, the clerk of the dockets makes *six* copies of the special verdict, *viz.* *four* for the judges, and *two* for the serjeants on each side.(dd) After the court have given their opinion, a rule is drawn up for the delivery of the *postea* to the prevailing party; upon which he is immediately entitled to tax his costs, and take out execution, without a rule for judgment: but the other party may have a rule, which should be duly served, to be present at taxing costs.

Another method of finding a species of special verdict is when the jury find a verdict generally for either party, but subject nevertheless to the opinion of the court, on a *special case*,(ee)[A] stated by the counsel on both

(k) 8 Price, 256.

(a) *Ante*, 737, &c.

(cc) Imp. K. B. 10 Ed. 348.

(ee) Append. Chap. XXXVII. § 54.

(b) 1 Bur. *in pref.* iv.

(dd) Imp. C. P. 7 Ed. 385.

[A] "Where there is a suit actually pending in court, whether commenced by amicable agreement or by suing out of original process, the parties or their counsel may, without proceeding to trial, state a cause by consent for the opinion and decision of the court. This may consist either of one written statement of all the facts of the case, or of several statements of the facts, each involving a different question of law drawn up for the opinion of the court in bank, and signed by the parties or their counsel. A case stated is a substitute for a verdict, resorted to for convenience and to save the expense of a trial; its purpose being not to make evidence for a jury, but to supersede the action of a jury altogether, by imparting to facts ascertained by consent the judicial certainty requisite to enable the court to pass upon the law and give judgment on the whole; and its existence is, consequently, inconsistent with an issue to draw the facts again into contest. Upon the statement of a case in a Circuit Court, there was the unusual agreement 'that the question of the admissibility, competency, and sufficiency of the evidence to maintain the action should be submitted to the court; and that in considering the evidence, the court should draw from it, so far as it was admissible and competent, every inference of fact and law which it would have been competent for a jury to draw from it.' On error from the Supreme Court of the United States, it was declared by the latter court that they did not admit the right of the parties, by such an agreement to impose upon the court such duties as come properly or solely within the cognizance of a jury. A case stated may be agreed on and submitted before an issue is attained, and indeed, before any of the pleadings have been filed; though a declaration is, in general, filed previously.

"In the case of *Bosler et ux. v. Kunkle*, it was held by *Tbd, J.*, delivering the opinion of the court, that after a case stated, the declaration is waived and superseded. And he said, 'The parties have agreed to put, and actually have put before us the facts of the case. True, the counsel did reserve their exceptions, but it is a reservation incompatible with the agreement.

sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question be determined, and the verdict is then entered for the plaintiff or defendant, *(ff)* as the case may happen. The practice of granting cases is not of very modern date, there being an instance as far back as the reign of *Charles* the Second, where a point was reversed at *nisi prius* for the opinion of the court on a special case. *(g)* But as nothing appears upon the record but the general verdict, the parties are precluded thereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law: *(h)* The courts therefore will sometimes, and particularly if they are divided in opinion on the point of law, give the parties leave, if they can agree, to turn the case into a special verdict, in order that the point may be decided on a writ of error. *(i)* The court of King's Bench will take no cognizance of a special case, reversed upon the trial of an indictment at the sessions. *(k)* And they have no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration: and therefore, where the sessions, on an appeal, having heard the witnesses on one side, had refused to hear those on the other side, on the ground that their testimony had been *prefaced by [*899] observations on the part of the advocate, contrary to their usual practice, the court refused to grant a *mandamus* to re-hear the appeal. *(a)* But it has been usual to reserve special cases upon convictions for penalties, on an appeal at the sessions, as well as in cases of settlement; and the court will take cognizance of them, when accompanying the proceedings removed by *certiorari* into the King's Bench. *(b)*

In a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts; *(c)* and it is drawn and settled in like manner, by the counsel: and if any difference arise about a fact at the trial, the opinion of the jury is taken, and the fact stated accordingly. *(d)* A special case was stated for the opinion of the court; and it

(ff) Barnes, 451.

(g) 1 Lev. 238; and see 3 Durnf & East, 131.

(i) 15 East, 501. 6 Taunt. 246. 1 Marsh. 577, S. C.

(a) 4 Barn. & Ald. 86; and see 2 Chit. Rep. 385.

(b) 15 East, 333, 345; and see 2 Chit. Rep. 284.

(c) 2 Wils. 163.

(h) 3 Blac. Com. 378.

(k) 13 East, 95.

(d) 1 Bur. in *pref.* iv.

They cannot, at the very time they are placing all the facts specifically on the record, object because all the parts are not specifically on the record in the declaration. It is an attempt to mix a special demurrer with a case stated.'

"An agreement to a case stated may be rescinded either by tacit or express consent; the abandonment of it is satisfactorily evinced by the parties subsequently pleading to issue; and when thus abandoned, it is not evidence which may be given to the jury upon the trial of the cause. A case stated, having been read to a jury as evidence of the facts contained in it, it is competent to prove by the attorney who signed it that the client's assent was not had; and the better opinion is that the paper is not evidence at all. The statement of a case being agreed on and signed, it is filed in the office of the Prothonotary; after which it is placed as an issue in law upon the list, and comes on for argument as soon as reached, when the question of law arising on the facts found, are discussed by the respective counsel, and decided by the court. 'If the parties submit their case to the opinion of a court of Common Pleas they must be bound by its decision, unless it be agreed that it shall be subject to a writ of error. This has been settled with respect to cases stated and submitted to a court of Common Pleas; of which the Supreme Court will not take cognizance unless it be the agreement of the parties that the case shall be considered as of the nature of a special verdict and subject to a writ of error.'" 1 Troubat & Haley's Pract. 523.

appearing that the greater part of the statement was fictitious, the court fined the attorney for his misconduct.(e) If a verdict be found for the plaintiff, with *nominal* damages, subject to the opinion of the court, on a special case to be drawn up by the plaintiff, and he refuse to prepare it, the case cannot be set down for argument, nor can the plaintiff be compelled to complete it; but the defendant may apply to set aside the verdict, and have a new trial.(f) Where the defendant, however, had neglected to settle the case reserved on a *quo warranto*, a rule *nisi* was granted, for the *postea* to be delivered over to the prosecutor; and that he should be at liberty to enter up judgment thereon.(gg) And so, where a plaintiff obtained a verdict, subject to a special case, and the defendant did not obtain the signature of a serjeant to such case, in order to delay its being argued, the court of Common Pleas directed the *postea* to be delivered to the plaintiff.(hh) For the argument of a special case, the same steps must be taken as for that of a special verdict, except that it is not entered of record. But it is a rule in the King's Bench, that "all special cases to be set down by the clerk of the papers to be argued, must be entered within the first *four* days of the term next after the trial, at which such special cases shall have been reserved; and that such special cases shall never be set down for argument, on any of the last *four* days of term."(i) In arguing a special case, the counsel are not permitted to go out of it; and the courts must judge upon it as stated:(k) If it be misstated, the parties must apply to amend; or, if it be so defective that the court are not able to give judgment, they will grant a new trial, in order to have it re-stated.(l) Where a verdict had been found, subject to a special case, and a new trial directed, it was ruled at *nisi prius*, that the special case, signed by counsel on each side, was evidence of the facts stated therein.(m)

[*900] *On the trial of an issue in the King's Bench, a case was made, and afterwards argued in court, that the facts not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed, to go to a new trial, when the plaintiff was nonsuited: and the question being about costs, whether the master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings; upon motion for the court's direction to the master, it was ordered, that he should tax the defendant his costs upon the whole, as well with relation to the first trial, as the last.(a) From the statement of this case, it does not appear whether, upon granting a new trial, anything was said about the costs of the former trial, or whether they were directed to abide the event of the suit: If they were not, it seems from subsequent cases,(b) that at this day they would not have been allowed. But where, after the argument of a special case, the court directed a new trial, because the case was insufficiently stated, and the defendant, without going to trial again, gave the plaintiff a *cognovit*; the court held, that the defendant was liable to pay the costs of the former trial.(c)

(e) 3 Barn. & Cres. 597. 5 Dowl. & Ry. 389, S. C.

(f) 6 Moore, 53.

(gg) 2 Chit. Rep. 398.

(hh) 8 Taunt. 421. 2 Moore, 478, S. C.

(i) R. M. 38 Geo. III. K. B.

(k) 1 Bur. 617; and see 3 Bing. 85.

(l) 1 Str. 300. 3 Durnf. & East, 507. 2 Chit. Rep. 398.

(m) By. & Mo. 4.

(a) 1 Str. 300.

(b) 3 Durnf. & East, 507. 6 Durnf. & East, 71.

(c) 6 Durnf. & East, 144; and see 9 Moore, 620. 2 Bing. 330, S. C.

It sometimes happens that a *point* is reserved, or saved by the judge at *nisi prius*, with liberty to apply to the court for a nonsuit or verdict; in which case, the court has been in the habit of considering itself in the situation of the judge, at the time of the objection raised; and a nonsuit or verdict is entered according to their determination, without subjecting the parties to the delay and expense of a new trial.(d)

The verdict, whether general or special, nonsuit, &c. are entered on the back of the record of *nisi prius*; which entry, from the *Latin* word it began with, is called the *postea*.(e) In the King's Bench, when the cause is tried at the sittings in *London* or *Middlesex*, the associate delivers the record to the attorney of the party for whom the verdict is given, and he afterwards indorses the *postea*, from the associate's minutes on the panel; but when the cause is tried at the *assizes*, the associate keeps the record till the next term, and then delivers it, with the *postea* indorsed thereon, to the party obtaining the verdict. In either case, the *postea* should be marked by the clerk of the *postea*s: And there is an old rule of court, requiring the *postea* to be marked in *two* days after it comes to the attorney's hands;(f) but now, it is deemed sufficient to mark the *postea*, at any time before the costs are taxed.(g) If the record be amended at *nisi prius*, on account of any *variance* between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, the order for the amendment should be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, should be amended accordingly. Stat. 9 Geo. IV. c. 15.

*In the Common Pleas, when the cause is tried in *London* or [*901] *Middlesex*, the associate keeps the record in his custody, till the *quarto die post* of the return of the *habeas corpora juratorum*, and in the mean time indorses the *postea* on the back of it. And in a late case,(a) the *postea* having been improperly obtained, from the associate by the plaintiff's attorney, who immediately taxed his costs, and signed final judgment on the *fourth* day of term: the court notified, that for the future, the *postea* should not be delivered out till the morning of the *fifth* day of term. It is a rule in this court, that "every clerk of assize, and associate to the lord chief-justice, shall make returns of all *postea*s, upon records issuing out of this court, whereupon any proceedings have been, by virtue of any writ of *nisi prius*, *distringas*, or *habeas corpora juratorum*, and cause the same to be delivered to the prothonotaries, upon the *quarto die post* of the return of the writ of *nisi prius* in bank, on pain of forfeiting the sum of twenty pounds; and shall take the fees due to them respectively, for the return of every such *postea*."(b) And where final judgment is signed upon *postea*s, or *inquisitions* upon writs of inquiry, such *postea*s or *inquisitions* shall immediately be left with the clerk of the judgments; and shall

(d) 1 Bos. & Pul. 339; and see Barnes, 451, 455, 460. 1 Campb. 91, 241, 475, 545, 549. 2 Campb. 4, 79, 195, 427. 1 Stark. Ni. Pri. 14. Holt Ni. Pri. 48, 9; 208, 9. 2 Marsh. 138. 9 Price, 288. 2 Dowl. & Ryl. 462. 1 Man. & Ryl. 261. (a)

(e) For the form of the *postea*, on a verdict for the plaintiff, in *assumpsit*, *covenant*, *debt*, *case*, *detinue*, *replevin*, *trespass*, and *ejectment*, see Append. Chap. XXXVII. § 7, &c., and for the defendant, on a nonsuit or verdict in *assumpsit*, &c. *Id.* § 38, &c.

(f) R. T. 2 Jac. I. reg. 2 K. B.

(g) 1 Crompt. 3 Ed. 271.

(a) 1 Brod. & Bing. 298. 3 Moore, 643, S. C.

(b) R. E. 2 Jac. II. C. P. And there is a particular rule in that court, as to the delivery of *postea*s in *qui tam* actions. R. E. 34 Car. II. reg. 1, C. P.

not afterwards be taken out of the office, without leave of the court.(c) In an indictment for perjury, alleged to have been committed on the trial of a cause before one of the judges of the court of King's Bench, without a *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice; the cause having in fact been tried before the judge specified. 1 Moody & M. 118.

On a motion for a new trial, the *postea* was brought into court, and after the new trial had been denied, the *postea* could not be found; the court on debate ordered a new one to be made out, from the record above, and the associate's notes.(d) If the *postea* be wrong, it may be amended by the plea roll, by the memory or notes of the judge, or by the notes of the associate, or clerk of assize.(e) And where a general verdict had been given on two counts, one of which was bad, and it appeared by the judge's notes, that the jury calculated the damages on evidence applicable to the good count only, the court of Common Pleas amended the verdict by entering it on that count, though evidence was given applicable to the bad count also.(f) So, on an information by the attorney-general for penalties, for breach of a navigation law, if the jury find a general verdict, and it be taken on a particular count, the court of Exchequer will afterwards, on motion, permit it to be entered on any other count, if that elected should prove to be defective, or unsupported by the evidence, as applied to the statute; for such informations are not to be considered as in the nature of *qui tam* actions, on statutes merely penal, in which that cannot be done; 10 Price, 9. So, where an action was brought, and a verdict obtained by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging by way of special damage, the false imprisonment of both, as well as the expenses incurred by them, though the action could not have been maintained in respect of the false imprisonment, the wrong done in that respect to one being no wrong to the other, yet the jury having confined their verdict to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the court ordered the *postea* to be amended, by confining the damages to those expenses only.(g) But the application to amend the verdict by the judge's notes, must be made to the judge who tried the cause, and not to [*902] the court:(h) And the court will not *alter a verdict, unless it appear on the face of it, that the alteration would be according to the intention of the jury;(a) nor will they, at a distance of time after the trial, amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been, to give the plaintiff such increased sum, and that they conceived the verdict they had found was calculated to give him such sum:(b) So, where a general verdict was taken for the plaintiff, the court of King's Bench refused to entertain an application for entering the verdict on particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after the judgment had been reversed on error, for a defect in one count.(cc) And where the jury, in an action of debt on the statute 2 & 3

(c) R. T. 13 Geo. II. reg. 2 C. P.; and see R. T. 29 Car. II. reg. 5, C. P.

(d) 2 Str. 1264.

(e) *Ante*, 713.

(f) 1 Bos. & Pul. 329.

(g) 10 Moore, 448, 452. (a.)

(h) 1 Chit. Rep. 283. *Ante*, 713. (i).

(a) 1 H. Blac. 78.

(b) 2 Durnf. & East, 281; but see 1 Bur. 383. 2 Ken. 24, S. C.

(cc) 1 Barn. & Ald. 161.

Edw. VI. c. 13, which gives *treble* value for not setting out tithes, found, on the general issue of *nil debet*, that the defendant owed a certain sum, being the amount of the *single* value, the court held that the *postea* could not be amended, by entering a verdict for the *treble* value.(d) In an action by one defendant in *assumpsit*, against a co-defendant for contribution, the *postea* is evidence to prove the amount of the damages;(e) but the indorsement of the master's *allocatur*, is not, it seems, sufficient to entitle the plaintiff to recover half the costs, without producing the judgment.(f)

* CHAPTER XXXVIII.

[*903]

Of the RULE for JUDGMENT; and moving for a NEW TRIAL, &c. or in ARREST of JUDGMENT; or for JUDGMENT non obstante veredicto, a REPLEADER, or VENIRE FACIAS de novo.

AFTER a general verdict or upon a writ of inquiry after judgment by default,(a) it is incumbent on the prevailing party, in the King's Bench, to enter a rule for judgment *nisi causa*,(b) on the *postea* or inquisition, with the clerk of the rules: And a rule for judgment is necessary, when a verdict is taken by consent, subject to the award of an arbitrator, as to the *quantum* of the demand:(c) But it is not necessary, if the plaintiff be nonsuited; for in that case, as he is out of court, judgment may be entered immediately after the day in bank.(d) This rule ought not to be entered before the day in bank:(d) And it expires in *four days exclusive*(e) after it is entered; unless the rule be entered on the last day of term, or within four days after; during which four days, it is the practice to enter these rules as of the last day of term:(f) and *Sunday*,(g) or any other day on which the court doth not sit, is not reckoned one of the four days.(h) At the expiration of four days exclusive after entering such rule, if no sufficient cause be shown to the contrary, judgment may be signed.(i) If there be a verdict for the plaintiff, and no rule for judgment given for *four* terms, a term's notice is not necessary of the plaintiff's intention to proceed by giving the rule; but he may give it of course, and sign judgment after the four days are expired: for there is no act to be done by the other party.(k) In the Common Pleas, there is no rule for judgment: but the prevailing party waits till after the appearance day, or *quarto die post* of the return of the *habeas corpora juratorum*,(l) before he signs final *judg- [*904] ment; unless the *habeas corpora* be returnable on the *first* or *last*

(d) 2 Chit. Rep. 351; but see 1 Bing. 182, where the jury having found the treble value in a similar action, on a writ of inquiry, the inquisition was amended, by the insertion of nominal damages.

(e) 2 Stark. Ni. Pri. 364; and see 9 Price, 359.

(a) 1 Salk. 399. 1 Str. 425.

(c) 4 East, 310.

(d) 3 Salk. 212, 215. 6 Mod. 241. 13 East, 21.

(f) *Rez v. Keene & others*, H. 26 Geo. III. K. B.

(g) 4 Bur. 2130; and see 11 East, 272. *Id.* (b), 13 East, 21.

(h) 13 East, 21. 1 Chit. Rep. 562.

(i) *Per Master Forster*, Imp. K. B. 10 Ed. 342. 3 Maule & Sel. 500. 1 Chit. Rep. 317, (a).

(l) *Barnes*, 443. Pr. Reg. 410, S. C. *Barnes*, 445, 6. Pr. Reg. 410, 11, S. C. It is said in

(f) 2 Stark. Ni. Pri. 364.

(b) Append. Chap. XXXVIII. § 1.

(d) R. E. 5 Geo. II. reg. 3, (a) K. B.

(i) R. E. 5 Geo. II. reg. 3, (a) K. B.

general return day: In the former case, final judgment cannot be signed till the expiration of the first *four* days in full term: In the latter, it may it seems be signed in the evening of the last day of term, being the appearance day of the return of the writ.(*aa*) But where a verdict has been found subject to a reference, and an award is made in vacation, whether before or after the return of the *habeas corpora juratorum*, final judgment should not be entered up till after the first *four* days of the term next ensuing the date of the award, in order that the party dissatisfied therewith may have an opportunity of taking the judgment of the court upon it.(*b*)

Within the time limited by the rule for judgment in the King's Bench, or practice of the court, as above stated, in the Common Pleas, the plaintiff may move the court to set aside a nonsuit, verdict or inquisition, and have a new trial or inquiry; or for judgment *non obstante veredicto*: Or the court may order a verdict to be entered for the plaintiff, where the judge directed a nonsuit in an undefended cause, with liberty for the plaintiff to move to enter a verdict.(*c*) And the defendant may move to set aside a verdict or inquisition, and have a new trial or inquiry; or, (after a point reserved,) that a nonsuit may be entered;(d) or he may move in arrest of judgment: and neither party may move for a repleader, or *venire facias de novo*. But the defendant cannot in strictness move to enter a nonsuit, or that a verdict be entered for him, but only for a new trial, unless leave was given him at the trial:(*e*) and therefore, when a legal objection is taken at the trial and over-ruled by the judge, without reserving the point, though the court are afterwards of opinion that the objection was a good ground of nonsuit, they will grant a new trial only, and not permit a nonsuit to be entered.(*f*) And where, upon the plaintiff's evidence, the judge intimated a strong opinion in favour of the defendant, upon a point decisive of the cause, and in consequence of such intimation, the defendant's counsel omitted to call witnesses in support of a different point, intended to be raised by way of defence; the court directed a new trial only, and would not order a verdict to be entered for the plaintiff. 1 Man. & Ryl. 269.

The first instance to be met with in the books, of a new trial on the evidence, was in the case of *Wood and Gunston*, A. D. 1665.(*g*) But *Holt*, Ch. J. seems to have been of opinion, that new trials were more ancient, from the challenge to be met with in the old books, that the juror had before given a verdict in the same cause:(*h*) Yet it does not from thence follow, that the court granted a new trial upon the evidence; for it might

1 Sel. Pr. 2 Ed. 478, that in the Common Pleas, the prevailing party must wait the same time (four days *exclusive*,) as in the King's Bench, which is allowed the other side to move for a new trial, or in arrest of judgment: but this *dictum* is not supported by the authorities referred to above; and in the case of *Thomas v. Ward*, 2 Bos. & Pul. 393, the court of Common Pleas held, that the rule that final judgment cannot be signed till *four* days after the return of the *habeas corpora juratarum*, does not extend to a case where the term closes before the four days are expired.

(*aa*) 2 Bos. & Pul. 393.

(*b*) *Wilkinson v. Stewart*, 59 Geo. III. C. P. 10 Moore, 111. *Ante*, 838, 9.

(*c*) 4 Barn. & Ald. 413. *Ante*, 868.

(*d*) 9 Price, 288. 2 Dowl. & Ryl. 462. 1 Man. & Ryl. 261, (*a*) *Ante*, 868, 900. Append. Chap. XXXVIII, § 2, 3.

(*e*) 2 Chit. Rep. 271, 2. 1 Man. & Ryl. 260, 61. *Id.* (*a*), 422, 425. *Ante*, 868, 900.

(*f*) 1 Barn. & Ald. 252; but see 8 East, 580. 2 Moore, 458, 9. 8 Taunt. 402, S. C. 1 Barn. & Cres. 94. 2 Dowl. & Ryl. 198, S. C. 1 Man. & Ryl. 261, (*a*) *Ante*, 868, 900.

(*g*) Sty. Rep. 462, 466. 1 Str. 392.

(*h*) 2 Salk. 648; and see 6 Durnf. & East, 622, 3.

appear to be a mis-trial upon the record, or there might be other reasons for awarding a *venire facias de novo*.⁽ⁱ⁾

But whatever might have been the origin of the practice, trials by jury in civil causes could not subsist now, without a power somewhere to grant *new trials. *If an erroneous judgment be given in [*905] point of law, there are many ways to review and set it right.

When a court judges of facts upon depositions in writing, their sentence or decree may many ways be reviewed and set right. But a general verdict can only be set right by a new trial; [A] which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. The writ of *attaint*, which had become a mere sound in every case, and in many did not pretend to be a remedy, is now abolished by the statute 6 Geo. IV. c. 50, § 60. There are numberless causes of false verdicts, without corruption or bad intention of the jurors: They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate: The examination may be so long, as to distract and confound their attention. Most general verdicts include legal consequences, as well as propositions of fact: In drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial, would be very precarious and unsatisfactory.^(a)

It was not formerly usual to grant a new trial in *ejectment*:^(b) [B] or after a trial at bar,^(c) nonsuit,^(d) or two *concurring* verdicts;^(e) [C] but for

(i) 2 Str. 995.

(a) 1 Burr. 393. 2 Ken. 57, S. C.

(b) 2 Salk. 648. Pr. Reg. 408.

(c) 7 Mod. 37, 156. 2 Salk. 650, S. C.

(d) 1 Blac. Rep. 532. Pr. Reg. 411. Barnes, 317.

(e) 6 Mod. 22. 2 Salk. 649. 1 Str. 692.

[A] The granting of new trials depends upon the legal discretion of the court, guided by the nature and circumstances of the particular case. *The Commonwealth v. Manson*, 2 Ashmead, 31. And the refusal to grant one, cannot be assigned as error. *State Bank v. Hunter*, 1 Dev. 100. A petition for a new trial is an appeal to the discretion of the court, and so long as the court keep within the limits of their authority, their proceedings are not subject to be revised or controlled by writ of error, *certiorari*, or appeal. *Houghton v. Slack*, 10 Verm. 520. Upon such a motion, every presumption is to be made in favour of the verdict of the jury, and the correctness of the instructions of the court; hence the want of a case stated in the record sufficient to authorize the verdict, or give rise to the opinions delivered by the judge, does not, *per se*, render the judgment erroneous. *Honeycut v. Angle*, 4 Dev. & Batt. 306. Generally, a new trial ought never to be granted where it appears that the party asking it has had a fair trial on the merits, and that justice has been done him. *Goode v. Love*, 4 Leigh, 635. *Cartwright v. Carpenter*, 7 How. (Miss.) 328. Or, if his application be not made in time. *Connell v. Strong*, 11 Verm. 280. It is said, that on a question of location, a new trial will more readily be granted than in most other cases depending upon facts, in consequence of their near approach to questions of law. *Felder v. Bonnett*, 2 M'Mullan, 44. *Wolfe v. Knotts*, 2 M'Mullan, 75. *Matthews v. Horibeck*, 1 Richardson, 382.

[B] But now, new trials in ejectment may be granted to either party; *Troublesome v. Estill*, 1 Bibb, 128; after a trial at bar, as well as after a trial at *nisi prius*. *Den v. Vancleve*, 2 South. 589. But it will not be granted where there has been a view, except under very special circumstances. *Leech v. Armitage*, 1 Yeates, 104. In proceedings under the 2d (New York) Revised Statutes, 312, for quieting titles to land, the judgment in favour of a plaintiff is conclusive as to the title, and a new trial will not be granted, of course, as in ejectment on payment of costs and damages. *Malin v. Rose*, 12 Wend. 258.

[C] A third trial will rarely be granted, after two concurring verdicts, unless some plain

the sake of obtaining justice, it may be now had in these as well as in other cases.(f) Where there are two *contrary* verdicts, it is not of course to grant a third trial, but the courts in their discretion will grant or refuse it, according to circumstances; there being no rule, either at law or in equity, which entitles the losing party in that case to the benefit of a third trial, if the second verdict be satisfactory to the court.(g) In an *inferior* court, it is said, a verdict cannot be set aside, and a new trial had, upon the merits, but only for irregularity:(h) And the court of King's Bench would not interfere by *mandamus*, to compel an inferior court to grant a new trial, in a cause wherein, it was alleged, injustice had been done to one of the parties.(i) An inferior court, however, has power to set aside a regular interlocutory judgment, in order to let in a trial of the merits.(k) And, by a late statute,(l) the courts of Kings Bench, Common Pleas, and Exchequer, are authorized, in certain cases, to grant new trials [*906] of causes *which have been commenced and tried in the courts of Great Sessions in *Wales*: And a new trial may be moved for, in the King's Bench, though the party has not entered into the recognizance required by that statute.(aa).

The principal grounds or reasons for setting aside a verdict or nonsuit,

(f) 2 Str. 1105. 4 Bur. 2224, in *ejectment*; Sty. Rep. 462, 466. 1 Str. 584. 2 Ld. Raym. 1358, S. C. 2 Str. 1105. 1 Bur. 395, after a *trial at bar*; 2 Ken. 65. 4 Bur. 1986. 2 Blac. Rep. 698. 3 Wils. 146, 338, after a *nonsuit*; and 4 Bur. 2109. 1 Durnf. & East, 171, after two *concurring* verdicts.

(g) 2 Blac. Rep. 963.

(h) 1 Salk. 201. 2 Salk. 650. 1 Str. 113, 392, 499. Fort. 198. Say. Rep. 202. 1 Bur. 572. 2 Ken. 290, S. C. Doug. 380.

(i) 2 Chit. Rep. 250.

(l) 5 Geo. IV. c. 106, § 2, 3, 4, 5.

(k) 1 Bur. 571. 2 Ken. 290, S. C.

(aa) 6 Barn. & Cres. 427.

rule of evidence or principle of law be violated. *Frost v. Brown*, 2 Bay, 133. After two verdicts in favour of a party, on facts, the court will rarely grant a new trial. *Aliter*, where the jury have disregarded the law. *Koble v. Arthur*, 3 Binn. 26. S. P. *Commissioners of Berks v. Ross*, 3 Ib. 520. *Play v. Play*, 2 N. & M. 184. But the court may award a third trial, if the evidence requires it, though the case has been decided uniformly the same way. *Wilkie v. Rosewell*, 3 Johns. Cas. 208.

Where there were two verdicts for the same party, and the last was sustained by the court below, it was held that the court above would not disturb it, though there seem to be a pretty clear preponderance of evidence against it. *Bennett v. Runyon*, 4 Dana, 422. Or, where there have been two trials, with a like result, a new trial will not be granted because the verdict appears to be against the weight of evidence. *Philbrick v. Holloway*, 6 How. (Miss.) 91. As a general proposition, it may be considered that a new trial will not be granted where there have been two concurrent verdicts, and no rule of law has been violated. *Davis v. Hale*, Geo. Decis. part II. 82. *Ross v. Ross*, 5 B. Monroe, 20. *Canning v. Frier*, Dudley, (Geo.) 182. *Mum v. Perkins*, 1 Smedes & Marsh. 412. But see *Stamps v. Bush*, 7 How. (Miss.) 255; and *The Commissioners v. James*, C. & N. 566. The Tennessee act of 1801, c. 6, § 59, which says, that no more than two new trials shall be granted to the same party, does not prevent the court from granting new trials, for error in the charge of the court to the jury, for error in the admission or rejection of testimony, for misconduct of the jury, and the like. *Trott v. West*, 1 Meigs, 163, S. C. 10 Yerg. 499. Under the Missouri Statute, (Rev. Code, 1835, 470,) a second new trial can be granted only for a misconception of the instructions of the court, or of the general law governing the case, if no instructions are given, or there is an entire disregard of such instructions, which must be inferred from a comparison of the verdict with the facts in evidence. *Hill v. Deaver*, 7 Mis. 57. And a second new trial cannot be granted except for the causes stated in such statute. *Humbert v. Eckert*, 7 Mis. 259. For the errors of the jury in matters of law, but not for the errors of the court, a second new trial may be granted in Missouri. *Hill v. Wilkins*, 4 Mis. 86. The vacating of a judgment and granting a new trial, under the 30th section of the Illinois act, 1838-9, is a matter of right, under the first motion made for that purpose, but whether a second motion shall be sustained is a matter which rests in the sound discretion of the court. *Vance v. Schuyler*, 1 Gilman, 160.

and granting a new trial, are first, the want of due notice of trial:(*bb*) but if the defendant appear and make defence, he shall not have a new trial on that ground:(*cc*) And where a cause was taken out of its turn, and tried as an undefended cause, the counsel for the defendant objecting thereto, and declining to appear, the court, we have seen, refused to grant a new trial, though on payment of costs, without an affidavit of merits.(*dd*) Secondly, that there is a material variance[*A*] between the issue or paper-book delivered and the record of *nisi prius*:(*e*) but the courts will not set aside a verdict on this ground, unless the variance be material to the point in issue:(*f*) or if a defence was made at the trial.(*g*) Thirdly, for want of a proper jury:[*B*] as where they are not duly returned:(*h*) But it is no ground for a new trial, that the attorney for the defendant was the under-sheriff, who had the summoning of the jury.(*i*) So where, upon the trial of an information for a libel, only ten special jurymen appeared, and two *talesmen* were sworn on the jury; it was decided to be no ground for a new trial, that two of the non-attending special jurymen, named in the panel, had not been summoned, though it appeared that this fact was unknown to the defendant, until after the trial.(*k*) And the disallowing of a challenge,

(*bb*) Bul. Ni. Pri. 327. 3 Price, 72.

(*cc*) 2 Salk. 646.

(*dd*) 5 Barn. & Ald. 907. 1 Dowl. & Ryl. 553. S. C. *Ante*, 818, 19; and see 2 Chit. Rep. 269, 70.

(*e*) Barnes, 475, 6. And for the effect of a variance between the issue and *nisi prius* record, see 8 Taunt. 634; 2 Barn. & Ald. 472; 1 Chit. Rep. 277. S. C. *Id.* 277, 8. (*a*). *Ante*, 720, 727.

(*f*) Barnes, 464, 475, 6, 7. 2 Str. 1131. Say. Rep. 154.

(*g*) Barnes, 445. 2 Wils. 160.

(*h*) 4 Durnf. & East, 473. *Ante*, 582.

(*i*) 1 Smith R. 304.

(*k*) 4 Barn. & Ald. 430.

[*A*] Variance between the declaration and the proof, if not objected to on the trial, is no ground for a new trial. *Hayden v. Nott*, 9 Conn. 367. Neither is a defect in the pleadings. *Jordan v. James*, 5 Ham. 88. *Bates v. Cooper*, *Ib.* 120. *M'Murtry v. Henry*, 4 Bibb. 410. *Pearl v. Randin*, 5 Day, 244. Especially if substantial justice has been done. *Barney v. Bliss*, 2 Aik. 60. If a plea is bad the adverse party, if aggrieved, must seek his remedy by writ of error, and not by motion for a new trial. *Dwyer v. Brannon*, 6 Mass. 330. A new trial will be granted where the plaintiff's declaration was not proved by legal evidence, although the objection was not made at the time by the defendant. *Bridge v. Austin*, 4 *Ib.* 115. But not where the evidence at the trial differs from the declaration in a part not constituting the gist of the action. *Cunningham v. Kimball*, 7 *Ib.* 65. But objections to the evidence, as not comporting with the declaration, ought not generally to be admitted; unless the objections were made at the trial, and the point reserved. *Jones v. Falls*, 4 *Ib.* 245. If, however, the objection goes to arrest the judgment, it ought to be heard; because the defendant may move in arrest of judgment after he has failed in a motion for a new trial. *Ib.* 254. So too, if the declaration, as amended, has varied the defence, either as to the principles of it or as to the rule of damages. *Ib.* So too where judgment, according to the verdict, will not be a bar to another action on the same breach of the same contract. *Ib.*

[*B*] Where one of the jurors to whom a cause had been committed, had entertained personal hostility towards the party against whom the verdict was returned, and had previously on hearing but a part of the evidence on a former trial of the same action, expressed an opinion in favour of the other party, and on being interrogated at the commencement of the present trial, had declared himself to be impartial, and had during the trial been drinking with the party in whose favour the verdict was returned, on his invitation and at his expense, the verdict was set aside and a new trial granted. *Studley v. Hall*, 9 Shep. 198. In Vermont and in some other States, a want of a freehold qualification in one of the jurors is a ground for a new trial, if the fact was not known to the party making the motion at the time of the trial. *Briggs v. Georgia*, 15 Verm. 61. But any incompetency of a juror, if known to the defendant before trial, and no objection made, is not ground for a new trial. *Tule v. The State*, 6 Mis. 426. *Booby v. The State*, 4 Yerg. 111. Alienage, though cause of challenge, is not a ground for a new trial, though it was unknown to the party moving for it and his counsel, till after the verdict was rendered. *Presbury v. The Commonwealth*, 9 Dana, 203. Insanity in a juror is a sufficient reason for a new trial, but it must be fully proved. *State v. Scott*, 1 Hawks, 24.

we have seen, (l) is not a ground for a new trial, but for a *venire de novo*. Fourthly, the misbehaviour of the prevailing party, towards the jury or witnesses, (m) is a good ground for a new trial. [A] And where it was sworn, that hand bills, reflecting on the plaintiff's character, had been distributed in court, and shown to the jury on the day of trial, the court granted a new trial; and would not receive from the jury affidavits in contradiction, though the defendant denied all knowledge of the hand bills. (n) But merely desiring a juror to appear, is no cause for setting aside the verdict. (o) Fifthly, the courts will sometimes, though rarely, grant a new trial, on account

(l) *Ante*, 854.

(n) 3 Brod. & Bing. 272. 7 Moore, 87, S. C.

(m) 7 Mod. 156.

(o) 1 Str. 643.

[A] If there appears the least attempt on the part of a prevailing party to seek to influence a juror who tries the cause, the verdict will be set aside. *Hilton v. Southwick*, 5 Shep. 303. During the trial of a cause, a jurymen said to a witness for the plaintiff, that "they would throw the costs of the action upon the defendant, of course," to which the witness replied, that "they could, of course." The jury found for the plaintiff, and upon a motion for a new trial, for the above reason, it was held, that although such conduct on the part of a juror was a violation of his public duty, yet, as it did not show any bias, or prejudice, for or against either of the parties, it was not a sufficient cause for granting a new trial; but if the plaintiff had been privy to such conversation, the verdict should be set aside. *M'Leaine v. Wilkins*, 12 N. Hamp. 474. A new trial will be granted where the jury, after the charge, converses with a witness who has testified before them. *The State v. Brazil*, Geo. Decis. Part II. 107. Or where a jury, after having retired from their box to consider their verdict, had privately examined a witness. *Smith v. Graves*, 1 Brevard, 16. Or if a juror, not being sworn as a witness, after the jury has retired, state facts of his own knowledge, which his fellow jurors regard as evidence. *Booby v. The State*, 4 Yerg. 111. But a new trial will not be granted on account of idle words spoken to a juror by a by-stander, it not appearing that there was any fault on the part of the juror, or that of the party in whose favour the verdict was given. *Stuart v. Small*, 5 Mis. 525. Nor will a verdict be set aside because a jurymen drinks spirituous liquors during the trial at his own expense, and in moderate quantity. *Wilson v. Abrahams*, 1 Hill, 207. Nor because the jury drank ardent spirits at their meals, during the progress of the trial, without proof that they were thereby disqualified from duly considering the case. *Stone v. The State*, 4 Humph. 27. But, where one of the jurors separated from his fellows, without permission of the court, under the charge of a constable, after they had retired to consider their verdict, and received a paper or document from the opposite party, which the jury wanted and which went into their possession, it was held ground for a new trial. *Offitt v. Viet*, Walker, 99. Or if it appear that the jury separated before verdict rendered and had free intercourse with other people, a new trial will be granted. *The State v. Sherbourne*, Dudley, (Geo.) 28. Or if the jury by evident mistake take out a deposition not read at the trial. *Taylor v. Sorensby*, Walker, 97.

Whatever would be a good cause of challenge to a juror, if discovered in time, will be cause for granting a new trial, if not discovered until the jury have retired to consider their verdict. *M'Kinley v. Smith*, Hardin, 167. If a juror who was on the first trial is put on the second trial, and the fact is not known to the party until the second verdict is rendered, it is sufficient cause for a new trial. *Herndon v. Bradshaw*, 4 Bibb, 45. *Craig v. Elliott*, *Ib.* 272. Where a juror previously to the trial declared that if he was of the jury he would give \$1000 damages, and the defendant did not know the fact until after the verdict, it is sufficient ground for a new trial. *Vance v. Haslett*, *Ib.* 191. Where a party after a verdict proves that one of the jurors had said before the trial, that his mind was made up against him, and the party also makes affidavit that he knew nothing of the fact before the trial, this is cause for a new trial. *Peirce v. Busch*, 3 Bibb, 347. Where after a cause had been opened to a jury one of the parties made to a juror out of court statements favourable to his own side of the cause, and the jury afterwards returned a verdict in his favour, a new trial was granted. *Perkins v. Knight*, 2 N. Hamp. 474. But where a party objecting had made the requisite inquiry of the juror upon the verdict, and failed of discovering the fact which would have disqualified him, a new trial might be granted, if it should afterwards be discovered that he did not stand indifferent in the cause. *Jefferies v. Randall*, 14 *Ib.* 205. But a new trial will not be granted on the ground that a juror after he was sworn, expressed a wish to withdraw because he had a similar suit pending in the same court, and such application was not granted to him. *Shobe v. Bell*, 1 Rand. 39.

of the unavoidable absence of the *attorneys*; (p)[A] or *witnesses*; (q)[B] or upon the discovery of new and material evidence since the trial; (r) or where upon the facts proved, an inference of law arises on a statute, of which *the parties were not then aware. (a) But a [*907] new trial is very rarely granted for the default or omission of the parties, their counsel or attorneys, in not coming prepared with, or going into evidence which they were apprised of, and might have produced at the former trial; (b)[C] or upon a suggestion that the party was not apprised of particular evidence, and therefore not prepared to answer it; (c) or because a witness refused from misapprehension, to execute a release which rendered him incompetent; (d) or has either from inattention, or the want of being prepared, made a mistake in giving his evidence; (ee)[D] or on

(p) 3 Taunt. 484. 1 Price, 201. 2 Chit. Rep. 269. 1 Car. & P. 46.

(q) 2 Salk. 645. 6 Mod. 22. 1 Price, 1. 2 Chit. Rep. 195.

(r) 2 Blac. Rep. 955.

(a) 7 Taunt. 309.

(b) 2 Salk. 647, 653. 6 Mod. 22. 1 Str. 691. 1 Wils. 98. 1 Blac. Rep. 298. 2 Blac. Rep. 802, 3. 1 Durnf. & East, 84. 2 Durnf. & East, 113. 1 Price, 143. 11 Price, 383; but see 8 Taunt. 730; 3 Moore, 58, S. C.

(c) 2 Atk. 319. 2 Chit. Rep. 194. 2 Moore, 179. 8 Taunt. 236. S. C. 8 Moore, 32. 2 Chit. Rep. 194, 267. 1 Bing. 339. 8 Moore, 612, S. C.; but see 2 Chit. Rep. 269, 271.

(d) 4 Bing. 171.

(ee) Say. Rep. 27. M'Clel. 179; but see 5 Taunt. 277; 7 Moore, 546; 1 Bing. 145, S. C.

[A] A new trial will not be granted because the defendant's attorney was absent when the case was called, and it went to the jury without him, though the plaintiff may agree, before the verdict is recorded, to open the case. *Allen v. Donnelly*, 1 M'Cord, 113. *Siergis v. Darby*, 8 Mis. 679. *Field v. Watson*, *Id.* 686; or because he has mistaken the law. *Edwards v. Lambert*, 2 Root, 430. *Gongerat v. M'Carthy*, 1 Yeates, 253. S. C. 2 Dall. 144; or because he pleads a wrong plea. *M'Neish v. Stewart*, 7 Cow. 474; or mistake in not summoning a witness. *Pleasants v. Clements*, 2 Leigh, 474. But a new trial ought not to be granted on account of the neglect of the agent or attorney of the party applying for it. *Patterson v. Mathews*, 3 Bibb, 80. *Barry v. Wilbourne*, 2 Bailey, 91. *Leedom v. Pancake*, 4 Yeates, 183. *Hawley v. Blanton*, 1 Mis. 49. *M'Lane v. Harris*, *Id.* 700. *Delto v. Commonwealth*, 2 Bibb, 17. *Smith v. Morrison*, 3 A. K. Marsh. 81. Where, however, on the trial of an action, the defendant was out of the commonwealth, his witnesses were absent, and his attorney was prevented by sudden indisposition from being present, and although he had a substantial defence, judgment was given against him, a new trial should have been granted, and it was error in the circuit court to refuse it. *Honore v. Murray*, 3 Dana, 31. A new trial may also be granted to a party, who, although he failed to use due diligence himself, employed a competent agent, who was prevented by unavoidable accident from attending. *Turner v. Brooker*, 2 *Id.* 334.

[B] See note [D] to this page.

[C] Where a defendant from the beginning, neglects his case on very insufficient grounds, whereby a default is rendered against him, and afterwards employs counsel to attend to the business, who does not practise in the court, he is not entitled to any indulgence of the court, and cannot claim any because of the absence of his counsel. *Cogdell v. Barfield*, 2 Hawks, 332. Illness of the defendant, which prevented his procuring the attendance of material witnesses, or his being present himself to move for a continuance, is ground for a new trial. *Stewart v. Durret*, 3 Monr. 113. But ignorance of a party or of his attorney, of the state of the case, is no ground for a new trial. *Legrand v. Baker*, 6 Monr. 235. A new trial was allowed a party, in Kentucky, where on account of an irregular calling of the docket, he was forced by the court unreasonably to trial, in the absence of his client; and it was held, that he need not show that he had made any preparation, or that a different result would probably occur on another trial. *Donnallen v. Leno*, 6 Dana, 89. But where a witness was in attendance a part of the term, and then absented himself before trial, without leave, a new trial was held to have been properly refused on that account. The party should have demanded a *capias* to bring in the witness. *Stewart v. Small*, 5 Mis. 525.

[D] A verdict will not be set aside on the ground that improper or irrelevant evidence was admitted and commented on by the judge, if no objection to its admission was made at the trial. *Wait v. Maxwell*, 5 Pick. 217. *Den v. Geiger*, 4 Halst. 225. *Worford v. Isbell*, 1 Bibb. 247. *Cannon v. Alabury*, 1 A. K. Marsh. 76. Or where a party omits, at the trial, to disclose to the court the object for which certain evidence is offered, and it is rejected for irrelevancy, he cannot afterwards obtain a new trial by showing that it could have been

account of the manner in which he was sworn; (ff) or of an objection to his competency, discovered after the trial. (gg) Sixthly, if the witnesses on whose testimony the verdict was obtained, have been since convicted of perjury [A] in giving their evidence, the courts will grant a new trial: (h) or, if a probable ground be laid, to induce the court to believe that the witnesses are perjured, they will stay the proceedings, on the finding of a bill of indictment against them for perjury, till the indictment is tried. (h) The court of Common Pleas, in one case, granted a new trial, where the testimony of witnesses, on which a verdict had proceeded, was founded on and derived its credit from particular circumstances, and those circumstances were afterwards clearly falsified by affidavit: (i) But in general, the finding of a bill of indictment for perjury, (k) or conspiracy, (l) is no ground for

(ff) 7 Moore, 36. 3 Brod. & Bing. 232, S. C.

(gg) 1 Durnf. & East, 717. 1 Bos. & Pul. 429. (a).

(h) *Benfield v. Petrie*, and *Petrie v. Milles*, M. 22 Geo. III. K. B. Adm. *Ford v. Yates*, R. 22 Geo. III. K. B.; but see 1 Bing. 339; 8 Moore, 612, S. C.

(i) 1 Bos. & Pul. 427; and see 3 Bur. 1771.

(k) *Benfield v. Petrie*, and *Petrie v. Milles*, M. 22 Geo. III. K. B.; and see *Aysheford v. Charlotte*, H. 25 Geo. III. K. B. 4 Maule & Sel. 140. 2 Price, 3. 2 Moore, 80. 8 Taunt. 182. S. C. 1 Bing. 339. 8 Moore, 612, S. C.

(l) 1 Bing. 339. 8 Moore, 612, S. C.

used for a purpose material to the issue. *Barksdale v. Toomer*, 2 Bailey, 180. Or where the witnesses on account of whose absence the defendant moved for a continuance were his own daughters, and the plaintiff agreed to admit what the defendant would state they would prove, the court refused to allow a new trial, because this motion was refused. *Farland v. Bouchell*, Harper, 83. Neither will a new trial be granted because a witness for the plaintiff who was then in court was examined after the plaintiff had rested his case, if his evidence was offered then to supply a mere omission in the plaintiff's attorney. *Campbell v. Ingraham*, 1 Rep. Con. Ct. 293. On a motion for a new trial because of a witness's intoxication, and consequent absence at the time of the trial, the witness's affidavit of what he will swear to must be produced or its absence accounted for. *Mann v. Clifton*, 3 Blackf. 304. Where a verdict in an action on a contract is in accordance with justice and the law of the state, a new trial will not be granted to give the party the benefit of the law of another state, not particularly insisted on at the trial, though the contract was made, and the parties resided in that state. *Burch v. Scribner*, 11 Conn. 388. Where a question of adverse possession was not submitted to a jury, on the trial of an action of ejectment, it was held that it was to be presumed that the question was abandoned and that a new trial would not be granted on that account. *Jackson v. Stevens*, 13 Johns. 495. A new trial will not be granted, on an objection to the form of action, where no such objection was made at the trial in the court below. *Russell v. Stocking*, 8 Conn. 238. *Smith v. Elder*, 3 Johns. 105. Or, if a party have good cause for continuing a case, but fail to make the motion and go into trial, this will not furnish a legal claim to a new trial. *Hatcher v. Reed*, Hardin, 515. Where a party was prevented from being present at the trial of his case, by the sickness of a daughter, and in consequence lost a continuance which he showed he might have obtained, if present, a new trial should have been granted. *Peebles v. Ralls*, 1 Litt. 24. So the fact that the defendant was detained as a juror in another county, is a sufficient apology for not being prepared for his defence, to sustain a motion for a new trial. *Grimes v. Commonwealth*, 4 Litt. 1. On a motion for a new trial, it is not enough that the applicant account for his absence at the trial; he should also show due diligence in preparing, and because of his absence his preparation was unavailing. *Mussin v. Collins*, 1 A. K. Marsh. 350. Where every reasonable diligence had been employed by a defendant, to prepare for trial, but he was unable to attend himself on account of sickness, and an important witness for him had left the county before the trial, and other circumstances appeared exonerating the party from laches, and showing a real and equitable defence, and the merits of the case had not been investigated, the court granted a new trial. *Leverad v. Olden*, 1 Halst. 344. But if a party, knowing a witness to be absent, hazards a trial, no new trial can be granted on account of alleged surprise arising from the absence of such witness. *Gill v. Warren*, 1 J. J. Marsh. 590.

[A] It is good cause for granting a new trial that one of the witnesses of a party, in whose favour the verdict was, has been convicted of perjury in the cause, upon his own confession. *G. F. M. Company v. Mathes*, 5 N. H. 574. *Allen v. Young*, 6 Monr. 136. But it is not ground for a new trial, that a witness, having testified that the character for truth of another witness was not good, admitted on cross examination that, at a former period, he had declared that his character was good. *Treat v. Browning*, 4 Conn. 408.

staying the proceedings, before conviction; it being found on *ex parte* evidence: And the court will not grant a new trial, on the mere affidavit of one party, contradicting the witnesses on the other side.(m)

A seventh ground of moving for a new trial is the misdirection of the judge;(n)[A] or his admitting or refusing evidence contrary to

(m) 4 Taunt. 640. 9 Moore, 581; and see 9 Price, 89; but see *id.* 76.

(n) 2 Salk. 649. 2 Wils. 273. 8 Moore, 443. 10 Moore, 407. 3 Bing. 88, S. C.

[A] A verdict in accordance with the weight of evidence and with justice, ought not to be set aside on account of an erroneous instruction given by the court to the jury. *Harris v. Doe*, 4 Blackf. 364. *Morton v. Lawson*, 1 B. Munroe, 45. *Bolan v. Peoples*, 1 Brevard, 109. *Ingraham v. South Carolina Ins. Co.*, 3 Brevard, 522. *Graham v. Bradley*, 5 Humph. 476. *Wyllie v. King*, Geo. Decis. Part II. 7. *Princeton and Kingston Turnpike Co. v. Gullick*, 1 Harr. 161. *Emanuel v. Cocks*, 6 Dana, 212. *Thomas v. Tanner*, 6 Monr. 52. *Howard v. Miner*, 7 Shep. 325. *French v. Stanley*, 8 Shep. 512. *Freeman v. Rankin*, 8 Shep. 446. *Reynolds v. Magness*, 2 Iredell, 26. *Jewett v. Lincoln*, 2 Shep. 116. But a new trial will be granted for misdirection of the judge in matter of law material to the issue. *Baker v. Ezard*, Geo. Decis. Part II. 112. A verdict will not be disturbed on account of an instruction which could not prejudice the party complaining. *Price v. Evans*, 4 B. Monroe, 386. *Batchiff v. Huntley*, 5 Iredell, 545. *Mansfield v. Wheeler*, 23 Wend. 79. *Freeman v. Rankin*, 8 Shep. 446. *Potter v. Hopkins*, 25 Wend. 417. *Sellick v. Turnpike Co.*, 13 Conn. 453. *Camden Transportation Co. v. Belknap*, 21 Wend. 854. If there is an error in some particulars in the direction of the court to the jury, but the result of the charge is correct, such error furnishes no ground for a new trial. *Gibson v. Stevens*, 7 N. H., 352. If an instruction is given to the jury that it might convey to the mind of any man of ordinary capacity, an incorrect view of the law applicable to the cause. *Sumner v. The State*, 5 Blackf. 579. A new trial will not be granted because the judge charged the jury that in his opinion there is not sufficient evidence to establish a certain fact, when at the same time, he instructs the jury to consider the evidence and to decide as they shall find the truth to be. *Gardner v. Pickett*, 19 Wend. 186. A new trial will not be granted for matters suggested in a charge not pertinent to the case, unless the attention of the judge is called to them and he refuses to explain. *Id.* Where a judge declared the evidence sufficient to entitle the plaintiff to recover, and so left the cause to the jury, it will be deemed a positive direction to find for the plaintiff, and where there are circumstances that ought to have been submitted to the jury, a new trial will be awarded. *Fitzgerald v. Alexander*, 19 Wend. 402. A mere theoretical error of the court, which could not have affected the verdict of the jury, is not good ground of reversal. *Mitchell v. Churchman*, 4 Humph. 218.

The admission of improper testimony in relation to a particular fact, but which fact is immaterial to the issue, furnishes no cause for a new trial. *Polleys v. Ocean Ins. Co.*, 2 Shep. 141. *Watson v. Lisbon Bridge*, 2 Shep. 201. *Merriam v. Mitchell*, 1 Shep. 439. *Barry v. Bennett*, 7 Met. 354. *Kimberlin v. Farris*, 5 Dana, 533. But if the evidence had a tendency to prejudice their minds, the court may, in their discretion, grant a new trial. *Ellis v. Short*, 21 Pick. 142. *Buddington v. Sheerer*, 22 Pick. 427. *The Commonwealth v. Bosworth*, 22 Pick. 397. *Clark v. Voice*, 19 Wend. 232. A new trial will not be granted in consequence of the admission of illegal testimony, where such testimony was suffered to go to the jury without objection either on its introduction or in the argument of the case. *Stone v. The State*, 4 Humph. 27. *Jacobs v. Bangor*, 4 Shep. 187. *Goldsbey v. Gentile*, 5 Blackf. 436. A verdict will not be set aside merely because evidence was admitted to prove a fact which the law would presume. *Hutchinson v. Moody*, 6 Shep. 393. So, where a point in the cause is clearly proved by competent evidence, and found by the jury, a new trial will not be granted because of the incidental admission of improper and not very important evidence, tending to prove the same point. *Prince v. Shepperd*, 9 Pick. 176. *Thompson v. Lothrop*, 21 Pick. 336. But it must appear very satisfactorily that the verdict must and ought to have been the same whether the questionable evidence was admitted or not. *Id.* If the chances are equal that irrelevant testimony may have had an injurious tendency on the jury, a new trial will be granted, of course, on a bill of exceptions; but in such a case the court exer-

law.(o)[A] But it is not a misdirection, if the judge refer the jury to their own

(o) 6 Mod. 242.

cises its discretion when no injury can have resulted to the party. *Farmers Bank v. Winfield*, 24 Wend. 419. Where improper testimony has been admitted, if there be also sufficient legal testimony to justify the verdict without regard to that which is exceptionable, and it is clear that justice has been done, and there is little reason to believe a different result would ensue upon a second trial, a new trial will not be granted. *Aliter*, in a doubtful case. *Bar-ringer v. Nesbit*, 1 Smedes & Marsh. 22. But see *The State v. Allen*, 1 Hawks Ch. 6. Where the verdict is manifestly against law, a new trial will be granted. *Hull v. Downs*, Brat. 168. *Ross v. Eason*, 1 Yeates, 14. *Moore v. Cherry*, 1 Bay, 269. *Dillingham v. Snow*, 5 Mass. 547. *Cunningham v. M'Gowen*, 18 Pick. 13. *Bank v. Marchand*, Charlt. 247. *Thomas v. Brown*, 1 M'Ord, 557. *Means v. Moore*, 3 Ib. 282. *Trumbull v. Rivers*, Ib. 131. *Cres-man v. Caster*, 2 Browne, 123. *Monroe v. Gardner*, 1 Rep. Con. Ct. 328. *Markley v. Amos*, 2 Bailey, 603. *United States v. Deval*, Gilpin, 356. It is not for every mistake of law that the court will grant a new trial; but they will unless they can see that no injustice has been done thereby. *Barney v. Goff*, 1 Chip. 314. *Hinton v. M'Neal*, 5 Ham. 509.

[A] A judge has a right to express to the jury his opinion as to the weight of evidence. *Commonwealth v. Child*, 10 Pick. 252. *Swift v. Stevens*, 8 Conn. 431. It is not improper for a judge to comment on the evidence so far as he may deem it necessary fairly to present the cause to the minds of the jurors. *Ware v. Ware*, 8 Greenl. 42. A judge may state and give his opinion to the jury on facts, and if the jury give a verdict in conformity with his conclusions, a new trial will not be granted even if he misstated some of the facts in a long and intricate case. The jury are the final judges of the facts. *Kinloch v. Palmer*, 1 Rep. Con. Ct. 216. If a question of law has been erroneously submitted to the decision of the jury, it seems that the court will not, for this cause alone, disturb the verdict if it appears that they have decided it correctly. *Springer v. Bowdoinham*, 7 Greenl. 442. *Copeland v. Wadley*, Ib. 141. *Shaw v. Wallace*, 2 Stew. & Port. 193. But where it is involved with a question of fact, both may be properly left to a jury. *Shaw v. Wallace*, 2 Stew. & Port. 193. Instructions should not assume or presuppose a fact proper for the consideration of the jury. *Lightburn v. Cooper*, 1 Dana, 273. Where, in a matter within the discretion of the judge, a motion is refused, such refusal is not a ground for setting aside the verdict. *Pierce v. Thompson*, 6 Pick. 193. *Sawyer v. Merrill*, Ib. 478. *Commonwealth v. Child*, 10 Ib. 252. *Alderman v. French*, 1 Pick. 1. *Mercer v. Sayre*, 7 Johns. 306. *Scott v. Hull*, 8 Conn. 296. *Alexander v. Byron*, 2 Johns. Cas. 318. *Pries v. Jenkins*, 1 N. & M. 153. It is a matter in the discretion of the court whether a witness shall be re-examined after both parties have summed up to the jury, but if the court below err, in the exercise of this discretion, the Supreme Court will grant a new trial. *Merrills v. Law*, 9 Cow. 65. Misapprehension of the judge as to material facts, and a direction to the jury accordingly, are irresistible reasons for a new trial. *Cannon v. Alsburgh*, 1 A. K. Marsh. 76. Where the verdict clearly appears to have been equitable, a new trial will not be granted, although the correctness of the ruling of the law be doubtful. *Rogers v. Page*, Brat. 169. *Breckenridge v. Anderson*, 3 J. J. Marsh. 710. *Ingraham v. S. C. Ins. Co.*, Const. Rep. 707. Although the omission of the court to charge the jury on im-portant questions of law involved in the case is not in itself a reason for granting a new trial, yet the court will exercise a discretion; and if they think the justice of the case will be pro-moted, they will grant it. *Calbreath v. Bracy*, 1 Wash. C. O. 198. A new trial will be granted if the judge should erroneously instruct the jury in a matter of law which might have influenced them in their verdict. *Baylies v. Davis*, 1 Pick. 206. *Lane v. Crombie*, 12 Ib. 177. *Boyden v. Moore*, 5 Mass. 365. *Dudley v. Sumner*, Ib. 438. *Hoyt v. Demon*, 5 Day, 479. *West v. Anderson*, 9 Conn. 107. *Doe v. Payne*, 4 Hawks, 64. If the court refuse in-structions which are material to the question to be tried, it is error. *Coleman v. Roberts*, 1 Mis. 97. *Aliter*, of the refusal to give instructions which would not benefit the party asking. *Fitzgerald v. Barker*, 4 J. J. Marsh. 398. The court are not bound to instruct a jury upon abstract propositions; but they are bound to meet and decide every legal proposition that arises in a cause. *Lewis v. State*, 4 N. Hamp. 389. *Van Hosen v. Van Alstyne*, 3 Wend. 75. *Coleman v. Roberts*, 1 Mis. 97. *Clarke v. Baker*, 7 J. J. Marsh. 194. Instructions entirely abstract are erroneous. *Ross v. Garrison*, 1 Dana, 35. An erroneous opinion upon an ab-stract question of law expressed by the judge in charging the jury, which is not involved in the decision of the case, is not a ground for reversing the judgment or for granting a new trial. *Reed v. M'Grew*, 5 Ham. 375. *Jordan v. James*, Ib. 18.

A judge cannot be required to declare the law on hypothetical questions not arising from the case; but if he does declare it, and erroneously, and it can have had any influence on the jury, their verdict ought to be set aside. *Etting v. U. S. Bank*, 11 Wheat. 59. Where the charge of the judge has a tendency to make an erroneous impression upon a jury, and to mislead them in their views of the case, a new trial will be granted. *Benham v. Carey*, 11 Wend. 83. Where a judge, in his instructions, tells the jury that it is the plainest

knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence: (p) And a judge's direction is not to be objected to, on account of particular expressions, if it be such as on the whole, and in substance, would lead to a just conclusion. (q) So, the courts will *not set aside a verdict, on account [*908] of the admission of evidence which ought not to have been received, provided there be sufficient without it, to authorize the finding of the jury: (a) [A] nor is it any ground for granting a new trial, that a witness called to prove a certain fact was rejected, on a supposed ground of incompetency, when another witness who was called, established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point, on which the verdict turned. (b) So, the courts will not set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff, at the trial of the cause: (c) And if, upon the judge's directing the jury to give nominal damages, the plaintiff elect to be nonsuited, the court of Common Pleas will not set aside the nonsuit, and grant a new trial, on the ground of the misdirection of the judge. (d) It also seems, that if a *junior* counsel at *nisi prius* take a well founded objection, which his leader gives up, that court will not entertain it, in discussing a rule for a new trial or nonsuit on another ground. (e)

Eighthly, a new trial may be moved for on account of the error or mistake

(p) 4 Maule & Sel. 532; and see *id.* 192. 1 Man. & Ryl. 198.

(q) 1 M'Clel. & Y. 338.

(a) 1 Taunt. 12.

(c) 1 Taunt. 10; and see 6 Taunt. 336. *Ante*, 860.

(d) 3 Taunt. 229; and see 9 Price, 291.

(e) 3 Taunt. 351; and see 4 Taunt. 779. *Ante*, 860.

(b) 3 East, 451.

case he ever saw in court, and that a fact was proved; the jury being the triers of the facts, it is ground for a new trial. *Allen v. Kopman*, 2 Dana, 221. Where the court instructed the jury as to the strength of certain evidence, which it is strictly the right of the jury to pass upon, a new trial will not be granted if substantial justice has been done by the verdict given. *Coit v. Tracy*, 9 Conn. 1. Where legal and equitable justice appears to be done by the verdict, a new trial will not be granted on account of a mistake of the judge in answering a sudden question put by a juror after a regular charge given to the jury, which answer was not complained of by counsel, and which did not probably, although it might possibly have operated upon the minds of some of the jury. *Train v. Collins*, 2 Pick. 145. *Brazier v. Clap*, 5 Mass. R. *Jones v. Fales*, 5 *Ib.* 101. *Muchall v. Hopkins*, 6 *Ib.* 350. But if he should erroneously instruct the jury in a matter of law which might have influenced them in their verdict, a new trial will be granted. *Baylies v. Davis*, 1 Pick. 206. *Lane v. Crombie*, 12 *Ib.* 177. *Boyd v. Moore*, 5 Mass. 365. *Dudley v. Sumner*, *Ib.* 438. Where evidence has been improperly rejected, a new trial will be granted. *Young v. Buckingham*, 5 Ham. 485. *M'Elves v. Sutton*, 2 Bailey, 128. *Heath v. Shelby*, 1 Blackf. 228. *Coleman v. Allen*, 3 J. J. Marsh. 229. *Hunt v. Adams*, 7 Mass. 518. A new trial will not be granted for the rejection of evidence which was unnecessary for the party demanding the new trial. *Fitch v. Chapman*, 10 Conn. 8. Where evidence is objected to and improperly admitted, it is ground for a new trial, although other evidence of the probable kind may have been given sufficient to justify the verdict. *Craddock v. Craddock*, 3 Litt. 77. *Glasscock v. Wells*, Cooke, 262.

[A] It is no cause for granting a new trial that a deposition was improperly rejected, if the party offering it is not injured by the rejection. *Comstock v. Smyth*, 10 Shep. 202. *Lively v. Ball*, 2 B. Monroe, 53. *Lett v. Holmer*, 5 Blackf. 296. Nor will a new trial be granted for the refusal of the judge to admit a question which was not shown to be relevant. *Fairchild v. Case*, 24 Wend. 381. But a new trial may be granted for the rejection of evidence on affidavit, that it was offered *bonâ fide*, and that its place can be supplied on a new trial. *Holmes v. M'Kiney*, 4 Monr. 4. *Hunt v. Owings*, 4 Monr. 20.

of the jury, in finding a verdict without, or contrary to evidence.(f)[A]

(f) 1 Bur. 12, 54. 2 Bur. 665. 2 Ken. 375. S. C. 2 Bur. 936. 3 Barn. & Ald. 692. 10 Moore, 337. 3 Bing. 610. 4 Bing. 195.

[A] A verdict which is clearly against evidence will be set aside, and a new trial granted. *Wells v. Waterhouse*, 9 Shep. 131. *Corlies v. Little*, 2 Green, 373. *Munn v. Gardiner*, 3 Brevard, 31. *Hudson v. Williamson*, 3 Brevard, 342. *Byrnes v. Alexander*, 1 Brevard, 213. *M'Bride v. Whitehead*, Geo. Decis. Part I. 165. *Childress v. Stone*, Geo. Decis. Part II. 157. *Jenkins v. Whitehead*, 1 Smedes & Marsh. 157. *Scott v. Brookway*, 7 Mis. 61. *Wait v. White*, 5 Pike, 640. *Gibson v. Gibson*, 9 Yerg. 329. *Cassels v. The State*, 4 Yerg. 149. *M'Coy v. Martin*, 4 Dana, 580. *Tiffen v. Forester*, 8 Mis. 642. *Shove v. Morris*, 6 Mis. 489. *Yale v. Yale*, 13 Conn. 185. *Brown v. Handley*, 7 Leigh, 119. *Mahon v. Johnston*, 7 Leigh, 317. *Brugh v. Shanks*, 5 Leigh, 598. *Myer v. Whillberger*, Geo. Decis. Part II. 20. But where a variety of testimony is fairly submitted to the jury, and no instruction asked of the court, or question of law raised, a new trial will not be granted unless the preponderance of evidence against the verdict is very great. *Kellogg v. Budlong*, 7 How. (Miss.) 340. *Elzey v. Stone*, 5 Smedes & Marsh. 21. *Yarborough v. Arbenathy*, 1 Meigs, 413. *Perry v. Smith*, 4 Yerg. 323. *Sellers v. Davis*, 4 Yerg. 503. *Pettitt v. Pettitt*, 4 Humph. 191. *Grubb v. M'Clatchy*, 3 Yerg. 442. *Harbour v. Rayburn*, 7 Yerg. 482. *Martin v. Withington*, 4 Mis. 518. *Wilson v. Burks*, 8 Mis. 446. *Kennick v. Walton*, 7 Mis. 292. *Lovry v. Orr*, 1 Gilman, 10. *Todd v. Boons County*, 8 Mis. 431. *Bagshaw v. Dorset*, Geo. Decis. Part II. 82. *Pendleton v. Mills*, Geo. Decis. Part II. 166. *Bonds v. Gray*, Geo. Decis. Part II. 136. *Walker v. Tatum*, Geo. Decis. Part II. 161. *Wilson v. Natoris*, 5 Yerg. 211. *Knight v. Mantz*, Geo. Decis. Part I. 22. *Irwin v. Morrell*, Dudley, (Geo.) 72. *Flourney v. Coze*, Dudley, (Geo.) 5. *Faber v. Baldrick*, 3 Brevard, 350. *Snipes v. Remourssin*, 2 Brevard, 33. *Lavall v. Cromwell*, 3 Brevard, 463. *Brugh v. Shanks*, 5 Leigh. 598. *Bank v. King*, 2 Green, 45. *Jackson v. Packer*, 13 Conn. 342. *Stanley v. Whipple*, 2 M'Lean, 35.

The court will not set aside a verdict as against the evidence in a cause, merely because they might upon examination of the evidence have arrived at a result different from that found by the jury. *Wendell v. Safford*, 12 N. Hamp. 171. *Ways v. Collision*, 6 Leigh. 230. *Brugh v. Shanks*, 5 Leigh. 598. Nor will they set it aside, upon this ground, where the credibility of witnesses is to be considered, presumptions are to be raised, and inferences to be made, and where the nature of the evidence is such that different persons might reasonably have different impressions concerning it. *Id.*

A verdict will not be set aside because founded on slight evidence. *Goodman v. Smith*, 4 Dev. 450. Nor merely on the ground of insufficiency of proof. *Angus v. Dickerson*, 1 Meigs, 459. That a verdict is against the mere preponderance of testimony, is not alone sufficient ground for granting a new trial. *Dickson v. Parker*, 3 How. (Miss.) 219. In cases of tort the court will not set aside a verdict because it is against the weight of evidence, unless it manifests partiality, prejudice, or intemperance in the minds of the jury. *Taylor v. Vanderveer*, 4 Harr. 22. A new trial will not, of course, be granted for a finding against the evidence or against the instructions of the court, or under misdirection of the court, if it appears that justice has been done. *Leigh v. Hodges*, 3 Scam. 15. *King v. Hill*, 2 Tayl. 211. *Gillett v. Sweet*, 1 Gilman, 475. Where the evidence was all on one side, and that against the verdict, the court granted a new trial. *Williams v. Bradfield*, 9 Yerg. 270. A verdict of an inferior court will not be reversed as being against evidence where there was any evidence in support of it. *Bagby v. Lewis*, 2 Mon. 76. *Roach v. Waid*, 2 Mon. 142. *Dodge v. Brittan*, 1 Meigs, 84. The Supreme Court will not set aside the verdict of a jury on matters of fact, unless there be a great preponderance of evidence against such verdict. This is a rule for the government of the Supreme Court, and not the Circuit Court. On the contrary this rule of the Supreme Court imposes on the Circuit Court a heavy obligation to observe the rules of the common law, applicable to the granting of new trials *in nisi prius*, lest injustice be done. *England v. Burt*, 4 Humph. 399. It must be a very flagrant case where the Supreme Court will grant a new trial, on the ground that the verdict is against evidence, where it has been refused in the court below. *Tackley v. Lane*, 7 Mis. 220.

If a verdict be clearly and manifestly against evidence and the weight of evidence, a new trial should be granted. *Wait v. M'Neil*, 7 Mass. 261. *Curtis v. Jackson*, 13 Ib. 507. *Bartholomew v. Clark*, 1 Conn. 472. *Cockfield v. Daniel*, 1 Rep. Con. Ct. 193. *Ring v. Huntington*, Ib. 162. *Stark v. Cocker*, 2 Ib. 337. *Zuber v. Geiger*, 2 Yeates, 522. *Emmet v. Robinson*, Ib. 514. *Kinnie v. Kinnie*, 4 Conn. 102. *Talcot v. Wilcox*, 9 Ib. 134. *Swearingen v. Birch*, 4 Yeates, 322. *State v. Lyon*, 12 Conn. 487. *Bacon v. Parker*, Ib. 212. *State v. Fisher*, 2 N. & M. 261. *Thomas v. Brown*, 1 M'Cord, 557. *State v. Bird*, 1 Mis. 585. *Nettson v. Lycan*, 3 J. J. Marsh. 440. *Kohne v. Ins. Co. of North America*, 1 Wash. C. C. 123. *Chur v. Keckley*, 1 Bailey, 479. *Lloyd v. Newell*, 3 Halst. 296. *Hutchinson v. Coleman*, 5 Ib. 74. *Steele v. Logan*, 3 A. K. Marsh. 394. *Mann v. Clifton*, 3 Blackf. 304. *Bacon v. Brown*, 1 Bibb, 432. *Price v. Cockram*, Ib. 570. *People v. Townsend*, Coleman, 68. *Gibbs v. Tucker*, 2 A. K. Marsh.

But where there is evidence on both sides, it is not usual to grant a new trial; (g) unless the evidence for the prevailing party be very slight, and the judge declare himself dissatisfied with the verdict. (h) The court of Common Pleas, in one instance, refused to grant a new trial in a writ of right, though the verdict was final and conclusive: (i) but in a late case, which was an issue under an inclosure act, they granted a new trial, on payment of costs, although there was evidence on both sides, and they did not think the verdict was wrong; it appearing that the question was involved in great doubt and obscurity, the property of considerable value, and that the right would have been bound for ever by the verdict: (k) In that case, however, the jury having again found a verdict the same way, the court refused to grant a second new trial, although there was conflicting evidence, and the judge who last tried the cause, thought the evidence

(g) 2 Str. 1106, 1142. 1 Wils. 22. 3 Wils. 37. 3 Taunt. 1. 2 Price, 282.

(h) Say. Rep. 264; and see 3 Wils. 38, 9. 6 Taunt. 336. 2 Chit. Rep. 271. 6 Price, 146. 11 Price, 736. 13 Price, 222. M'Clel. 69. S. C. *Ante*, 860.

(i) 2 Blac. Rep. 941.

(k) 3 Taunt. 91; and see 1 Price, 278.

219. *Rett v. Smith*, *Ib.* 194. *Hughes v. Howard*, 3 Har. & J. 9. *United States v. Duval*, Gilpin, 356. But unless it is so, and if there be conflicting testimony, on both sides, a new trial will not be granted. *Hammond v. Wadhams*, 5 Mass. 353. *Coffin v. Phoenix Ins. Co.*, 15 *Ib.* 291. *Oram v. Bishop*, 7 Halst. 153. *State Bank v. Holcomb*, *Ib.* 191. *Haines v. Wright*, 4 Hayw. 63. *Murray v. Rubble*, *Ib.* 203. *Lewis v. Payne*, 4 Wend. 423. *Smith v. Hicks*, 5 *Ib.* 48. *Douglas v. Tousey*, 2 *Ib.* 352. *State v. Sims*, 2 Bailey, 29. *State v. Hooper*, *Ib.* 37. *State v. Anderson*, *Ib.* 565. *Motley v. Montgomery*, *Ib.* 11. *Laval v. Cromwell*, Const. Rep. 593. *Darby v. Calhoun*, 1 Rep. Con. Ct. 398. *Miller v. M'Bernney*, *Ib.* 231. *Cohen v. Simmons*, *Ib.* 446. *Caldwell v. Barkley*, 2 *Ib.* 452. *Palmer v. Hyde*, 4 Conn. 426. *Laffin v. Pomroy*, 11 *Ib.* 440. *Troubridge v. Baker*, 1 Cow. 251. *Vinchell v. Latham*, 6 *Ib.* 682. *M'Knight v. Wells*, 1 Mis. 13. *Casey v. January*, Hardin, 539. *Republica v. Lacaze*, 2 Dall. 118. *Nelson v. Chelfant*, 3 Litt. 165. *Lee v. Banks*, 4 *Ib.* 11. *Johnson v. Davenport*, 3 J. J. Marsh. 390. *Reid v. Langford*, *Ib.* 420. *Creel v. Belle*, 2 *Ib.* 309. *Talbot v. Talbot*, *Ib.* 3. *Fitzgerald v. Barker*, 4 *Ib.* 398. *DeTouclear v. Shottenkirk*, 3 Johns. 170. *M'Kane v. Bowner*, 1 Bailey, 113. *Hughes v. M'Gee*, 1 A. K. Marsh. 28. *Murray v. Gardiner*, Const. Rep. 1. *Marvell v. M'Ilroy*, 2 Bibb, 211. *Houglan v. Moore*, 2 Blackf. 167. *Daniel v. Prather*, 1 Bibb, 484. *Brown v. Wilde*, 12 Johns. 454. *Higden v. Higden*, 2 A. K. Marsh. 42. *Reese v. Lawlers*, 1 *Ib.* 58. *Ellard v. Martin*, 1 Rep. Con. Ct. 365.

A new trial will not be granted where justice has been done by the verdict. *Howard v. Aiken*, 3 M'Cord, 467. *Welson v. Rhoades*, 4 Yeates, 38. *Murden v. Beath*, 1 Rep. Con. Ct. 244. *Blagg v. Phoenix Ins. Co.*, 3 Wash. C. C. 58. *Wilson v. Williams*, 14 Wend. 146. *Crary v. Sprague*, 12 *Ib.* 41. *Hart v. Johnson*, 6 Ham. 87. *Jordan v. James*, 5 *Ib.* 88. *Alsop v. Magill*, 4 Day, 42. *Dodge v. Kendall*, 4 Verm. 31. *Blythe v. Sutherland*, 3 M'Cord, 258. *Fitch v. Sergeant*, 1 Ham. 355. *Buck v. Waddle*, *Ib.* 363. *Lester v. State*, 11 Conn. 415. *Ralston v. Cummings*, 2 Yeates, 436. *High v. Watson*, 2 Johns. 46. *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 183. A new trial ought not to be granted on the ground that the verdict is contrary to the evidence, where the evidence on both sides was merely circumstantial. *Sharp v. Wickliffe*, 3 Litt. 10. *Blanchard v. Colburn*, 16 Mass. 345. The party complaining of a verdict, must prove its incorrectness; but where the most important proofs, that were given at the trial, were lost without fault of the party, and the verdict was against the opinion of the judge, a new trial was granted. *Doncavut v. Mothershed*, 2 Rep. Con. Ct. 169. Where the jury is not instructed by the court, on the ground that the case is too clear for one of the parties, to render such instruction useful, and the jury find for the other party, a new trial will be granted. *Page v. Pattee*, 6 Mass. 459. In a case of great intricacy or doubt, the court has a discretionary power to grant a new trial, without invading the province of the jury, or impeaching a verdict upon legal grounds. *Brown v. Frost*, 2 Bay, 126.

Where the jury, probably through inattention, did not allow certain interest to the plaintiff, by means of which he did not recover full costs, but the verdict was not against law or evidence, a new trial was refused. *Hagar v. Weston*, 7 Mass. 110. *Westbrook v. M'William*, 1 Hill, (S. C.) 317. But if it was legally proved that the jury had reduced the damages below \$20, contrary to evidence, to prevent the plaintiff from recovering full costs, the court will not sustain the verdict; but where other and legal reasons may be supposed to have influenced their decision, the court will not impute to them an improper motive. *Bracer v. Tyringham*, 12 Pick. 547.

against the verdict preponderated. (l) Ninthly, the misbehaviour of the jury in casting lots for their verdict, (m) [A] &c. is a good ground for a new

(l) 3 Taunt. 232.

(m) 2 Salk. 645. 1 Str. 642. Barnes, 438, 441. Bul. Ni. Pri. 326.

[A] A jury, for the purpose of ascertaining what amount of damages should be assessed, agreed among themselves that each member should set down a sum according to his own judgment, and that the aggregate amount should be divided by twelve, and the result returned as a verdict, which was accordingly done. Held, that the verdict should be set aside, and a new trial awarded. *Ellege v. Todd*, 1 Humph. 43. Held also, that the affidavit of one of the jurors was admissible evidence to establish the fact. *Ibid.* After the retirement of a jury, each of them wrote upon separate pieces of paper the amount of damages he was willing to allow, which were put together in a hat and drawn out, the aggregate of which they divided by twelve. This result not being satisfactory to them, upon further deliberation the damages were fixed at a higher amount. Held, that as there was no agreement to make the result their verdict, and such result was not in fact made, a new trial should not be granted for this reason. *Johnson v. Perry*, 2 Humph. 569. So, where each of the jurors set down a certain sum and then divide the aggregate of the sums by twelve, not under an agreement that the result shall be their verdict, but merely as an experiment to see whether the result would be satisfactory to them, a new trial will not be granted. *Harvey v. Jones*, 3 Humph. 157. The court refused to set aside a verdict with which they were satisfied in an action of slander on proof made by the defendant's attorney, that a juror had told him, after separating, that the amount of damages was agreed upon by each juror putting down the amount of his verdict, and dividing the aggregate by twelve. *Chandler v. Barker*, 2 Harring. 387. On a motion for a new trial, jurors are precluded from giving evidence of their own misconduct, of the reason and ground of their determination, and the motives which governed their conduct, in order to impeach their verdict. *Hannum v. Belchertown*, 19 Pick. 311. *The State v. Doon*, R. M. Charlt. 1. *Stone v. The State*, 4 Humph. 27. *Cain v. Cain*, 1 B. Monroe, 213. *Meade v. Smith*, 13 Conn. 346; but see *Booby v. The State*, 4 Yerg. 111. Affidavits charging the jury with irregularities and misconduct in the progress of a trial, founded on information and belief, are not sufficient to set aside a verdict. The irregularities and misconduct charged must be stated positively and specifically, and be sustained by oath. *Stone v. The State*, 4 Humph. 27.

Where any gross misbehaviour or legal impropriety of conduct in any of the jury, sufficient to destroy the credit of a verdict, shall be made to appear, the verdict will be set aside. *Grinnell v. Phillips*, 1 Mass. 530. *Jefferies v. Randall*, 14 Ib. 205. *Commonwealth v. Roby*, 12 Pick. 496. For any even the least, intermeddling with jurors, a verdict will always be set aside. *Knight v. Freeport*, 13 Mass. 218, 220. *Amherst v. Hadley*, 1 Pick. 38, 42. The court has the superintendence of juries in matters of fact, and will grant a new trial where it has strong reason to believe a jury has erred capriciously or ignorantly, as to the credibility of the testimony. *Burt v. Stackney*, 2 Rep. Con. Ct. 323. The affidavit of jurors ought not to be received to prove misbehaviour in themselves or their fellow jurors, as a ground for a new trial. *Taylor v. Giger*, Hardin, 586. *Steele v. Logan*, 3 A. K. Marsh. 394. *Altier, Smith v. Cheelman*, 3 Caines, 56. The affidavit of jurors, as to their intentions and impressions, ought not to be received to invalidate their verdict. *Heath v. Conway*, 1 Bibb, 398. With respect to the conduct of the jury among themselves previous to their verdict, the testimony of a juror may be admitted as to overt acts which may be the subject of a legal inquiry, and in that case each member of the jury may be a competent witness. *Grinnell v. Phillips*, 1 Mass. 530. On a motion to set aside a verdict, the testimony of one of the jurors that he had thought it his duty to coincide with the rest of the jury, but in his mind he had never approved of the verdict or consented to it, was held inadmissible. *Ib.* *Commonwealth v. Drew*, 4 Ib. 391. *Bridge v. Egglestone*, 14 Ib. 245. *Johnson v. Davenport*, 3 J. J. Marsh. 390. The affidavits of jurors stating that they were influenced, in making up their verdict, by facts related to them by some of their fellow jurors after they had retired from the bar, cannot be read on a motion for a new trial. *Den v. M^r Allister*, 2 Halst. 46. Where a jury, after agreeing upon a verdict, separate without leave, it is not a ground for new trial. *Wright v. Burchfield*, 3 Ham. 53. *Smith v. Harrow*, 3 Bibb, 446. But see *Houle v. Dunn*, 1 Leigh, 455. A separation of a jury after they have been impanelled and sworn, but before any evidence has been given, is no ground for a new trial, especially where the separation was so momentary that any tampering with the jurors was hardly possible. *Martin's Case*, 2 Leigh, 745. Where a jury separated after having agreed on a verdict in substance and were sent out again to put it in form, such separation and the return of a second verdict, were held insufficient grounds for a new trial. *Winslow v. Draper*, 8 Pick. 170. If the jury, in order to ascertain the damages, agree that each juror shall set down the sum which he thinks the plaintiff ought to recover, and dividing the aggregate by twelve, they return the quotient as their verdict, this is not a ground for impeaching their verdict, provided there was no pre-

trial. But the dispersion of the jury, with the permission of the judge, during the interval of an adjournment, in case of a misdemeanour, does not vitiate their verdict, when there is no suggestion of their having been improperly practised upon in the *interim*:(n) And the courts will not *receive an affidavit of partiality and prejudice in one of the [*909] jury-men, from the unsuccessful party,(a) or of their misbehaviour from any of the jury-men themselves, in all of whom such conduct is a very high misdemeanour;(b) nor will they suffer the jury to explain by affidavit the grounds of their verdict, or to show that they intended something different from what they found:(c) And an admission by jury-men, that the verdict was entered by mistake, made after they had separated, though on the day of trial, is not sufficient ground for a new trial.(d) In general, the assent of all the jury to the verdict pronounced by the foreman, in their presence and hearing, is to be conclusively inferred; and no affidavit can in any case be admitted to the contrary: But if all the jury were not present when a verdict of guilty was delivered, and it is therefore uncertain whether they all heard the verdict pronounced by the foreman, the court will, with the consent of the defendant, grant a new trial.(e) Tenthly, a new trial may be had for excessive damages;(f)[A] but in that case, the

(a) 2 Barn. & Ald. 462. 1 Chit. Rep. 401, S. C.

(a) 7 Price, 203; and see 11 Price, 383.

(b) Say. Rep. 100. 1 Durnf. & East, 11. 2 Blac. Rep. 1299. 1 New Rep. C. P. 326. 8 Taunt. 26. 1 Moore, 455. S. C. 7 Moore, 87. 3 Brod. & Bing. 272, S. C.

(c) 5 Bur. 2667. 2 Blac. Rep. 803. 2 Durnf. & East, 281; but see Cas. Pr. C. P. 66. 1 Bur. 383. 2 Ken. 24. S. C. 9 Price, 134, *semb. contra*.

(d) 2 Chit. Rep. 268.

(e) 2 Stark. Ni. Pri. 111.

(f) For the general power of the courts to grant a new trial for excessive damages, see Sty. Rep. 462, 466. 2 Mod. 150. Comb. 357. 2 Salk. 649. 2 Str. 692. 1 Bur. 609. 3 Bur. 1846. Cowp. 231. 2 Durnf. & East, 166. 4 Durnf. & East, 651, 657. 6 East, 244, 256, K. B. 2 Wils. 160, 244, 250. 2 Blac. Rep. 929, 1327. *Hurry v. Watson*, T. 27 Geo. III. 4 Durnf. & East, 659, (a.) 5 Taunt. 277, 281, C. P. 1 Younge & J. 478, 9, Excheq. And for cases in which a new trial has been granted for excessive damages, in an action for a malicious prosecution, see 2 Str. 692; for words, Sty. Rep. 462, 466. Say. Dam. 210, S. C.;

vious agreement to be bound by such result. *Dorr v. Lenno*, 12 Pick. 521. *Grinnell v. Phillips*, 1 Mass. 530. *Coperthwaite v. Jones*, 2 Dall. 55. *Heath v. Conway*, 1 Bibb, 398. Where there is evidence of improper conduct by the prosecutor, such as exhibiting papers at places where jurors boarded, the court may, in its discretion, set aside the verdict and order a new trial. *State v. Haskell*, 6 N. H. 352. If it appear that a party has had intercourse with one of the jury, after he was sworn, a new trial will be granted. *Ritchie v. Holbrook*, 7 S. & R. 458. If the jury take out with them a deposition, part of which was deemed inadmissible by the court, but that part totally inapplicable to the count on which judgment is given, this is no ground for a new trial. *Aliter*, if it was delivered to the jury by the counsel of the party in whose favour the verdict was given. *Lonsdale v. Brown*, 4 Wash. C. C. 148. Or a paper drawn up by the plaintiff, containing a statement of the items composing his claim for damages, having been accidentally passed to the jury with other papers in the cause, though not by them regarded as evidence regularly before them, the verdict which was for the plaintiff, was for this cause set aside. *Benson v. Fish*, 6 Greenl. 641. Or if the jury received new evidence after leaving the bar. *Brunson v. Graham*, 2 Yeates, 166. *Thompson v. Mallet*, 2 Bay, 94. *Rane v. Van Nole*, 1 South. 146. Or because the judge, after the court was adjourned, wrote a letter to the jury respecting the cause which had been committed to them. *Sergeant v. Roberts*, 1 Pick. 337; or for the purpose of correcting a mistake in a judgment caused by the miscalculation of the interest on a promissory note. *Whitwell v. Atkinson*, 6 Mass. 272. So, where the jury, probably through inattention, did not allow certain interest to the plaintiff, by means of which the plaintiff did not recover full costs, but the verdict was not against law or evidence, a new trial was refused. *Hagar v. Weston*, 7 Ib. 110. And a new trial will be granted as often as a jury disregards the laws of the land, and clear and indubitable testimony. *Payl v. Treswant*, 2 Bay, 23. But a new trial will not be granted on the ground of the jury's mistaking the law. *Scovel v. Tyler*, 2 Root, 144. *Tyler v. Stephens*, 4 N. H. 116. *Silliard v. M'Gee*, 3 J. J. Marsh. 549.

[A] Where the damages are excessive, a new trial may be granted, in order to determine

damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury: (f) And when a new trial is granted for excessive damages, [A]

for diverting a watercourse, 7 Durnf. & East, 529. 1 Chit. Rep. 729, (a.); for assault and battery, 5 Durnf. & East, 257. 1 Chit. Rep. 729; and for assault and false imprisonment, Comb. 357. Say. Dam. 217, S. C. And for cases in which a new trial has been refused, on the ground of excessive damages, in an action for breach of promise of marriage, see 1 Younge & J. 477; for malicious prosecution, Barnes, 436. Cowp. 230. 2 Blac. Rep. 1327. 5 Taunt. 277; for *scandalum magnatum*, 2 Mod. 150. Say. Dam. 211, S. C.; for words, T. Jon. 200. Say. Dam. 214. S. C. Cowp. 330; for criminal conversation, 1 Bur. 609. Say. Dam. 217. S. C. 4 Durnf. & East, 651. 6 East, 244; for debauching daughter, 3 Wils. 18. 2 Durnf. & East, 4, 166. 11 East, 23; for assault and battery, 3 Bur. 1845. 1 Durnf. & East, 277. 2 Bos. & Pul. 224; for assault and false imprisonment, 2 Wils. 160, 205, 244. Say. Dam. 217, 18; 222. S. C. 2 Blac. Rep. 929; for trespass to lands, 5 Taunt. 442. 1 Marsh. 139, S. C.; and for trespass to houses, 2 Wils. 382. Say. Dam. 230. S. C. 2 Wils. 405. 3 Wils. 61. 2 Blac. Rep. 942.

(f) See note (f) preceding page.

the amount of damages, without opening the whole case. *Boyd v. Brown*, 17 Pick. 453. *Robbins v. Townsend*, 20 Pick. 345. *Harrison v. Sale*, 6 Smedes & Marsh. 634. But a verdict will not be set aside in case of tort, for excessive damages, unless it clearly appear that the jury committed some gross and palpable error, or acted under some improper bias, inference or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. *Whipple v. Cumberland Man. Co.*, 2 Story, 661. *Dodd v. Hamilton*, 2 Tayl. 31. *Pomeroy v. Golly*, Geo. Decis. Part I. 26. *Longstreet v. Reeside*, Geo. Decis. Part I. 39. *Harris v. Halliday*, 4 How. (Mis.) 338. *Thompson v. French*, 10 Yerg. 452. *Boyers v. Pratt*, 1 Humph. 90. *Schlenker v. Risley*, 3 Scam. 483. *Simpson v. Pūman*, 13 Ohio, 365. *Fisher v. Patterson*, 14 Ohio, 418. *Allen v. Craig*, 1 Green, 294. *Fripp v. Martin*, 1 Spears, 236. *Davis v. Kuff*, Cheves, 17. *Stott v. Ryan*, 3 Brevard, 417. *Respass v. Palmer*, 2 A. K. Marsh. 365. *Webber v. Henry*, 1 Ib. 345. *Vanch v. Hall*, 2 Penn. 814. *Deacon v. Allen*, 1 South. 338. *Taylor v. Giger*, Hardin, 586. *Vanzant v. Jones*, 3 Dana, 464. In cases where there is no certain measure of damages, the court will not substitute its own sense of what would be the proper amount for the verdict, and will not set aside a verdict for excessive damages, unless there is reason to believe that the jury were actuated by passion, or by some undue influence perverting the judgment. *Jacobs v. Bangor*, 4 Shep. 187. A verdict will not be set aside on the ground of excessive damages where they appear to have been assessed neither at the highest nor lowest estimate of witnesses, and there is nothing indicating that the jury must have acted under the influence of passion or undue bias. *Gilbert v. Woodbury*, 9 Shep. 246, 323. Where the criterion of damages is fixed by law, if the jury, after judgment by default, assess too great an amount, the court should set aside the verdict. *White v. Green*, 3 Monr. 155.

[A] Where a verdict is given for too large a sum, the excess, if ascertained, may be remitted, and judgment be rendered for the balance; but where the excess is uncertain and considerable in amount, a new trial will be granted. *Lambert v. Craig*, 12 Pick. 199. *McConnell v. Hampton*, 12 Johns. 234. A new trial will be granted where the jury find more damages than those laid in the writ, unless the plaintiff will release the excess. *Hook v. Turnbull*, 6 Call, 85. Where a verdict is for a greater sum than is demanded in either count of a declaration, it will be set aside and a new trial ordered. *McIntire v. Clark*, 7 Wend. 330. *Dox v. Day*, 3 Ib. 356. An inconsiderable excess of damages is no ground for awarding a new trial in an action of *assumpsit*. *Luckett v. Clark*, Litt. Sel. Cas. 178. *Caldwell v. Roberts*, 1 Dana, 355. *Long v. Perry*, Hardin, 317. *Vanflyck v. Hodgeborn*, 6 Johns. 270. Where a jury gave a sum in damages too small to carry full costs, but expressed in their verdict that the plaintiff should have full costs, a new trial was refused for the smallness of the damages, in order that at a future trial sufficient damages might be obtained to carry full costs. *Lincoln v. Hapgood*, 11 Mass. 350. Where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict, as in actions on contracts, or for torts done to property, the value of which may be ascertained by evidence, the verdict may be set aside for excessive damages. *Coffin v. Coffin*, 4 Mass. 1, 41. *Commonwealth v. Norfolk*, 5 Ib. 435. A new trial will not be granted on the ground of excessive damages, unless they are outrageously excessive. *Worford v. Isabel*, 1 Bibb, 247. *Worth v. Cates*, 2 Ib. 591. *Roberts v. Swift*, 1 Yeates, 209. In an action for a libel or slander, a new trial will not be granted on the ground of excessive damages, unless they are so flagrant as manifestly to show the jury to have been actuated by passion, partiality, or prejudice. *Clark v. Binney*, 2 Pick. 113. *Shaw v. Barrett*, 7 Ib. 82. *Oaks v. Barrett*, 1 Ib. *Coffin v. Coffin*, 4 Mass. 1. *Coleman v. Southwick*, 9 Johns. 46. *Southwick v. Stephens*, 10

the former verdict stands as a security in the mean time, for the damages which may be given on the second trial.(g) It is not usual, however, to grant a new trial for *smallness* of damages;(h)[A] though inquiries, on writs of *inquiry, have been sometimes set aside on [*910] that ground.(a) Eleventhly, it is a general rule, not to grant a new trial, except for the misdirection of the judge,(b) or where a point has been saved at the trial,(c) in a *penal*,(d) *hard*, or *trifling*(e) action, after a verdict for the defendant.[A] But the statutes 2 & 3 Edw. VI. c. 13, for not setting out tithes,(f) and 11 Geo. II. c. 19, § 3, for assisting a tenant in carrying away his goods, to prevent a distress,(gg) are remedial acts; and, in actions thereon, the court will grant a new trial for a mistake of the jury.(f) When the sum to be recovered is under *twenty* pounds, the action is considered as trifling, so as to prevent the court from granting a new trial, after a verdict for the defendant.(hh) When it amounts to that precise sum, the court will grant a new trial:(i) And a new trial has been granted in *trespass* for cutting down trees, though the damages were under *twenty* pounds, where the object of the action was to try a right of a per-

(g) 7 Durnf. & East, 529. 1 Chit. Rep. 729; but see 8 Taunt. 714, 15.

(h) 2 Salk. 647. 2 Str. 940, 1051. 2 Wils. 248. Doug. 509. 4 Durnf. & East, 655; but see Barnes, 448, 9; 455, 6, in which latter case it is said, that where a demand is certain, as on a promissory note, the court will set aside a verdict for too small damages, but not where the damages are uncertain: and it is observable, that the cases referred to in 2 Str. 940, 1051, were of this latter description.

(a) *Ante*, 582.

(b) 4 Durnf. & East, 753. 5 Durnf. & East, 19. 6 East, 316. (b). 1 Marsh. 555.

(c) 1 Bos. & Pul. 338, 9. *Ante*, 900, 904.

(d) 2 Str. 899, 1238. 1 Wils. 17. Barnes, 435, 466. 3 Wils. 59. 2 Blac. Rep. 1226. *Hooper v. Cobb*, T. 22 Geo. III. K. B. 10 East, 268. 1 Campb. 450. S. C. 4 Maule & Sel. 338. 2 Chit. Rep. 273.

(e) 2 Salk. 644, 648, 653. 1 Bur. 12, 54. 2 Bur. 664. 2 Ken. 375. S. C. 3 Bur. 1306. 2 Blac. Rep. 851. Cowp. 37. 1 Marsh. 555. 9 Moore, 583. See also the cases referred to by Mr. Evans, in his edition of Salkeld, 2 V. 644, (a), on the subject of new trials.

(f) 6 Taunt. 297.

(gg) 9 Price, 301.

(hh) *Taylor v. Green*, H. 38 Geo. III. K. B. 5 Taunt. 537. 8 Moore, 339, C. P. 9 Price, 591. 1 McClell. & Y. 266, in *Seac*.

(i) *Dyball v. Duffield*, M. 59 Geo. III. K. B. 1 Chit. Rep. 265, (a).

Ib. 443. They must be clearly excessive, and greatly disproportionate to the injury proved. *Bodwell v. Osgood*, 3 Pick. 329. So too, in all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. *Roister v. Canal Bridge*, 16 *Ib.* 506. *Coffin v. Coffin*, 4 Mass. 1, 41. *Taunton Man. Co. v. Smith*, 9 Pick. 11. A new trial will not be granted in trespass for the smallness of damages. *Jackson v. Boust*, 2 Virg. Cas. 49. Nor for excessive damages, unless they are outrageous. *Owings v. Utroy*, 3 A. K. Marsh. 454. In case for seduction, and other actions of a like nature, the court will not set aside a verdict for excessive damages, unless they are so excessive as to warrant an inference of prejudice, passion, or corruption in the jurors. *Sargeant v. —*, 5 Cow. 106. *Deacon v. Allen*, 1 South. 338.

[A] As a general rule, the court will not grant a new trial to enable the plaintiff to recover vindictive damages merely; but if he is entitled to nominal damages only, and the action is brought to try a question of permanent right, a new trial may be granted. *Plumleigh v. Dawson*, 1 Gilman, 544. *Johnson v. Weedman*, 4 Scam. 495. *Jenney v. Dellesdernier*, 1 App. 183. *Bush v. Cutchfield*, 5 Ham. 109. *Bales v. Cooper*, *Ib.* 117. In cases of tort, where the injury is trifling and the damages should be merely nominal, a new trial will not be granted because the verdict for the defendant is against the evidence. *Robertstone v. Gentry*, 2 Bibb, 542. *Peter v. Whipple*, 8 Johns. 369. Nor will a new trial be granted to enable the party to avail himself of a legal defence where it is inequitable, and substantial justice has been done. *McConnell v. Strong*, 11 Verm. 280. See also, preceding note.

manent nature.(k) So, where the verdict is perverse, the court of Exchequer will grant a new trial, although the damages given for the plaintiff are less than *twenty* pounds.(l)[A] Lastly, it is a rule, not to grant a new trial, after a verdict for the plaintiff, where the defence is unconscionable;(m) and the verdict is found according to the justice and honesty of the case:(n) and there is said to be no instance, in which a new trial has been granted, in a case wherein the defendant had pleaded in abatement.(o) On moving for a new trial, the motion was acceded to, on condition that the defendant should procure a bond from third persons, to secure the sum to be recovered by the plaintiff and costs, in case a similar verdict should be given on the second trial; and the court of Common Pleas held, that this bond was properly stamped with a 35s. stamp:(p) but they would not amend the rule for a new trial, after such bond had been entered into, by providing that the action should not abate by the death of the defendant.(q)[B]

[*911] *A new trial cannot be granted in *civil* cases, at the instance of one of several defendants:(a) nor for a *part* only of the cause

(k) 1 Chit. Rep. 265.

(l) 1 Younge & J. 402.

(m) 2 Salk. 644, 646, 7. 1 Bur. 12, 54. 2 Bur. 664. 2 Ken. 375. S. C. 4 Durnf. & East, 468.

(n) 2 Bur. 936. 2 Wils. 306, 362. 2 Blac. Rep. 1221. 2 Durnf. & East, 4. 4 Durnf. & East, 468. 1 Bos. & Pul. 338. 11 Price, 381, 383. 1 Man. & Ryl. 198.

(o) 4 Dowl. & Ryl. 242.

(p) 8 Taunt. 712.

(q) *Id.* 714, 15.

(a) 3 Salk. 362. 12 Mod. 275. 2 Str. 814.

[A] But where judgment is rendered for too small a sum, owing to a mistake in casting interest upon a promissory note, the remedy is by petition for a new trial, and not by writ of error. *Whitewell v. Atkinson*, 6 Mass. 272. *Winn v. Young*, 1 J. J. Marsh. 51.

[B] The granting of a new trial is a matter of discretion, the exercise of which by inferior tribunals, the Supreme Court of New York will not undertake to regulate, as that discretion is not governed by any fixed principles. *People v. Superior Court of New York*, 5 Wend. 114. The refusal of a subordinate court to grant a new trial being matter of discretion, is no ground for a writ of error. *Brooklyn v. Patchen*, 8 Wend. 47. *Chase v. Davis*, 7 Verm. 476. *Durant v. Atkinson*, 2 Bailey, 18. *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170. *Gray v. Bridge*, 11 Pick. 189. *Hudson v. Williamson*, Const. Rep. 360. *Lester v. State*, 11 Conn. 415. *White v. Trinity Church*, 5 Ib. 187. *Calhoun v. M'Means*, 1 N. & M. 422. *Fennell v. Patrick*, 3 Stew. & Port. 244. *Barr v. White*, 2 Port. 342. *Sawyer v. Stevenson*, Breese, 6. *Cornelius v. Boucher*, *Ib.* 12. To justify a reversal of a judgment refusing a new trial, the cause should be clearly made out, and no laches imputable to the applicant. *King v. Walker*, 1 A. K. Marsh. 313. *Duncan v. Finneyhorn*, Ken. Dec. 309. Upon a rule to show cause why a new trial should not be granted, if the judges are divided in opinion as to granting a new trial, the rule must be discharged, it amounting to nothing more than a notice of a new trial. *Laming v. London*, 4 Wash. C. C. 382. Such a division of opinion is not a case that can be certified to the Supreme Court. *Ib.* In granting new trials the court may, in its discretion, impose terms according to the rules and usages of law; but the terms must relate only to the case then before the court. *Haggin v. Christian*, 1 A. K. Marsh. 579.

On a motion for a new trial, the reasons must be filed in the case. *Brown v. Swan*, 1 Mass. 202. *Taylor v. Giger*, Hardin, 586. *Read v. Miller*, 1 Bibb. 142. *Goldsbury v. May*, 1 Litt. 254. On motion for a new trial, the party can avail himself of no other objection than that taken at the trial. *Davidson v. Bridgeport*, 8 Conn. 472. *Nichols v. Alsop*, 10 Ib. 263. On a motion for a new trial, points of law not made or which were waived in the court below, cannot be discussed. *Torny v. Holmes*, 10 Conn. 499. Where a new trial was prayed for, on the ground that the jury found their verdict against the weight of evidence, and also because they were misdirected by the judge in a matter of law, what was the evidence to the jury, or the direction of the judge in the matter of law, ought to appear either by exceptions allowed by the judge or by his report, unless the judge should unreasonably refuse to allow exceptions or make a report. *Bond v. Culler*, 7 Mass. 205. Overruling one motion for a new trial, is no cause for refusing to listen to a second motion, if made on different grounds, and reasons shown for not incorporating both grounds in the first motion. *Hughes v. M'Gee*, 1 A. K. Marsh. 28. A motion for a new trial will not be heard where a former motion has been overruled. *Scull v. Daniel*, 2 Penn. 576.

of action: (b) And therefore, where one of four issues was found against evidence, the court granted a new trial, not only as to such issue, for that they said could not be, but for the whole; (c) But then the issue found against evidence must be a material one; for if two of three issues are found against evidence, yet if the material issue in the cause be agreeable to evidence, the court will not grant a new trial. (d) And where two issues were joined between the parties, both of which were found for the plaintiff, and upon moving for a new trial, the judge before whom the cause was tried, certified the verdict as to one of the issues to be contrary to evidence, but as to the other issue, certified it to be right; the court of Common Pleas, upon hearing counsel on both sides, were of opinion that the verdict could not be severed, and being right in part must stand. (e) If a new trial be granted, because a judge has improperly nonsuited the plaintiff, it must take place upon the whole record, unless there be some agreement between the parties to the contrary: But there may be cases, in which the new trial may be restrained to a particular part of the record: as if the judge give leave to move on one point or part only, upon an understanding between the judge and the counsel, that he shall not move on anything else; or if, on the evidence, the court above think that justice has not been done, and that they shall do more injustice by setting the matter at large again, they may restrict the parties to certain points on the second trial. (f)

In *criminal* cases, affidavits of fresh facts are not in general admissible, on a motion for a new trial, unless there was some surprise on the defendants at the trial. (g) And no new trial can be granted, where the defendant has been acquitted, (h) although the acquittal was founded upon the misdirection of the judge: (i) But there is an exception to this rule in the case of a *quo warranto*, wherein a new trial has been granted, after verdict for the defendant, against the weight of evidence: (k) And where the defendant has been acquitted on an indictment for not repairing a road, &c. the court will, under very special circumstances, suspend the entry of judgment, so as to prevent a plea of *autrefois acquit*; and enable the parties to have the question re-considered upon another indictment, without the prejudice of a former judgment. (l) So, the court will not grant a new trial where the defendant has been convicted on an indictment for felony; (m) but *after a conviction for a misdemeanour, [*912] a new trial may be granted, at the instance of the defendant, where the justice of the case requires it: (a) And where several defendants are tried at the same time for a misdemeanour, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. (bb) But it is a rule, that all

(b) 2 Bur. 1224. 1 Blac. Rep. 298, S. C.; and see 2 Str. 814. 3 Wils. 47.

(c) *Rez v. Pool*, E. 1734. Bul. Ni. Pri. 326.

(d) *Dexter v. Barrowby*, E. 25 Geo. II. Bul. Ni. Pri. 326.

(e) Barnes, 436; but see *id.* 448.

(f) 4 Taunt. 556, per Gibbs, J.

(g) 2 Chit. Rep. 278.

(h) 6 East, 315. 4 Maule & Sel. 337. 1 Barn. & Ald. 63. 2 Chit. Rep. 282. S. C. 1 Barn. & Ald. 64, (d), 67, (a). 1 Chit. Rep. 352. 1 Chit. Cr. Law, 657.

(i) 1 Stark. Ni. Pri. 516.

(k) 2 Durnf. & East, 484. 6 East, 316, in *notis*. 4 Maule & Sel. 338.

(l) 1 Barn. & Ald. 63. 2 Chit. Rep. 282. S. C. 1 Barn. & Ald. 64, (d), 67, (a); but see 5 Maule & Sel. 392.

(m) 6 Durnf. & East, 638; and see 1 Chit. Cr. Law, 654, &c.

(a) 6 Durnf. & East, 638; and see 1 Chit. Cr. Law, 654, &c.

(bb) 6 Durnf. & East, 619.

the defendants, convicted upon an indictment for a misdemeanour, must be present in court, when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance: (c) and it is not a sufficient excuse for absence, that they are in custody on civil process. (d)

The motion for a new trial must be made, in the King's Bench, within *four days exclusive* after the entry of a rule for judgment: (e) and it cannot be made after the *four days*, though by consent of the parties. (f) If it be not made within that time, the party complaining cannot afterwards be heard, on the subject of a new trial; (g) and there is no difference in this respect between civil and criminal cases; (h) though in the latter, where the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that substantial justice has not been done, they have sometimes interposed after the regular time, and granted a new trial: (i) And as the rule for judgment cannot be entered till the return of the *distringas*, a motion for a new trial, of a cause tried at a sitting in term, may be made within *four days* after the return of the *distringas*, and is not confined to the space of *four days* after the trial of the cause. (k) In the Common Pleas, the motion for a new trial must be made within the *first four days* of the term, if the cause be tried in vacation; and cannot be received after the *four days*, unless where the foundation of the motion is a fact not disclosed to the party till after that time. (l) If the cause be tried in term, the motion must be made before or on the appearance day of the return of the *habeas corpora juratorum*, if returnable, as is usual in actions by *original*, on a general return day: (l) or if returnable on a day certain, then within *four days inclusive* of the return day: (m) And it is a rule in that court, that no motion for a new trial shall be entertained, unless *two days'* previous notice be given of the motion, to the judge who tried the cause, that he may be enabled to bring down his notes of the evidence, and have them ready in court at the time when [*913] the motion is *made. (aa) To give effect to this rule, the serjeants will not move for a new trial, in any cause in which the attorney instructing them to move has not previously certified to them, that he has *two days* before, given notice of his intention to the judge before whom the cause was tried: (bb) And such notice must be given, as well in cases where a point has been reserved at the trial, as in other cases. (cc) It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment. (dd) This rule, however, extends only to cases where the party has knowledge of the fact, at the time of moving in arrest of judgment: therefore, a new trial was granted after such a motion, on

(c) 11 East, 307. 3 Maule & Sel. 9, 10. (a). 4 Barn. & Cres. 329. 6 Dowl. & Ryl. 344, S. C.; and see 1 Chit. Cr. Law, 659. 7 Dowl. & Ryl. 663.

(d) 4 Barn. & Cres. 329. 6 Dowl. & Ryl. 344, S. C.; and see 8 Dowl. & Ryl. 65. 5 Barn. & Cres. 334, S. C.

(e) Doug. 171.

(f) 1 Chit. 382, 3. (a).

(g) 5 Durnf. & East, 436.

(h) *Id.* 436. 11 East, 308.

(i) 2 Str. 845, 995. 2 Bur. 1189. Doug. 171, 797. 5 Durnf. & East, 436, 7. 1 East, 146. 11 East, 308; and see 1 Chit. Cr. Law, 658.

(k) 2 Barn. & Ald. 613. 1 Chit. Rep. 382, S. C.

(l) 1 Barnes, 443, 446. Pr. Reg. 410, 11, S. C.

(m) Imp. C. P. 7 Ed. 394.

(aa) R. T. 53 Geo. III. C. P. 4 Taunt. 721. 5 Taunt. 611.

(bb) 5 Taunt. 86.

(cc) 7 Taunt. 257.

(dd) 2 Salk. 647. Pr. Reg. 241. 1 Bur. 334. 4 Barn. & Cres. 169. 6 Dowl. & Ryl. 281, S. C.; and see 1 Chit. Cr. Law, 658.

affidavits of two of the jury, that they drew lots for their verdict.(e) When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned.(f) And where the defendant, pending his motion for a new trial, served the plaintiff with a copy of an allowance of a writ of error, the court of King's Bench held this to be an admission of the facts of the case, and refused to grant a new trial.(g)

On a feigned issue, directed by the Chancellor, the application for a new trial must be made in Chancery; as well where the point relates to the admissibility of evidence, as on other grounds:(h) and it is in the discretion of that court, to grant or refuse a new trial of an issue directed to be tried at law; for the issue having been originally directed merely to satisfy the conscience of the court, on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at law; and it will send the issue down, as often as the result is not satisfactory: or if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called,) has been received below:(i) But where, on the trial of an issue directed by the Chancellor, leave is given by the judge to move for a new trial, the motion may it seems be made in the court where the cause was tried:(k) And, in an action brought under the Chancellor's order, the application for a new trial may be made either in Chancery,(l) or in the court where the action is depending.(m) In the Exchequer, motions for new trials of issues, directed from the equity side of the court, are not subject to the rule requiring such motions to be made within the first *four* days of the following term: Such applications may be made at any time during the succeeding term, or the sittings after; but they should in the first instance be made before the lord chief

*baron, sitting alone in equity, if they arise out of causes pend- [*914]
ing before him.(a)

An affidavit is necessary, to move for a new trial, unless the ground of it appear on the face of the evidence: And, in the King's Bench, by a late rule,(b) "no affidavit shall be used, in support of a motion for a new trial, in any case whether criminal or civil, unless such affidavit shall have been made before the expiration of the first *four* days of the term following the trial, if the cause be tried in vacation; and before the expiration of the first *four* days after the return of the *distringas*, if the cause be tried in term, without the special permission of the court for that purpose." The rule for a new trial, if granted, is a rule to show cause; on obtaining which, application should be made to the judge who tried the cause, for his report of the evidence; and if he be not of the same court, his clerk will deliver it to the *puise* judge of the court in which the action is brought. In the King's Bench it is a rule,(c) that "after any rule *nisi* shall be ob-

(e) Pr. Reg. 409. Bul. Ni. Pri. 325, 6. *Sed quære*, whether such affidavits would now be received? *Ante*, 908.

(f) 2 Chit. Rep. 272. *Ante*, 863.

(h) 6 Taunt. 444; and see 8 Dowl. & Ry. 71.

(k) 2 Chit. Rep. 270.

(m) *Folkes v. Chad & others*, M. 22 Geo. III. K. B. *Carstairs v. Stein*, T. 55 Geo. III. K. B. *accord*.

(a) 11 Price, 380.

(b) R. T. 5 Geo. IV. K. B. 3 Barn. & Cres. 176. 4 Dowl. & Ry. 836; and see 1 Chit. Rep. 383, *in notis*.

(c) R. M. 40 Geo. III. K. B.

the defendants, convicted upon an indictment for a misdemeanour, must be present in court, when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance:(c) and it is not a sufficient excuse for absence, that they are in custody on civil process.(d)

The motion for a new trial must be made, in the King's Bench, within *four days exclusive* after the entry of a rule for judgment:(e) and it cannot be made after the *four days*, though by consent of the parties.(f) If it be not made within that time, the party complaining cannot afterwards be heard, on the subject of a new trial;(g) and there is no difference in this respect between civil and criminal cases;(h) though in the latter, where the court have seen of themselves, or it has appeared to them on the suggestion of counsel, that substantial justice has not been done, they have sometimes interposed after the regular time, and granted a new trial:(i) And as the rule for judgment cannot be entered till the return of the *distringas*, a motion for a new trial, of a cause tried at a sitting in term, may be made within *four days* after the return of the *distringas*, and is not confined to the space of *four days* after the trial of the cause.(k) In the Common Pleas, the motion for a new trial must be made within the first *four days* of the term, if the cause be tried in vacation; and cannot be received after the *four days*, unless where the foundation of the motion is a fact not disclosed to the party till after that time.(l) If the cause be tried in term, the motion must be made before or on the appearance day of the return of the *habeas corpora juratorum*, if returnable, as is usual in actions by *original*, on a general return day:(l) or if returnable on a day certain, then within *four days inclusive* of the return day:(m) And it is a rule in that court, that no motion for a new trial shall be entertained, unless *two days'* previous notice be given of the motion, to the judge who tried the cause, that he may be enabled to bring down his notes of the evidence, and have them ready in court at the time when [*913] the motion is *made.(aa) To give effect to this rule, the serjeants will not move for a new trial, in any cause in which the attorney instructing them to move has not previously certified to them, that he has *two days* before, given notice of his intention to the judge before whom the cause was tried:(bb) And such notice must be given, as well in cases where a point has been reserved at the trial, as in other cases.(cc) It is a general rule, that the party shall not move for a new trial, after he has moved in arrest of judgment.(dd) This rule, however, extends only to cases where the party has knowledge of the fact, at the time of moving in arrest of judgment: therefore, a new trial was granted after such a motion, on

(c) 11 East, 307. 3 Maule & Sel. 9, 10. (a). 4 Barn. & Cres. 329. 6 Dowl. & Ryl. 344, S. C.; and see 1 Chit. Cr. Law, 659. 7 Dowl. & Ryl. 663.

(d) 4 Barn. & Cres. 329. 6 Dowl. & Ryl. 344, S. C.; and see 8 Dowl. & Ryl. 65. 5 Barn. & Cres. 334, S. C.

(e) Doug. 171.

(f) 1 Chit. 382, 3, (a).

(g) 5 Durnf. & East, 436.

(h) *Id.* 436. 11 East, 308.

(i) 2 Str. 845, 995. 2 Bur. 1189. Doug. 171, 797. 5 Durnf. & East, 436, 7. 1 East, 146. 11 East, 308; and see 1 Chit. Cr. Law, 658.

(k) 2 Barn. & Ald. 613. 1 Chit. Rep. 382, S. C.

(l) 1 Barnes, 443, 446. Pr. Reg. 410, 11, S. C.

(m) Imp. C. P. 7 Ed. 394.

(aa) R. T. 53 Geo. III. C. P. 4 Taunt. 721. 5 Taunt. 611.

(bb) 5 Taunt. 86.

(cc) 7 Taunt. 257.

(dd) 2 Salk. 647. Pr. Reg. 241. 1 Bur. 334. 4 Barn. & Cres. 169. 6 Dowl. & Ryl. 281, S. C.; and see 1 Chit. Cr. Law, 658.

affidavits of two of the jury, that they drew lots for their verdict.(e) When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions be abandoned.(f) And where the defendant, pending his motion for a new trial, served the plaintiff with a copy of an allowance of a writ of error, the court of King's Bench held this to be an admission of the facts of the case, and refused to grant a new trial.(g)

On a feigned issue, directed by the Chancellor, the application for a new trial must be made in Chancery; as well where the point relates to the admissibility of evidence, as on other grounds:(h) and it is in the discretion of that court, to grant or refuse a new trial of an issue directed to be tried at law; for the issue having been originally directed merely to satisfy the conscience of the court, on facts material to the equity of the case, it may order evidence to be received, although not strictly admissible on other trials at law; and it will send the issue down, as often as the result is not satisfactory: or if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial, on the ground that inadmissible evidence (strictly so called,) has been received below:(i) But where, on the trial of an issue directed by the Chancellor, leave is given by the judge to move for a new trial, the motion may it seems be made in the court where the cause was tried:(k) And, in an action brought under the Chancellor's order, the application for a new trial may be made either in Chancery,(l) or in the court where the action is depending.(m) In the Exchequer, motions for new trials of issues, directed from the equity side of the court, are not subject to the rule requiring such motions to be made within the first *four* days of the following term: Such applications may be made at any time during the succeeding term, or the sittings after; but they should in the first instance be made before the lord chief

*baron, sitting alone in equity, if they arise out of causes pend- [*914] ing before him.(a)

An affidavit is necessary, to move for a new trial, unless the ground of it appear on the face of the evidence: And, in the King's Bench, by a late rule,(b) "no affidavit shall be used, in support of a motion for a new trial, in any case whether criminal or civil, unless such affidavit shall have been made before the expiration of the first *four* days of the term following the trial, if the cause be tried in vacation; and before the expiration of the first *four* days after the return of the *distringas*, if the cause be tried in term, without the special permission of the court for that purpose." The rule for a new trial, if granted, is a rule to show cause; on obtaining which, application should be made to the judge who tried the cause, for his report of the evidence; and if he be not of the same court, his clerk will deliver it to the *puisne* judge of the court in which the action is brought. In the King's Bench it is a rule,(c) that "after any rule *nisi* shall be ob-

(e) Pr. Reg. 409. Bul. Ni. Pri. 325, 6. *Sed quære*, whether such affidavits would now be received? *Ante*, 908.

(f) 2 Chit. Rep. 272. *Ante*, 863.

(h) 6 Taunt. 444; and see 8 Dowl. & Ryl. 71.

(k) 2 Chit. Rep. 270.

(m) *Folkes v. Chad & others*, M. 22 Geo. III. K. B. *Carstairs v. Stein*, T. 55 Geo. III. K. B. *accord*.

(a) 11 Price, 380.

(b) R. T. 5 Geo. IV. K. B. 3 Barn. & Cres. 176. 4 Dowl. & Ryl. 836; and see 1 Chit. Rep. 383, *in notis*.

(c) R. M. 40 Geo. III. K. B.

(g) *Bennet v. Hunt*, T. 15 Geo. III. K. B.

(i) 2 Price, 399.

(l) 2 Atk. 319.

tained for a new trial, &c. in any cause tried in *London* or *Middlesex*, the attorney for the party obtaining the said rule *nisi* shall, before the time of showing cause, deliver a note in writing, at the house or chambers of the lord chief justice, specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion." And where the chief justice died, after a rule *nisi* had been obtained by the defendant for a new trial, without any affidavits being filed, and before the chief justice had reported the evidence thereon, the court said, they could not proceed on this rule; but the defendant must now file affidavits of the facts, and ground his motion on them, without regarding the former rule, and then the plaintiff, on showing cause, must answer them.(d) In the Common Pleas, the court will not hear a rule for a new trial discussed, without having the report of the judge who tried the cause, though there be no dispute about the facts:(e) And, in any of the courts, if the judge who tried the cause declare himself satisfied with the verdict, it has been usual not to grant a new trial, on account of its being against evidence: On the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it.(f) In a case where a judge only reported evidence, without declaring himself to be satisfied or dissatisfied with the verdict, the court were under difficulty how to act: they seemed inclined however to hear it spoken to; but, through their interposition, the parties agreed to abide by the determination of the point of law.(g)

The granting of a new trial is either without, or upon payment of the costs of the former trial; or such costs are directed to abide the [*915] event of the suit: or nothing is said respecting them. If a new trial be granted for irregularity, the costs of the former trial ought not to be paid;(a) and the party applying is in such case entitled to the costs of the application. When the plaintiff has been nonsuited, by the mistake of the judge in point of law, the courts have in several instances ordered the nonsuit to be set aside, without costs;(b) and verdicts have been set aside in a similar manner, when they have been obtained by unfair practice,(cc) or contrary to law and the judge's direction.(dd) In general, when the jury have given a perverse verdict, the court will grant a new trial without costs;(ee) but when a new trial is granted for the error or mistake of the jury, either in finding a verdict without or contrary to evidence, or in giving excessive damages, it is always upon payment of the costs of the former trial.(ff) Where the cause was taken as an undefended one by mistake, the court of King's Bench refused to make the payment of costs a condition of the rule for a new trial:(gg) And when a

(d) 1 Ken. 370.

(e) 5 Taunt. 340.

(f) *Cas. temp. Hardw.* 23. *Barnes*, 439. *Bul. Ni. Pri.* 327; and see 6 Price, 146. *Ante*, 908.

(g) *Rez v. Phillips*, 23 Geo. II. *Bul. Ni. Pri.* 327.

(a) 12 Mod. 370.

(b) 1 Blac. Rep. 670. *Say. Costs*, 189. 3 Wils. 146, 338. 1 Chit. Rep. 633, 4. (a).

(cc) 1 Bur. 352.

(dd) *Say. Costs*, 189. 2 Bur. 1224. 1 Blac. Rep. 298. S. C. 1 Blac. Rep. 670. *Gagnier v. Stonehouse*, M. 24 Geo. III. K. B. S. P. 1 Chit. Rep. 633, 4. (a). 3 Barn. & Ald. 692.

(ee) *Wilkinson v. Commissioners of Navy*, E. 25 Geo. III. K. B. per Lord Mansfield, Ch. J. and per Lord Ellenborough, Ch. J. in the case of *Howorth v. Samuel*, H. 58 Geo. III. K. B. 1 Chit. Rep. 633, 4, (a); and see 2 Chit. Rep. 268, 426.

(ff) 12 Mod. 370. 1 Str. 642. 1 Bur. 12, 393. 2 Bur. 665. 2 Ken. 375, S. C. *Wilkinson v. Commissioners of Navy*, E. 25 Geo. III. K. B. Pr. Reg. 408, C. P.; and see 1 Durnf. & East, 20. 1 Chit. Rep. 633, 4, (a). 2 Chit. Rep. 426.

(gg) 1 Chit. Rep. 634, *in notis*.

new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do, he will have no remedy for the costs of the former trial, even though he should again obtain a verdict.(h) The court of Exchequer, will not order a prisoner, applying for a new trial on the ground of excessive damages, to pay the costs of the former trial, before the plaintiff's counsel proceed to show cause against the rule.(i)

On granting a new trial for the misbehaviour of the jury, the costs of the former trial were directed to abide the event of the suit.(k) And where one party having obtained a verdict in the Common Pleas, the court granted a new trial, directing that the costs of the former one should abide the event of the new trial, and on the second trial the verdict was for the other party; it was holden, that the latter was only entitled to the costs of the second trial.(l) So when, upon setting aside a verdict for the plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the trial.(m) So when, upon setting aside a nonsuit, or verdict for the defendant, the costs are directed to abide the event of the suit, though the plaintiff succeed on the second trial, he is not entitled to the costs of the first: neither is the defendant, in such case, entitled to the costs of the first trial. *And although a defendant succeeded upon the first trial [*916] by a forgery, the court cannot give the plaintiff, succeeding on the second trial, the costs of both.(a) Where the plaintiff, in an action on a policy of insurance, having recovered for an average loss, obtained a new trial, the costs of the first being directed to abide the event, and at the second trial recovered again for no more than an average loss; the court of Common Pleas held, that he was entitled to the costs of one of the trials only, and the defendant to the costs of neither.(b) But in general, when the same party succeeds on both trials, he is entitled to the costs of both.(c) And when a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause: and therefore, if the verdict on the second trial be set aside, and on a third trial the ultimate event is the same as at the first, the party will be entitled to the costs of the first trial.(d)

When the rule is silent as to costs, the costs of the first trial are not in general allowed, in the King's Bench, whichever way the verdict may go upon the second trial.(e) And where the court, after verdict for the plaintiff, granted a new trial, without mentioning the costs, and the plaintiff afterwards discontinued; the court held, that the defendant was not entitled to the costs of the trial:(f) But where the court after the argument of a special case, directed a new trial, because the case was insufficiently stated,(gg) or the defendant after verdict against him, applied for and ob-

(h) *Doe ex dem.* *Davis & another v. Haddon*, M. 25 Geo. III. K. B.

(i) 4 Price, 307.

(j) 2 New Rep. C. P. 382. 5 Moore, 309.

(k) 4 Taunt. 671.

(l) 1 H. Blac. 641. 8 Durnf. & East, 619.

(m) 5 Barn. & Ald. 766.

(e) Doug. 438. *Shoolbred v. Nutt*, M. 23 Geo. III. K. B. 3 Durnf. & East, 507. 6 Durnf. & East, 71, 131. 1 East, 111. 1 H. Blac. 639. 1 Barn. & Cres. 100; but see 1 Str. 300. 5 Bar. 2694. 6 Durnf. & East, 144. 10 East, 416. 2 Barn. & Ald. 317. 1 Chit. Rep. 19, S. C. *Id.* 633. 2 Barn. & Cres. 620. 4 Dowl. & Ryl. 129, S. C.

(f) 5 Barn. & Cres. 458. 8 Dowl. & Ryl. 220, S. C.

(gg) 6 Durnf. & East, 144; and see 9 Moore, 620. 2 Bing. 330, S. C. *Ante*, 900.

(k) 1 Str. 642; and see Willes, 488.

(m) 1 Barn. & Ald. 566.

(b) 1 Bing. 393. 8 Moore, 440, S. C.

(a), S. C. cited 1 Bing. 394.

tained a rule for a new trial,^(h) and afterwards the defendant, instead of going down to trial again, gave the plaintiff a *cognovit*; the court of King's Bench held, that he was liable to pay the costs of the former trial. So where, after verdict for the defendant, and a new trial awarded upon a question of law, without any thing being said as to costs, the parties, instead of proceeding to a second trial, agreed to state the facts specially, as if a case had been reserved at the first, on which the *postea* was afterwards delivered to the plaintiffs, that court held, that they were entitled to the costs of the first trial.⁽ⁱ⁾ In the Common Pleas, the rule is different: for there, if a new trial be granted, and the rule say nothing about costs, if the verdict on the second trial go the same way, the party succeeding is entitled to the costs of both trials;⁽ⁱⁱ⁾ and also, as it seems, to the costs of the application:^(k) but if the verdicts go different ways, the party ultimately succeeding is not entitled to the costs of the first trial.^(l)

[*917] So, where *the jury find an *insufficient* verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately succeeding is not entitled, in the Common Pleas, to the costs of the former trial.^(a) If the plaintiff obtain a verdict for a total loss on a policy, which he endeavours to support on a rule *nisi* for a nonsuit, and the court are of opinion that he is not entitled to recover as for a total loss, but only to a return of *premium*, the plaintiff is not entitled, in the Common Pleas, to the costs of the rule; nor to any costs, except those of the count for money had and received, and such parts of the briefs and evidence as are applicable thereto.^(b) And, in that court, where there were three verdicts; the first in favour of the plaintiff, the second in favour of the defendant, by reason of a misdirection, and the third in favour of the defendant, upon the merits; and the rule, for the first new trial, reserved the consideration of costs; the court allowed the defendant to take the costs of the first or second trial at his option, and also the costs of the third.^(c) [A] In the Exchequer, if a cause come on for trial and be referred, and the arbitrator's award in favour of the plaintiff be afterwards set aside, so that the cause is in consequence, subsequently tried, the plaintiff, if he obtain a verdict, will be allowed the costs of the former trial.^(d)

If the verdict or nonsuit be set aside, and a new trial granted, the rule for that purpose should be drawn up and served; and if it be on payment of costs, an appointment must be obtained to tax them, from the master or prothonotaries; and when taxed, they must be forthwith paid, or the prevailing party may move the court to discharge the rule, and for leave to sign judgment, and tax his costs.^(ee) And, in the King's Bench, where

(h) 2 Barn. & Ald. 317. 1 Chit. Rep. 19, S. C.; but see 1 Moore & P. 88. 4 Bing. 415, S. C.

(i) 10 East, 415.

(ii) Doug. 438.

(k) 10 Moore, 96.

(l) *Shoolbred v. Nutt*, M. 23 Geo. III. K. B. *Parker v. Wells*, 1 H. Blac. 639, n. *Id.* 641. 1 East, 112. *Sertes v. Hubbard*, E. 44 Geo. III. K. B.; and see 7 Moore, 147. 3 Brod. & Bing. 304. S. C. 3 Bing. 174.

(a) 2 Marsh. 475; but see 7 Moore, 147. 3 Brod. & Bing. 304, S. C.

(b) 3 Taunt. 406. *Routh v. Thompson*, K. B. *id.* 406, 7, *semb. contra.*

(c) 3 Bing. 174.

(d) 1 Price, 310; and see 7 Moore, 147. 3 Brod. & Bing. 304, S. C. (ee) 13 East, 186.

[A] It is competent for a court trying a cause, to impose terms upon the party applying for a new trial, as the condition of granting it, and upon the opposite party as the condition of refusing it. *Stephenson v. Mansoney*, 4 Ala. 317. Where a new trial is granted to a party on payment of costs by him, the payment or tender of the costs is a condition precedent to the notice of the cause for trial. *Somers v. Sloan*, 3 Harr. 46. *Moberly v. Davar*, 5 Blackf. 409.

a nonsuit is set aside *upon payment of costs*, such payment is made a condition precedent to setting it aside; and unless they are paid, the plaintiff cannot proceed to another trial.^(f) It has been said, that after a new trial granted, no amendment can be allowed in the record:^(g) But the practice is otherwise; it being usual, in both courts, to permit amendments to be made after trial, where the justice of the case requires it, upon reasonable terms.^(h) And when a rule for a new trial is granted, the plaintiff is not bound to proceed upon it in any limited time.⁽ⁱ⁾ In order to proceed to a new trial, it is not necessary that the *nisi prius* record should be re-engrossed, unless the *postea* be indorsed on it, or that any new entries should be made or paid for; but the record, in the King's Bench, must be passed again, with an alteration of the term in the second *placita*, and of the return of the *distringas* in the *jurata*, and a new notice of trial given:^(k) after which, another *venire* and *distringas* must be sued out and returned, and *the cause set down anew.^(a) In the Common [*918] Pleas, if the cause be not tried the same term, a new *placita* must be added to the record of *nisi prius*, of the term it is intended to be tried; and in that case the record must be re-sealed, and paid for again to the clerk of the treasury, and there must be a new *venire* and *habeas corpora*; but this is unnecessary if the cause be tried the same term.^(b) The *jurata* should also be altered, in the return of the *habeas corpora juratorum*.

The only ground of *arresting* judgment at this day, is some matter *intrinsic*, appearing upon the face of the record, which would render it erroneous and reversible; for though it seems to have been otherwise formerly,^(c) yet it is now settled, that judgment cannot be arrested for *extrinsic* or foreign matter, not appearing on the face of the record, but the courts are to judge upon the record itself, that their successors may know the grounds of their judgment.^(d) The old course of taking advantage in arrest of judgment was thus: The party, after a general verdict, having a day in court, (for so he has, as to matters of law, though not of fact,) did assign his exceptions in arrest of judgment, by way of plea, and it was called pleading in arrest of judgment: This differed from moving in arrest of judgment, which was done by one as *amicus curiæ*, when the party was out of court.^(e) After judgment on *demurrer*, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer: the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiæ*, and tell them that the judgment which they gave on mature deliberation is wrong; but it is otherwise after judgment by default, for that is not given in so solemn a manner.^(f) The

(f) *Id.* 185.

(g) 2 Blac. Rep. 920.

(h) 7 Durnf. & East, 132. 9 East, 335. *Ante*, 697, 737, K. B. 1 New Rep. C. P. 28. 2 Bos. & Pal. 243. 3 Taunt. 81, C. P.

(i) *Buckle v. Hollis*, T. 4 Geo. IV. K. B.

(k) *Bingley v. Mattison*, E. 24 Geo. III. K. B.

(a) Imp. K. B. 10 Ed. 363; and see R. E. 33 Geo. III. R. M. 6 Geo. IV. K. B. 2 Wms. Saund. 5 Ed. 253, (8), 254. *Ante*, 776, 781.

(b) Imp. C. P. 7 Ed. 400; and see 2 Wms. Saund. 5 Ed. 254.

(c) 1 Salk. 77.

(d) 1 Ld. Raym. 232. 1 Salk. 77. S. C. *Id.* 315. 4 Bur. 2287.

(e) 1 Salk. 77, 8; 315. 6 Mod. 143.

(f) 1 Str. 425. 6 Taunt. 650. 2 Marsh. 326. S. C. 6 Moore, 209, *per Richardson, J.*

defendant in *audita querela* cannot move in arrest of judgment; but must either demur at the time of filing the writ of *audita querela*, or if the verdict be given against him, must bring a writ of error, or move for a new trial: (g) And, on the trial of an issue directed by a court of Equity, it is incompatible with the nature and object of the proceeding, to move in arrest of judgment. (h) It is also a rule, that the defendant cannot move in arrest of judgment, for any thing that he might have pleaded in abatement: (i) and, if the record be right, a motion in arrest of judgment cannot be founded on an apparent error in the copy of the declaration delivered to the defendant. (k) So, if there be a misjoinder of counts, and a verdict for the plaintiff on the counts well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment. (a) And when there is a misjoinder of counts, one of them being partly in *case* and partly in *trespass*, and another entirely in *trespass*, and no evidence was given as to the acts of trespass, the verdict, if taken generally, may be amended, according to the evidence, by the judge's notes. (b)

The parties cannot move in arrest of judgment, for any thing that is aided after verdict, at common law; or amendable at common law, or by the statutes of amendments; or cured, as matter of form, by the statutes of jeofails. (c)

At common law, when any thing is omitted in the declaration, though it be matter of substance, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment. (d) [A] This rule

(g) 1 Marsh. 226.

(i) 2 Blac. Rep. 1120.

(a) 2 Maule & Sel. 533.

(h) 11 Price, 162.

(k) 8 Taunt. 335.

(b) 1 Chit. Rep. 625, (a).

(c) For the cases in which defects are aided after verdict at common law, or by the statutes of jeofails, see 1 Wms. Saund. 5 Ed. 228. (1). Steph. Pl. 167, &c. 1 Man. & Ry. 285, 6. (a).

(d) 2 Show. 233. T. Raym. 487, S. C.; and see Cro. Jac. 44. Hob. 78. 1 Sid. 218. Carth. 304, 389. 1 Salk. 130. 2 Ld. Raym. 1214. 1 Wils. 1, 255. 2 Wils. 5. 4 Bur. 2020. Cowp. 825. 1 Durnf. & East, 141. 3 Durnf. & East, 25, 6; 147. 7 Durnf. & East, 518. 2 Bos. & Pul. 259, 267. 1 Maule & Sel. 236, 7. 10 Moore, 183. 2 Bing. 464. S. C. 4 Barn. & Cres. 138. 6 Dowl. & Ry. 188. S. C. 1 M'Clel. & Y. 205.

[A] After verdict the court will support the declaration by every legal intendment, if there is nothing material, on record, to prevent it. *Warren v. Litchfield*, 7 Greenl. 63. Where a fact must necessarily have been proved at a trial, to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof. *Dobson v. Campbell*, 1 Sumner, 319. After an order for judgment, the court will not look astutely into the form of a count, and will therefore refuse a motion to set aside such an order on the ground of defect in the declaration, it being enough if the count appears to be bottomed upon a judgment of record. *Vaughan v. Dinkens*, Harper, 26. So too, after verdict, on a motion in arrest of judgment, the court will intend that every material fact alleged in the declaration, or fairly inferrible from what is alleged, was proved on the trial; but if the plaintiff totally omits to state a good title or cause of action, even by implication, there is no room for intendment or presumption. *Addington v. Allen*, 11 Wend. 375. The verdict cures all mispleadings, insufficient pleadings, and misjoining of issues, provided sufficient appear to enable the court to give judgment according to the right of the case. *Associates of the Jersey Co. v. Halsey*, 2 South. 750. *Read v. Chelmsford*, 16 Pick. 128. *Ward v. Bartholomew*, 6 Ib. 409. *Moore v. Boswell*, 5 Mass. 306. *Riddle v. Locks and Canals*, 7 Mass. 169. *Wheeler v. Train*, 3 Pick. 255. *Crocker v. Wilney*, 10 Mass. 316. *Worster v. Canal Bridge*, 16 Pick. 541. *Avery v. Tyringham*, 3 Mass. 160. *Hamilton v. Harvey*, 4 Yeates, 129. *Hockley v. Fulmer*, Ib. 130. For example, such as a want of an averment of a special demand or notice. *Chester Glass Co. v. Dewey*, 6 Ib. 94. *Coll v. Root*, 17 Ib. 229. *Kingsley v. Bill*, 9 Ib. 198. *Avery v. Tyringham*, 3 Ib. 160. Or seizin in a writ of entry. *Ward v. Bartholomew*, 6 Pick. 409.

however is to be understood with some limitation; for on looking into the cases, it appears to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption:(e) And hence it is a general rule, that a verdict will aid a title defectively set out, but not a defective title;(f)[A] or, in other words, nothing is to

(e) Doug. 679.

(f) 1 Salk. 365. 2 Ld. Raym. 1225. S. C. 2 Str. 1011, 1023. Cas. temp. Hardw. 116. S. C. 1 Bur. 301. 2 Bur. 1159. 3 Wils. 275. 4 Durnf. & East, 472. 4 Barn. & Crea. 555.

Or want of particularity or certainty. *Richardson v. Eastman*, 12 Mass. 505. *Ingersoll v. Jackson*, 9 Ib. 495. *Livermore v. Boswell*, 4 Ib. 437. *Coffin v. Coffin*, 2 Ib. 358. And after verdict upon a plea to the merits of a case, advantage cannot be taken of a variance between the writ and declaration. *Robinson v. Cox*, Minor, 84. A defect of pleading, by which a general, instead of a special breach, is assigned, is cured by verdict. *Minor v. Mechanics Bank of Alexandria*, 1 Pet. 68. If the venue is improperly laid in a declaration, in a transitory action, the defect will be cured by verdict. *Barlow v. Garrow*, Minor, 1. If parties appear, and go to trial without a plea being put in, it is such an irregularity as will be cured after verdict, by the statute of amendments. *Brazzle v. Usher*, Breese, 14. A declaration in *assumpsit*, alleging a promise before the date of the writ, is good after verdict. *Bemis v. Faxon*, 4 Mass. 263. Defects in substance in a declaration are cured by verdict, if, from the issue of the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial. *Stanley v. Whipple*, 2 McLean, 35. Thus, where a count in a declaration was defective on account of dates being left blank, but the party had pleaded and gone to trial, the presumption is, that the proof supplied the defect. *Stockton v. Bishop*, 4 How. (U. S.) 155. Or where there is a defect or omission in a declaration, and the issue joined is such as to require on the trial proof of the facts defectively stated, or omitted, such defect or omission is cured by a verdict. *Emerson v. Lakin*, 10 Shep. 384. *Poindexter v. Turner*, Walker, 349. *Delahoff v. Reed*, Walker, 74.

After verdict, judgment will not be arrested for any defect in the declaration, which by reasonable intendmen: must be considered to have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration. *Morey v. Homan*, 10 Verm. 565. *Dale v. Dean*, 16 Conn. 579. *Reservoir Company v. Chase*, 14 Conn. 123. *Insurance Company v. Seitz*, 4 Watts & Serg. 273. The statute of jeofails, in Mississippi, provides that no judgment after verdict shall be reversed for any mistake or misconception of the form of action. *Cartwright v. Carpenter*, 7 How. (Miss.) 328. *Kellog v. Badloy*, 7 How. (Miss.) 340. Even a misjoinder of issue is cured by verdict. *Chichester v. Dagget*, 2 How. (Miss.) 863. In an action of *assumpsit*, in that state, the defendant pleaded a special plea of set-off, which does not exist in that state, in such action, which was his only plea. The plaintiff took issue upon it, and a verdict was rendered thereon, and judgment given accordingly. Held, that the mispleading was cured by the verdict. *Henry v. Hoover*, 6 Smedes & Marsh. 417. Under the statute of jeofails, after verdict and judgment, no defect in the declaration and pleadings will be noticed which might have been taken advantage of by demurrer. *Whitaker v. Comfort*, Walker, 421. In Arkansas, the want of joinder in demurrer is cured by verdict. *Eason v. Fisher*, 1 Pike, 90. In Kentucky, an irregularity of pleading, where issue is joined, is cured by the verdict. *Hocker v. Davis*, 2 Monr. 118. In Indiana, an inquiry of damages cures all defects that are cured by a verdict. *Peltier v. Britton*, 4 Blackf. 502. A variance between the writ and declaration, and an omission of the amount of the *ad damnum*, is cured by the statute of jeofails of that state, after verdict, or inquiry of damages after default. *Ib.* If a special plea in bar in denial be set aside on the plaintiff's motion, and the cause be afterwards fully and fairly tried on the merits, in the same manner as if a plea had been filed requiring the plaintiff to prove every fact necessary to support the action, the setting aside the plea cannot be assigned for error by the defendant. *Darter v. The State*, 5 Blackf. 61.

[A] A verdict will not aid the want of consideration in the declaration, in an action of *assumpsit*. *Hitchcock v. Page*, 1 Root, 293. *Whitall v. Morse*, 5 S. & R. 358. The omission to allege a matter in the pleadings essential to the action, unless it may be implied from the allegation made, is never cured by verdict. *Griffin v. Pratt*, 3 Conn. 513. *Phelps v. Sill*, 1 Day, 315. *Chichester v. Voss*, 1 Call, 83. If there be two counts in a declaration, the one

be presumed after verdict, but what is expressly stated in the declaration, or necessarily implied from the facts which are stated. (g) Thus, where the grant of a reversion was stated, which could not take effect without attornment, that, being a necessary ceremony, might be presumed to have been proved: (hh) But where, in an action against the *indorser* of a bill of exchange, the plaintiff did not allege a demand on and refusal by the *acceptor*, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the verdict: (ii) for in this case, it was not requisite for the [*920] plaintiff to prove, *either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged. So, where a declaration in *debt* for tithes, on the statute 2 & 8 Edw. VI. c. 13, § 1, omitted to state that the tithes had been yielded and paid, and of right ought to have been paid, within *forty* years next before the passing of the act; the court held that it was defective, even after verdict, and the judgment was arrested. (a)

Another rule at common law is, that *surplusage* will not vitiate, after verdict; *utile per inutile non vitiatur*: (b) and therefore, in *trover*, if the plaintiff declare that on the *third* of *March* he was possessed of goods, which came to the defendant's hands, and that afterwards, to wit, on the *first* of *March*, he converted them to his own use, this is cured after verdict; for "that he *afterwards* converted them" is sufficient, and the *scilicet* is void. (c)

As the plaintiff's action must have all the essentials necessary to maintain it, so the defendant's bar must be substantially good; and if the gist of the bar be bad, it cannot be cured by a verdict found for the defendant; but if it be found for the plaintiff, he shall have judgment, either for the badness or falsity of the bar. (d) Thus, before the statute for the amendment of the law, (e) if the defendant had pleaded payment without an acquittance, and it had been found for him, yet he could not have had judg-

(g) *Per Buller, J.* 1 Durnf. & East, 145; and see 7 Durnf. & East, 521. 1 Wms. Saund. 5 Ed. 228, (1).

(hh) Doug. 683.

(ii) *Id.* 679; and see 7 Barn. & Cres. 468. 1 Man. & Ryl. 394, 403, S. C.; but see 3 Bing. 611.

(a) 4 Barn. & Ald. 655; and see 1 Taunt. 128. 4 Barn. & Cres. 345. 6 Dowl. & Ryl. 438. S. C. 4 Barn. & Cres. 555. 7 Dowl. & Ryl. 56. S. C. 6 Barn. & Cres. 154, 164. 10 Moore, 446.

(b) Co. Lit. 303, b. Plowd. 232. 1 Wms. Saund. 5 Ed. 169, 287. Steph. Pl. 417, &c.

(c) Cro. Jac. 428.

(d) Gilb. C. P. 140. 2 Wms. Saund. 5 Ed. 319, c.

(e) 4 Ann. c. 16, § 12.

commencing in covenant and ending in case, and the other entirely in case, to which the defendant pleads, that he "had not broken the covenants," after a general verdict for the plaintiff, judgment will be arrested, and a repleader awarded. *Terrels v. Page*, 3 H. & M. 118. Where a declaration sounds in tort, and the plea is *non assumpsit*, such a plea would be bad on demurrer. If not demurred to, and the case goes to trial, (the issue and verdict following the plea) the defect is so material that it is not cured by verdict under the statute of jeofails. *Garland v. Davis*, 4 How. 131. Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration. *1b.* While a verdict will cure an ambiguity, an entire failure to state a ground of action is not cured by it. *Farwell v. Smith*, 1 Harr. 133. *Needham v. M'Auley*, 13 Verm. 68. *Poindexter v. Turner*, Walker, 349. *Dickerson v. Hays*, 4 Blackf. 44. *Williams v. Hingham Turnpike*, 4 Pick. 341.

ment, because the gist of the plea was bad; since the obligation remained in force, until dissolved *eodem ligamine quo ligatur*: but if it had been found for the plaintiff, he should have had judgment.(f)

When a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto*;(g) and in such case, a writ of inquiry shall issue. The right method, in cases of this nature, is not to state the entry of judgment upon the verdict by rule; but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*.(h) But where in an action for a libel, the *defendant pleaded the general issue, and eight special pleas of [*921] justification; and the jury, at the trial, found a verdict for the plaintiff on the general issue and two of the special pleas, without assessing damages, and for the defendant on the other pleas; and the court on motion to enter up judgment for the plaintiff *non obstante veredicto*, decided that the latter pleas were ill, and awarded a writ of inquiry to assess the damages, and final judgment was entered thereon, in the King's Bench;(aa) the court of Exchequer chamber, we have seen,(bb) on a writ of error, reversed the judgment as to the award of the writ of inquiry, and final judgment thereon, and remitted the record to the court of King's Bench, and directed that court to award a *venire de novo*, to try the general issue, and issue joined on the two special pleas, on which the finding was for the plaintiff; holding the verdict on those issues to be void, because no damages had been assessed.(c)

A verdict cannot help an *immaterial* issue: but an *informal* one is aided by the 32 Hen. VIII. c. 30.(d) An immaterial issue is, when that which is materially alleged by the pleadings is not traversed, but an issue taken on such a point as will not determine the merits of the cause: An informal issue is, where such allegation is not traversed in a proper manner.(e) When the issue is immaterial, the courts will award a *repleader*; respecting which, the following rules were laid down by the court, in the case of *Staple and Haydon*:(f) First, that at common law, a repleader was allowed before trial, because a verdict did not cure an immaterial issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict, by the statute of jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *quod partes replacent*; and the parties must begin again at the first fault, which occasioned the immaterial issue:(g) Thus, if the declaration be ill, and the bar and replication are also ill, the parties must begin *de novo*: but if the

(f) 5 Co. 43. Cro. Eliz. 455. Moore, 692. S. C. Cro. Eliz. 778.

(g) Cro. Eliz. 214. Carth. 370. 1 Salk. 173. S. C. 6 Mod. 1. 2 Ld. Raym. 924. S. C. 1 Str. 394. 2 Str. 873. Barnes, 255. Com. Rep. 548. S. C. Willes, 364. Barnes, 266. S. C. 1 Bur. 301. Cowp. 510. Doug. 749. 2 New Rep. C. P. 225. (a). 4 Taunt. 821. 6 Taunt. 305. 1 Marsh. 614. S. C. 1 Moore, 199. 8 Taunt. 413. 2 Moore, 464. S. C. 3 Moore, 610. 1 Brod. & Bing. 280. S. C. 4 Barn. & Ald. 560. 3 Dowl. & Ryl. 27. 2 Barn. & Cres. 302. 3 Dowl. & Ryl. 556. S. C. 2 Barn. & Cres. 678. 4 Dowl. & Ryl. 230. S. C. 8 Moore, 467. 1 Bing. 403. S. C. McClel. 198. 13 Price, 434. S. C. 4 Barn. & Cres. 138. 6 Dowl. & Ryl. 188. S. C.

(h) Willes, 364. Barnes, 266. S. C.

(aa) 3 Barn. & Ald. 702.

(bb) *Ante*, 574, 5.

(c) 3 Brod. & Bing. 297.

(d) Gilb. C. P. 147.

(e) Cro. Eliz. 327. Carth. 371. 1 Lev. 32. 2 Mod. 137.

(f) 2 Salk. 579; and see 6 Mod. 1. 2 Ld. Raym. 922. 3 Salk. 121, S. C.

(g) 1 Ld. Raym. 169.

bar be good, and the replication ill, at the replication.(h) Fourthly, no costs are allowed on either side.(i) Fifthly, that a repleader cannot be awarded after a default at *nisi prius*. To which may be added, that a repleader can never be awarded after a demurrer, or writ of error, but only after issue joined;(k) nor where the court can give judgment on the whole record:(l) and it is not grantable in favour of the person who made the first fault in pleading.(m)

[*922] *The distinction between a repleader, and a judgment *non obstante veredicto*, seems to be this: that where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*:(a) but where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader:(b) A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case:(cc) a repleader is upon the form and manner of pleading.(dd)[A]

A *venire facias de novo*(ee) is grantable in the following cases: First, when the jury are improperly chosen, or there is any irregularity in returning them,(f) or a challenge is improperly disallowed.(g) Secondly, when they have improperly conducted themselves.(f) Thirdly, when they give general damages, on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective:(h) But the courts will not arrest the judgment in an action for words, in one count, though some of them be not actionable; *secus*, where there are two counts, and none of the words in one are actionable, and there is a general verdict for the plaintiff.(i) Fourthly, a *venire de novo* is grantable, when the verdict, whether general or special,(k) is imperfect, by reason of some uncertainty

(h) 3 Keb. 664.

(i) 2 Vent. 196. 6 Durnf. & East, 131. Barnes, 125. 2 Bos. & Pul. 376.

(k) 3 Salk. 306.

(l) Willes, 532, 3.

(m) 1 Ld. Raym. 170. Doug. 396, 747; and see 2 Wms. Saund. 5 Ed. 319, c.; but see 2 Str. 994.

(a) 1 Salk. 173. 6 Mod. 1. 2 Ld. Raym. 924. S. C. 1 Str. 394. 2 Str. 873. Willes, 364. 1 Bur. 301. Cowp. 510. Doug. 749; and see the other cases referred to, *ante*, 920. (g).

(b) 3 Salk. 305. 1 Ld. Raym. 391. S. C. 2 Str. 847, 994. 1 Bur. 301. 5 Taunt. 386. 1 Marsh. 95, S. C.

(cc) *Raikes v. Townsend & another*, M. 45 Geo. III. K. B. 2 Smith, R. 9. S. C. 3 Taunt. 237.

(dd) See further as to *repleaders*, 1 Chit. Pl. 4 Ed. 567, &c.

(ee) For the difference between a *venire de novo* and a new trial, see 1 Wils. 55.

(f) 2 Durnf. & East, 126, *in notis*.

(g) *Ante*, 854.

(h) R. M. 1654, § 21, K. B. R. M. 1654, § 24, C. P. Barnes, 478. Doug. 377, 8; 722; and see 1 Durnf. & East, 542. 1 H. Blac. 78. 6 Durnf. & East, 691. 7 Moore, 269. 3 Bing. 349, 50. 2 Wms. Saund. 5 Ed. 171, a. *Ante*, 894.

(i) Willes, 443; and see 2 Wms. Saund. 5 Ed. 171, b, c.

(k) 2 Ld. Raym. 1521, 1584. 2 Str. 887. S. C. *Id.* 1124, S. P.

[A] See *Mayor of Colchester v. Brooke*, 7 Queen's Bench, 358.

or ambiguity,(l) or by finding less than the whole matter put in issue,(m) or by not assessing damages.(n) Fifthly, by the statute 6 Geo. IV. c. 50, § 16,(o) if the plaintiff, after issuing jury process, do not proceed to trial at the first assizes; but if the jury be discharged at the assizes, in *order to have a view, there is no need of a *venire de novo*.(a) [*923] A *venire de novo* may be granted by a court of error;(b) or after a demurrer to evidence,(c) or bill of exceptions:(d) But there is said to be no instance of a court of error granting a *venire de novo*, when the proceedings originated in an inferior court.(e) And when a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial.(ff)

The doctrine of *amendments* having been already considered,(gg)[A] I shall next proceed to take a short review of the statutes of *jeofails*, and the decisions thereon, as applicable to different proceedings in the course of the suit. And first, of the *original writ*.

The want of an *original writ*, we have seen,(hh) is aided after verdict, by the 18 Eliz. c. 14: which statute has been extended, by an equitable construction, to the want of a bill upon the file.(ii) This statute also cures the want of form, touching false *Latin*, or variance from the register, or other defaults in form, in any writ original or judicial, &c. By the 21 Jac. I. c. 13, "judgment after verdict shall not be stayed or reversed, by reason of any variance, in form only, between the original writ or bill, and the declaration, plaint or demand." And by the 16 & 17 Car. II. c. 8, § 1, (which *Twisden*, Justice, used to call the *omnipotent act*),(k) "judgment after verdict shall not be stayed or reversed, for want of form, or pledges returned upon the original writ, or because the sheriff's name is not returned thereon, or for want of pledges upon any bill or declaration, &c." Lastly, by the 5 Geo. I. c. 13, (lord *King's act*),(l) "judgment after verdict shall not be stayed or reversed, for any defect or fault, either in form or substance, in

(l) Same cases; and see 2 Ken. 388. 5 Bur. 2669. 7 Durnf. & East, 52. 1 East, 111. 2 Bing. 282. But it seems that if the plaintiff state a defective case upon a special verdict, he is never entitled to a new trial, by a *venire de novo*. 3 Smith R. 39.

(m) Cro. Jac. 31. 2 Ld. Raym. 1521, 2. 4 Barn. & Cres. 69. 6 Dowl. & Ryl. 68, S. C. (n) 2 Str. 1052. 2 Wils. 367, 377. 2 Durnf. & East, 126, *in notis*. 7 Moore, 200. 3 Brod. & Bing. 297, S. C. 2 Wms. Saund. 5 Ed. 210, f, 211. (3.)

(o) And see stat. 7 & 8 W. III. c. 32, § 1.

(a) Com. Rep. 248.

(b) 2 Str. 1051, 1053, 1124. Cowp. 89, 91. Doug. 730. 1 Durnf. & East, 783. 5 Durnf. & East, 367. 2 H. Blac. 211. 2 New Rep. C. P. 328, 9. 3 Barn. & Ald. 642. 5 Barn. & Cres. 188, 195; but see 2 Str. 1055. Cas. temp. Hardw. 345, S. C. 1 Durnf. & East, 151, *semb. contra*.

(c) Sty. Rep. 34, 335. 5 Durnf. & East, 367. 2 H. Blac. 211.

(d) *Darvies v. Lewis*, T. 27 Geo. III. K. B. 2 Durnf. & East, 125, 6. 3 Durnf. & East, 36, 7. 2 New Rep. C. P. 328, 9.

(e) 1 Durnf. & East, 153. 3 Barn. & Ald. 610, S. C. cited; but see 2 Durnf. & East, 125, *contra*.

(ff) 6 Durnf. & East, 131. 1 East, 111. *Ante*, 900, 916, 17.

(gg) *Ante*, Chap. XXIX. p. 696, &c. 712, &c.

(hh) *Ante*, 108; and see 1 Wms. Saund. 5 Ed. 318. (2.)

(i) Hob. 130, 134, 284, 281.

(k) 1 Vent. 100; and see 7 Durnf. & East, 587.

(l) 3 Atk. 601.

any bill, writ original or judicial, or for any variance in such writs, from the declaration or other proceedings."

Secondly, the want of a *warrant* of attorney for either party, or a misnomer therein, *(m)* is aided after verdict, by the 32 Hen. VIII. c. 30, and 18 Eliz. c. 14. And, by the 21 Jac. I. c. 13, "judgment shall not be stayed or reversed, for that the *plaintiff* in ejectment, or other personal action, being under age, appeared by attorney." But if the de-

[*924] *fendant* *being under age, appear by attorney, it is still error: *(a)* Though, if an attorney undertake to appear for an infant defendant, the courts will oblige him to do it in proper manner. *(b)*

Thirdly, mistakes and omissions in the *declaration*, and other subsequent *pleadings*, are oftentimes cured by the statutes of jeofails; which declare, that "judgment after verdict, shall not be stayed or reversed, by reason of any mispleading, lack of colour, insufficient pleading or *jeofail*, or other default or negligence of the parties, their counsellors or attorneys; *(c)* want of form in any count, declaration, plaint, bill, suit or demand: *(d)* lack of averment of any life, so as the person be proved to be alive; *(e)* want of any *profert*, or the omission of *vi et armis* or *contra pacem*, mistaking the christian name or surname of either party, *(f)* sums, day, month or year, in bill, declaration or pleading, being right in any writ, plaint, roll or record proceeding, or in the same roll or record wherein the same is committed, to which the *plaintiff*" (or, more properly, the *defendant*) "might have demurred, and shown the same for cause; want of the averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for not alleging *prout patet per recordum*, or the want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid; or any other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial is altered." *(g)*

Fourthly, the misjoining of the *issue* is aided by the 32 Hen. VIII. c. 30, which also extends to any miscontinuance or discontinuance, or misconveying of process: And a discontinuance is cured by the appearance of the party, in *penal* as well as other actions. *(h)* But the want of a *similiter* was formerly holden not to be aided or amendable: *(i)* And where, in the *similiter*, the defendant's name was put instead of the plaintiff's, the chief-justice dismissed the jury, conceiving that he had no commission to try the issue. *(kk)* But, in a subsequent case, where a similar mistake was made, the court, after trial of the issue, refused to arrest the judgment: *(l)* and at length, the want of a *similiter* was holden to be amendable, upon three grounds; first, that it was merely an omission of the clerk; secondly, that it was implied in the &c. added to the last pleading; and thirdly, that by amending, the court only made that right, which the defendant himself understood to be so, by his going down to trial. *(m)* So where, to a rejoinder concluding with a verification, the plaintiff, instead of taking issue and concluding to the country, added the *similiter*, and took down the record

(m) 6 Moore, 135. 3 Brod. & Bing. 65. 9 Price, 432, S. C.

(a) *Ante*, 99. Barnes, 413.

(c) 31 Hen. VIII. c. 30.

(e) 21 Jac. I. c. 13.

(g) 16 & 17 Car. II. c. 8.

(i) 1 Str. 641. 8 Mod. 376, S. C.

(l) 3 Bur. 1793.

(m) Cowp. 407; and see 1 Str. 551. 2 Wms. Saund. 5 Ed. 319, (6). 1 Stark. Nl. Pri. 400. 9 Moore, 741. 2 Bing. 384, S. C.

(b) 1 Str. 114, 445.

(d) 18 Eliz. c. 14.

(f) 3 Wils. 40.

(h) 6 Durnf. & East, 255.

(kk) 2 Str. 1117.

to trial, and the defendant obtained a verdict, the court would not grant a new trial, but amended the record: ⁽ⁿ⁾ So, where *the [*925] parties had gone down to trial, upon a plea which had not been traversed, the plaintiff, after a verdict in his favour upon the merits, was permitted to amend, by adding a traverse; and the defendant's motion in arrest of judgment was discharged, upon payment of costs by the plaintiff of both motions. ^(a) And, in the King's Bench, a record may be amended, even in a penal action, after verdict for the plaintiff, by inserting a *similiter*, though the objection was taken at the trial. ^(b) But, in the Common Pleas, where the defendant pleaded *six* several pleas, and the plaintiff did not reply to the last, but left it wholly unnoticed in the record, which he was aware of before trial, and a verdict was found for the plaintiff with nominal damages, subject to the award of an arbitrator, who found for the plaintiff on the first and second issues, and for the defendant, on the third, fourth and fifth, without prejudice to the objection on the record; the court held, that the plaintiff could not amend, by adding a traverse and *similiter* to the sixth plea; and that the defendant was not entitled to arrest the judgment, but might bring a writ of error: ^(c) And, in a late case, the omission of a *similiter* was holden to be an irregularity, for which the court set aside the verdict. ^(d)

Fifthly, with respect to the *jury* process, it is provided by the statute 21 Jac. I. c. 13, that "after verdict, judgment shall not be stayed or reversed, by reason that the *venire facias*, *habeas corpora* or *distringas*, is awarded to a wrong officer, upon any insufficient suggestion; or by reason the *visne* is in some part mis-awarded, or sued out of more places, or of fewer places than it ought to be, so as some one place be right named; or by reason that any of the jury which tried the said issue is mis-named, either in the sur-name or addition, in any of the said writs, or in any return upon any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned; or by reason that there is no return upon any of the said writs, so as a panel of the names of the jurors be returned and annexed to the said writ; or for that the sheriff's name, or other officer's name, having the return thereof, is not set to the return of any such writ, so as upon examination it be proved that the said writ was returned by the sheriff or under-sheriff, or any such other officer." And, by the statute 16 & 17 Car. II. c. 8, the want of a right venue is cured after verdict, so as the cause be tried by a jury of the proper county, where the action is laid. The last of these statutes seems to extend, not only to cases where there is a wrong venue in a right county, but also to those where the cause has been improperly tried in a wrong county. ^(ee) But where, in *ejectment* for lands in *Cardiganshire*, the *venire* was awarded out of *Shropshire*, upon a suggestion of its being the next *English* county, the court, after verdict for *the plaintiff, arrested [*926] the judgment on the ground of a mis-trial, *Herefordshire* being the next adjoining *English* county to *South Wales*; although it appeared, that *Shropshire* was in fact nearer to the lands in question, and the

⁽ⁿ⁾ 1 New Rep. C. P. 28.

^(a) 5 Taunt. 164.

^(b) 6 Maule & Sel. 50. 2 Chit. Rep. 25. 1 Stark. Nl. Pri. 400, S. C.

^(c) 2 Moore, 215.

^(d) 6 Moore, 57. 3 Brod. & Bing. 1 S. C.

^(ee) 7 Durnf. & East, 583; and see 1 Ld. Raym. 330. Carth. 448, S. C. Willes, 431. 2 East, 580. 1 Wms. Saund. 248, (3). 2 Wms. Saund. 5 Ed. 5, (3).

cause might have been more conveniently tried there than in *Herefordshire*.(a)

If a *venire* be of the same action, and between the same parties, all other faults are amendable.(b) But these are incurable: and therefore, in *ejectment*, if the *venire* be of a *plea of trespass*, omitting and *ejectment of farm*, it is ill, because not in the same action; but if the *distringas* had been right, the court would have adjudged the *venire* to be null, and the want of it is aided.(c) So, in *scire facias* against an executor, to have execution of a judgment for damages in *trover*, it was moved in arrest of judgment, that the *venire* was in a *plea of debt*, and a new *venire* was awarded.(d) The statute 21 *Jac. I.* only extends to the *surnames* and additions of the jurors; and therefore, if there be a mistake in the *christian* name, it is incurable.(e) But the court of Common Pleas refused to set aside a verdict, and grant a new trial, because one of the jurors was named *Henry* in the *venire*, *habeas corpora*, and *postea*, his real christian name being *Harry*.(f) And where the son of a jurymen summoned and returned, had answered to his father's name, when called on the panel, and served, without objection, as one of the jury on the trial of the cause; the court of King's Bench, after consulting with the other judges, held that this was not of itself a sufficient ground for setting aside the verdict, as for a mis-trial.(g) But where a person not summoned to serve on a jury, answered to the name of a person who was, and served in his room, the objection having been made before the verdict was taken, the court of Common Pleas awarded a *venire de novo*.(h) So where, on the trial of an indictment for perjury, it being necessary to swear *tales-men* from the common jury panel, to serve on the jury, and one J. W. being called, his son, R. H. W., at the request of his father, and without collusion with the prosecutor or defendant, appeared for him, and was sworn and served on the jury, he not being of age, nor having a qualification by estate, nor being on any panel; the court held, that there was a mis-trial, and that a rule obtained for a new trial must be made absolute.(i) It is necessary, by the above statute, that there should be a panel returned: therefore, if the sheriff return but twenty three on the *venire*, and twenty-four on the *distringas* or *habeas corpora*, and the twenty-fourth, omitted on the *venire*, appear and be sworn, the verdict will be void.(k) But if twelve of the twenty-three be sworn, and not [*927] the twenty-fourth, it is *aided by the 18 Eliz. So, where there were but twenty-four returned upon the panel annexed to the *venire facias*, and there were forty eight on the *habeas corpora*, upon which the defendant made no defence, the court of Common Pleas, upon motion, set aside the verdict without costs; saying, that the 21 *Jac. I.* means only the formal words upon the writ, for there must be a panel annexed to the return.(a) Where, in a *distringas*, the day of *nisi prius* is made subsequent to the day in bank, it is not amendable.(b)

(a) 2 Maule & Sel. 270.

(b) Gilb. C. P. 174.

(c) *Id.* 175. Bul. Ni. Pri. 320; but see Cro. Car. 275, 278, where a similar mistake in the *jurata* was amended, the *venire* and *distringas* being right.

(d) Cro. Jac. 528. Bul. Ni. Pri. 320.

(e) 5 Co. 42. Cro. Car. 202. Gilb. C. P. 177.

(f) Willes, 488. Barnes, 454, S. C.; but see Willes, 492, 3.

(g) 12 East, 229; but see Willes, 484. Barnes, 453, S. C. *contra*.

(h) 6 Taunt. 460. 2 Marsh. 154, S. C.

(i) 5 Barn. & Cres. 254. 7 Dowl. & Ryl. 684, S. C.

(k) Cro. Car. 278. Gilb. C. P. 173.

(a) *Brown & Johnson*, T. 11 Geo. II. C. P. Bul. Ni. Pri. 324.

(b) 1 Salk. 48, 51. *Ante*, 711, 12.

The statutes of jeofails are extended, by the statute for the amendment of the law,(c) to judgments entered upon confession, *nihil dicit*, or *non sum informatus*,(d) in any court of record; and it is thereby enacted, that "no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of *jeofails* in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to law:" And, by a subsequent act,(e) this and all the statutes of jeofails are extended to writs of *mandamus*, and informations in nature of a *quo warranto*. But pleadings on writs of *extent* are not considered as proceedings for the recovery of the king's debts, within the meaning of the statute 4 Ann. c. 16, § 24.(f) A motion in arrest of judgment, after judgment by default, is to be considered exactly the same as if the question had arisen on a general demurrer:(g) and on demurrer, we may remember, that by the statute 4 Ann. c. 16, the court are required to give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defects, as are particularly mentioned in the act, or any other matter of like nature, except the same shall be specially set down and shown for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen *Elizabeth*, so as sufficient matter appear in the pleadings, upon which the court may give judgment, according to the very right of the cause.(h) As there cannot, however, be the same intendment, in support of a judgment by default, as after a verdict, it has been holden, that the statutes of jeofails do not protect judgments by default against objections that are cured by a verdict at common law, but such only as are remedied after a verdict by the statutes.(i)

The statute 32 Hen. VIII. c. 30, is confined to actions at common law; and in all the subsequent statutes of jeofails, there is a *proviso*, that *they shall not extend to *criminal* proceedings; nor to any [*928] writ, bill, action, or information upon any *popular* or *penal* statute, other than such as concern the customs, and subsidies of tonnage and poundage.(aa) It has, however, been determined, that the statute 32 Hen. VIII. c. 30, extends to *penal* actions.(bb) And, by the statute 4 Geo. II. c. 26, which reduces the forms of legal proceedings into the *English* language, "all and every statute and statutes for the reformation and amending of the delays arising from any *jeofails*, shall and may extend to all and every form and forms, and to all proceedings in courts of justice, (except in *criminal* cases,) when the forms and proceedings are in *English*; and all errors and mistakes are amendable and remedied thereby, in like manner as if the proceedings had been in *Latin*." And though, by the 16 & 17 Car. II. c. 8, the several omissions, variances and defects therein mentioned, are required to be *amended* by the judges of the court where the judgment is given, or the record removed by writ of error, yet an actual

(c) 4 Ann. c. 16, § 2.

(d) But this statute does not seem to apply to judgments on *nul tiel record*.

(e) 9 Ann. c. 20, § 7.

(f) 5 Price, 621.

(g) 2 Bur. 899.

(h) *Ante*, 695; and see 10 East, 359.

(i) 2 Str. 933; and see 1 Wms. Saund. 5 Ed. 228, (1). 13 East, 407.

(aa) 16 & 17 Car. II. c. 8; and see 1 Wils. 127. Cowp. 392.

(bb) 3 Lev. 375. 1 Str. 136. 2 Str. 1227. Doug. 115. *Ante*, 712.

amendment is never made on this statute; but the benefit of the act is attained by the court's overlooking the exception.(c)

The motion in arrest of judgment, or for judgment *non obstante veredicto*, &c., may be made in the King's Bench, at any time before judgment is given;(d) though a new trial has been previously moved for.(e) But it is against the ancient course of the court, to make a rule to stay judgment, unless the *postea* be brought in: and therefore it is said, that if one move in arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is to give a rule upon the *postea*, for bringing it into court, and that is notice of itself.(f)

In the Common Pleas, the motion in arrest of judgment must be made before or on the appearance day of the return of the *habeas corpora juratorum*:(g) and it cannot be made, without notice, on the last day of term.(h) On moving in arrest of judgment after verdict, the roll should be brought into court, if it be entered on record; if not, (the record of *nisi prius* should be produced by the associate:)(i) If the motion be made on an inquisition, and the same be not taken from the sheriff, he should have notice to produce it in court, in order to move for the rule; or if the plaintiff's attorney has it, notice should be given him to produce it: and in either case, an affidavit should be made of the service of notice.(k) The rule, if granted, is drawn up by the secondaries; and stays the entry of final judgment upon the verdict or inquisition, until the court be moved on behalf of the plaintiff, and shall otherwise order:(l) and if the plaintiff mean to discharge the rule, notice of motion must be given to the de-
[*929] fendant's attorney,(a) and an affidavit made of the service of such notice.(b) If judgment be arrested, a rule is drawn up by the defendant's attorney, and a copy of it served on the plaintiff's; or if the rule for arresting the judgment be discharged, the plaintiff's attorney draws up the rule for discharging it, and proceeds in the usual way, to tax his costs on the *postea* or inquisition.(b) In the Exchequer, the motion in arrest of judgment must, it seems, be made within the first *four* days of the next term after the trial; and it cannot be made after an unsuccessful motion for a new trial.(cc)

[*980]

*CHAPTER XXXIX.

Of JUDGMENTS.

ON the expiration of the rule for judgment in the King's Bench, or time limited for that purpose in the Common Pleas,(a) if there be no previous

(c) 2 Str. 1011. Cas. temp. Hardw. 314, 15.

(d) 2 Str. 845. 2 Ken. 467. *Rex v. Keene & others*, H. 26 Geo. III. K. B. 5 Durnf. & East, 445. And for the form of the rule, see Append. Chap. XXXVIII. § 4.

(e) Doug. 745, 6.

(f) 1 Salk. 78. 6 Mod. 24, S. C.; and see 5 Durnf. & East, 454, 5. 8 East, 28, K. B. 2 Wils. 380, C. P.

(g) Barnes, 445.

(h) *Id.* 247. Cas. Pr. C. P. 106, S. C.

(i) Imp. C. P. 7 Ed. 390.

(k) *Id.* 390, 91.

(l) Append. Chap. XXXVIII. § 5.

(a) Append. Chap. XXXVIII. § 6.

(b) Imp. C. P. 7 Ed. 390.

(cc) 7 Price, 566; but see Man. Ex. Pr. 353.

(a) *Ante*, 903, 4.

motion for a new trial, or in arrest of judgment, &c. the prevailing party may proceed to tax his costs, and sign final judgment. Costs are taxed by the master in the King's Bench, or prothonotaries in the Common Pleas, as will be more fully shown in the next Chapter: and final judgment is signed by the master or prothonotaries, (b) on a sheet of paper called a final judgment paper, containing an *incipitur* of the pleadings. Taxing costs and signing final judgment are considered, in the King's Bench, as contemporaneous acts: and therefore the attendance of the defendant's attorney before the master, on taxing costs, is holden to be an admission that the judgment was properly signed; and it cannot afterwards be objected to, as having been signed too soon. (c)

Judgment is the conclusion of law, upon facts found or admitted by the parties, or upon their default, in the course of the suit. And, except when the court are equally divided in opinion, it is either for the plaintiff, or defendant: for the former, by *confession*, (d) *non sum informatus*, (e) or *nihil dicit*, (f) for the latter, on a *non pros*, (g) discontinuance, (h) *nolle prosequi*, (i) *stet processus*, *cassetur billa vel breve*, (k) *retraxit*, nonsuit, (l) or as in case of a nonsuit; (m) and for either party, upon demurrer, (n) *nul tiel record*, (o) or verdict. (p) When the court are equally divided in opinion, no judgment can regularly be entered: (q) but in a case where that occurred, (r) one of the judges declined giving his judgment, in order to give the plaintiff an opportunity, if he should be so disposed, to carry the matter further; it being understood, that if he should not be disposed to do so, no judgment was to be entered. The present chapter will be *principally confined to the judgment on an issue in *fact* [*931] found by verdict; the other species of judgments having been already treated of.

In *assumpsit*, *covenant*, *case*, *replevin*, (aa) and *trespas*, the judgment for the plaintiff is, that he recover his damages and costs against the defendant; to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis*. (b) In *debt*, the judgment for the plaintiff is, that he recover his debt, together with his damages and costs: to be levied, when the plaintiff is entitled to costs in an action against an executor or administrator, of the goods of the testator, or intestate, if, &c. and if not, then the damages and costs to be levied *de bonis propriis*. (c) In *annuity*, the judgment is for the plaintiff to recover the annuity, and arrearages of the same, as well

(b) R. M. 6 Geo. II. reg. 4, C. P.; and see R. T. 29 Car. II. reg. 5 C. P.

(c) *Per Cur. E.* 45 Geo. III. K. B.; and see 5 Taunt. 672. 1 Marsh. 278. S. C. 8 Moore, 104. 1 Bing. 233, S. C. C. P.

(d) Append. Chap. XXII. § 5, &c.

(e) *Id.* § 25, &c.

(f) *Id.* § 34, &c. 71, &c. 88, 9.

(g) *Id.* Chap. XVII. § 25, &c. Chap. XXVIII. § 5, 6. Chap. XXX. § 43, 4.

(h) Append. Chap. XXVIII. § 9, 10.

(i) *Id.* § 11, 12, 13.

(k) *Id.* Chap. XXVI. § 7.

(l) *Id.* Chap. XXXIX. § 26, &c.

(m) *Id.* Chap. XXXIII. § 22.

(n) *Id.* Chap. XXXI. § 2, &c.

(o) *Id.* Chap. XXXII. § 19, &c.

(p) *Id.* Chap. XXXIX. § 1, &c.

(q) 1 Salk. 17. 1 Str. 37. 1 Camp. 468.

(r) *Deane v. Clayton*, 7 Taunt. 489. 1 Moore, 203, S. C.

(aa) Append. Chap. XIV. § 61.

(b) 4 Durnf. & East, 648. 7 Durnf. & East, 359. Append. Chap. XXII. § 9, 46. Chap. XXXIX. § 17.

(c) Append. Chap. XXII. § 20. Chap. XXXIX. § 17.

before the bringing of the action as afterwards, up to the time when judgment is given.(d) In *detinue*, it is for the plaintiff to recover the goods, or their value, with damages and costs.(e) In *replevin*, the judgment for the defendant, at common law, is to have a return of the goods;(f) to which damages are superadded, by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3;(g) or, upon the statute 17 Car. II. c. 7, to recover the arrearages of rent, or value of the goods, and costs:(h) and, in other actions, the judgment for the defendant upon a *non pros*, nonsuit or verdict, is to recover his costs only.(i)

After final judgment signed, execution may be immediately taken out against the defendant's person or goods; but in order to charge him in execution, or bind his lands, or to proceed against him by action of *debt* or *scire facias* on the judgment, or against his bail on their recognizance, or if a writ of error be brought, it is necessary that the judgment should be entered of record and docketed, and the judgment roll carried to and filed in the treasury of the court. And it seems, that any person who is interested in a judgment, may compel the plaintiff to enter it up.(k)

The judgment after verdict, &c. is entered on the *issue roll*,(l) which from thenceforth is called the *judgment roll*; and in the King's Bench, if the roll has been already carried in, which seldom happens but where the plaintiff has been ruled to enter the issue, the *postea* is taken, with the master's *allocatur*, to the treasury at *Westminster*, and the clerk of the treasury continues the proceedings, and enters the judgment. But if, as is more frequently the case, an *incipitur* only is made on the issue roll, at the time of passing the record of *nisi prius*, the whole proceedings [*932] are to *be entered, beginning with the warrants of attorney.(a)

The proceedings in this court are continued on the issue roll, after the award of the *venire facias*, by the following entry: *Afterwards, the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before the lord the king at Westminster, or (by original,) wheresoever, &c. until [the return of the distringas,] unless, &c. [as in the jurata,] according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear: At which day, before the said lord the king at Westminster, comes the said (plaintiff,) by his said attorney: and the said chief justice, [or justices of assize,] before whom the said issue was tried, sent hither his [or their] record had in these words, to wit: [then follows a copy of the postea, from the nisi prius record, and afterwards the final judgment.](b) In the Common Pleas, the entry is as follows:(c) At which day, the jury between the parties aforesaid, of the plea aforesaid, was thereupon put in respite between them, until this day, to wit, [the return of the habeas corpora juratorum,] then next following, unless, &c. [as in the jurata.] And now here at this day, comes the said (plaintiff,) by his attorney aforesaid; and the said chief justice, [or jus-*

(d) Co. Ent. 50. Cro. Car. 436. *Ante*, 879.

(e) *Ante*, 886, 7. Append. Chap. XXII § 89. Chap. XXXIX. § 21.

(f) *Ante*, 887. Append. Chap. XLV. § 55, 70, 71, 85, 6.

(g) *Ante*, 887.

(h) *Ante*, 888. Append. Chap. XLV. § 57, 72, 88.

(i) *Id.* Chap. XVII. § 25, &c.

(k) 2 New Rep. C. P. 474; and see 9 Price, 592.

(l) *Ante*, 729, 733, 4.

(a) *Ante*, 734.

(b) Append. Chap. XXXIX. § 1, &c., and see 2 Wms. Saund. 5 Ed. 253, (8).

(c) Lil. Ent. 379.

tices of assize,] before whom, &c. sent hither his [or their] record, &c. [as in the King's Bench.] And in the Common Pleas, we have seen, the *postea* is left with the clerk of the judgments, who enters it on the roll. (d) In a county palatine, an entry is made on the roll of the record being sent, with the *postea* indorsed upon it, by the justices before whom the cause was tried, on a day prefixed to the parties to be in court, to hear judgment. (e)

At common law, the death of a *sole* plaintiff or defendant, before final judgment, would have abated the suit: but as the judgment relates to the first day of term, if the party be alive after that day, it may be entered, and costs taxed thereon, after his death. (f) [A] And if either party had died in vacation, after the plaintiff was entitled to enter judgment on a warrant of attorney, (g) or on a verdict at a sitting in term, (h) &c. judgment might have been entered that vacation, as of the preceding term, and it would have been a good judgment at common law as of the preceding term; though it be not so, upon the statute of frauds, in respect of purchasers, but from the *signing*. And if either party die after a special verdict, or special case, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law, after his death, as of the term in which the *postea* was returnable; or judgment would otherwise have been given, *nunc pro tunc*; (i) that the delay arising from the act of the

(d) *Ante*, 901.

(e) Append. Chap. XXXIX. § 7, &c.

(f) 1 Ken. 378.

(g) 1 Ld. Raym. 695. 1 Salk. 87. 3 Salk. 116. 2 Ld. Raym. 766, 849. 7 Mod. 2, 93. S. C. 3 Salk. 159. 1 Salk. 401. 7 Mod. 39. S. C. 3 P. Wms. 399. Willes, 427. 6 Durnf. & East, 368. 7 Durnf. & East, 20.

(h) 1 Salk. 401. 6 Mod. 191. 2 Ld. Raym. 869. Barnes, 266.

(i) 1 Leon. 187. Latch, 92. 1 Sid. 462. 1 Vent. 58, 90, S. C. 10 Mod. 30, 325. 1 Str.

[A] If the plaintiff in trespass *quare clausum fregit*, die after verdict in his favour and before judgment, the court will enter judgment as of the term in which the verdict was returned. *Goddard v. Bolster*, 6 Greenl. 427. *Collins v. Prentice*, 15 Conn. 423. *Spaulding v. Congdon*, 18 Wend. 543. *Griffith v. Ogle*, 1 Binn. 172. Or where a co-plaintiff dies after judgment, his survivor may have execution by suggesting his death on the record. But if the survivor is a *feme* who afterwards marries, a *scire facias* must issue. *Berryhill v. Wells*, 5 Binn. 56. After the death of a party has been suggested, a judgment against him is clearly erroneous. *Whittenburgh v. Whittenburgh*, 1 Mis. 226. It has been held in New Jersey, after verdict for the plaintiff and *postea* returned, and pending a rule to show cause why a new trial should not be granted but before argument, the defendant dies, judgment may be entered for the plaintiff, *nunc pro tunc*. *Den v. Tomlin*, 3 Harr. 14. The verdict, however, must have been actually rendered, as it has been held in Arkansas, that if a defendant dies before verdict is actually rendered, the judgment cannot be recorded against him *nunc pro tunc*. *Jennings v. Ashley*, 5 Pike, 128. Where, after a continuance for advisement by the court, the defendant died, judgment was rendered as of the former term. *Perry v. Wilson*, 7 Mass. 293. Where a supposed trustee answered in an unsatisfactory manner, and a further examination was ordered before a justice of the peace, to which he refused to submit, and before the ensuing term the defendant, who had been defaulted, and the trustee, both died, the court entered judgment and gave execution as of the former term, against the trustee. *Patterson v. Buckminster*, 14 Mass. 144. And where after a verdict was found (for the plaintiff) in an action, certain questions of law were reserved, but upon a hearing judgment was rendered on the verdict. In the mean time the plaintiff had died; but the fact being unknown to his counsel, the execution was issued in his favour. The court, upon the execution being returned, unexecuted and cancelled, vacated the judgment, and permitted the administrator to come in and prosecute the action, it appearing that the rights of third persons would not be affected thereby. *Stickney v. Davis*, 17 Pick. 169. The confession of a judgment by a defendant, after the death of the plaintiff and before the substitution of his representatives, is void as to such representatives, and any persons who may be collaterally interested in the payment of the same. *Finney v. Ferguson*, 3 Watts & Serg. 413.

[*933] court, may not turn to the prejudice of the party. *So, in actions against executors or administrators, if the application be made in a reasonable time, the courts will give the plaintiff leave to enter up judgment as of a preceding term, when it was signed, *nunc pro tunc*.(a) The granting of such leave however, is in all cases discretionary in the courts; and being a matter of indulgence, they have sometimes refused to allow it, after a considerable lapse of time, where the delay has been owing to the plaintiff or his attorney.(bb) And in granting this indulgence, the courts will take care that it shall not operate to the prejudice of the defendant; by making the plaintiff undertake not to disturb intermediate payments made by the defendant,(cc) or impeach judgments obtained in the interval.(d) In an action of *debt* on judgment, the court of King's Bench would not give leave to enter up the judgment *nunc pro tunc*, where the proceedings were stayed pending a writ of error, and the plaintiff died before the affirmance of the judgment.(e) So, if the plaintiff die after a verdict for the defendant, and the latter do not enter up judgment within *two* terms after the verdict, pursuant to the statute 17 Car. II. c. 8, § 1, the court have no authority to permit it to be entered up afterwards, *nunc pro tunc*.(f) And in general it should seem, that if there be a rule for judgment, and it be not entered for many years, the court will not suffer it to be entered, without examining how it came not to be entered before.(g)

When either party dies *between verdict and judgment*, it is enacted by the statute 17 Car. II. c. 8, that "his death shall not be alleged for error, so as the judgment be entered within *two* terms after the verdict." This statute does not seem to extend to *nonsuits*: And in the construction of it after *verdict*, it has been holden, that the death of either party before the assizes is not remedied; but if the party die after the assizes begin, though before the trial, that is within the remedy of the statute; for the assizes are considered but as one day in law, and this is a remedial act, which shall be construed favourably.(h) But a verdict and judgment for the plaintiff were set aside by the court of Common Pleas, where the defendant died on the night before the trial of a cause at the sittings in term.(i) So, if a verdict be taken for the plaintiff, subject to a reference, and one of the parties die before any award is made, the arbitrator, we have seen,(k) cannot afterwards proceed to make an award; the death of the party operating as a revocation of his authority. The judgment upon this statute is entered by or against the party, as though

[*934] he *were alive;(a) and it should be entered, or at least signed,(b) within *two* terms after the verdict: but there must be a *scire facias* to revive it, before execution.(c)

427. 2 Str. 917. 1 Ken. 253. 1 Bur. 147, 226. 4 Bur. 2277. 1 East, 409. Barnes, 255, 261. 1 Taunt. 385.

(a) 6 Durnf. & East, 6. *Baker v. Baker*, executrix, H. 35 Geo. III. K. B. *Lloyd v. Howell*, administratrix, H. 37 Geo. III. K. B.

(bb) 1 Str. 639. Barnes, 262; and see 6 Mod. 191.

(cc) 6 Durnf. & East, 11; and see 2 Ken. 442.

(d) *Lloyd v. Howell*, administratrix, H. 37 Geo. III. K. B.; and see 4 Taunt. 702. 1 Younge & J. 368.

(e) 1 Durnf. & East, 637.

(f) 4 Taunt. 702; and see 1 Younge & J. 368.

(g) 6 Mod. 59.

(h) 1 Salk. 8; and see 2 Ld. Raym. 1415, *in notis*. 7 Durnf. & East, 31.

(i) 3 Bos. & Pul. 549.

(k) *Ante*, 822, 3; 838.

(a) 1 Salk. 42, 401.

(b) 1 Sid. 385. Barnes, 261.

(c) 1 Wils. 202.

By a subsequent statute(*dd*) it is enacted, that "in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die *after interlocutory and before final judgment*, the action shall not abate by reason thereof, if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them." By the same statute,(*ee*) "if there be *two or more plaintiffs or defendants*, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants."(*ff*) But where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action; the court held, that it thereby abated: and the defendant, we have seen,(*g*) could not afterwards have judgment as in case of a nonsuit.(*h*) If the plaintiff become *bankrupt* after interlocutory judgment, his assignees may proceed to final judgment(*i*) and execution,(*k*) in the bankrupt's name, without a *scire facias*. So where the plaintiff, after verdict, was discharged under an insolvent act, the court of King's Bench held that the assignee might make use of his name, in entering up judgment, and taking out execution.(*l*) And, by the statute 6 Geo. IV. c. 16, § 67, "whenever an assignee of a bankrupt shall die, or a new assignee or assignees shall be chosen as therein mentioned, no action at law or suit in equity shall be thereby abated; but the court in which any action or suit is depending may, upon the suggestion of such death, or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." And there is a similar *pro- [*935] vision in the last general insolvent act,(*a*) in case of the death or removal of assignees of insolvent debtors.

The judgment, by general intendment of law, has relation to the first day of the term whereof it is entered,(*b*) unless any thing appear on the

(*dd*) 8 & 9 W. III. c. 11, § 6.

(*ee*) § 7.

(*ff*) Append. Chap. XXII. § 45. Chap. XXX. § 21, 23, &c. 54. Chap. XXXIX. § 13.

(*g*) *Ante*, 763.

(*h*) 6 Barn. & Cres. 253.

(*i*) 2 Wils. 358, 372, 378.

(*k*) 3 Durnf. & East, 437. But note, there was a *scire facias* after judgment to warrant execution, in the cases of *Bibbins & others v. Mantle*, 2 Wils. 372, 378; and *Winter & others v. Kretzman*, 2 Durnf. & East, 45; and see 1 Mod. 93. 1 Vent. 193, S. C. 5 Mod. 88. 1 Durnf. & East, 463.

(*l*) *Abbis v. Barnard*, M. 35 Geo. III. K. B.

(*a*) 7 Geo. IV. c. 57, § 26.

(*b*) Cro. Car. 102. 3 Salk. 212. 1 Wils. 39. 1 Ken. 378. 7 Durnf. & East, 21. 4 Moore, 430. 2 Brod. & Bing. 53, 4, S. C. In actions by *original*, the judgment seems to relate to the *assoin* day; in actions by *bill*, to the first day in full term. 2 Wms. Saund. 5 Ed. 148, *d. Per Buller, J.*, in *Richards v. Hinton*, E. 22 Geo. III. K. B. *Petrie v. Lord Porchester*, H. E. & T. 23 Geo. III. K. B. 2 Durnf. & East, 576. 1 Sel. Pr. 2 Ed. 7; and see 7 Durnf. & East, 20.

record, showing that it cannot have that relation; (c) and as against the defendant and his heirs, it binds a moiety of all the *freehold* lands and tenements, (d) which he or any person or persons in *trust* for him, (e) was or were seized of, at or after the time to which the judgment relates: And a court of equity will not oblige a judgment creditor to wait, till he is paid out of the rents; but will accelerate the payment, by directing a sale of the moiety. (f.) But *copyhold* lands are not bound by the judgment. (gg) When there is a *term* attendant on the inheritance, a judgment is a lien on the inheritance, and consequently affects the term; (hh) but generally speaking, a judgment does not bind *leasehold* property, which is affected only by the writ of execution; (ii) and as against purchasers, by the delivery of it to the sheriff. (kk)

As to *freehold* lands, they are bound at common law, from the time of the judgment, so that execution may be had of these, though the party aliene *bond fide* before execution sued out. (l.) Therefore, if a man has judgment for debt, and the debtor, before execution sued, aliene by fine, and *five* years pass, yet the plaintiff may still sue out execution. (m) But if one article to buy an estate, and pay the purchase money, and afterwards a judgment is recovered against the vendor by a third person, who had no notice, yet this judgment shall not in equity affect the estate; because from the time of the articles, and payment of the money, the vendor was only a trustee for the purchaser. (n) In such case however it must be understood, that the consideration paid is somewhat adequate to the thing purchased; for if the money be but a small sum, in respect of the value of the land, this shall not prevail over a mesne judgment creditor: (o) and a mortgagee for a valuable consideration, and without notice, shall take place of the intended purchaser; for in this case, the money is lent upon the title and credit of the estate, and attaches upon the land; but it is not so in the case of a judgment creditor, who (for aught that appears,) [*936] *might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is only a general security, not a specific lien upon the land. (a)

If A. and B. recover several judgments against C. of *different* terms, and A. sue out an *elegit*, and have a moiety of C.'s lands delivered to him, and then B. sue out an *elegit*, the sheriff it seems can only extend a moiety of the remaining lands. (b) But if A. have two judgments against C. of the *same* term, and take out two *elegits*, on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter, to a moiety of the moiety; for in judgment of law, the whole term is but as one day. (cc) On lending money therefore, if the lender take two several bonds and warrants of attorney, one for a part, the other for the

(c) 3 Bur. 1596; and see 3 Barn. & Cres. 317. 5 Dowl. & Ry. 175, S. C.

(d) Stat. Westm. 2, (13 Edw. I.) c. 18. And bringing *debt* on a judgment is no waiver of the lien created by it. 1 Salk. 80.

(e) Stat. 29 Car. II. c. 3, § 10.

(f) 2 Atk. 610. Ambl. 17, S. C.

(gg) 1 Rol. Abr. 888. 5 Blac. Com. 419.

(hh) 2 Vern. 525.

(ii) Godb. 161. 8 Co. 171. 2 Nels. Abr. 783.

(kk) Stat. 29 Car. II. c. 3, § 16. 3 Atk. 739; and see 1 Ves. 195. Sugd. V. & P. 7 Ed. 479, 483, 678, &c.

(l) 2 Wms. Saund. 5 Ed. 8, k.

(m) 1 Chan. Cas. 268. 1 Mod. 217.

(n) 1 P. Wms. 278. 10 Mod. 468. 2 Eq. Cas. Abr. 683.

(o) 1 P. Wms. 282.

(a) 1 P. Wms. 279.

(b) Cro. Eliz. 483. Hardr. 23, 27. 2 Blac. Abr. 350. Gilb. Exec. 55, 6; and see Patch. on Mortgages, 293, 4.

(cc) Hardr. 23.

residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands upon them.(d)

By the statute 21 Jac. 1, c. 19, § 9, "creditors having security by judgment, &c. whereof there is no execution or extent served and executed upon any of the lands, &c. of the bankrupt, before such time as he shall become bankrupt, shall not be relieved upon any such judgment, &c. for any more than a rateable part of their just and due debts, with the other creditors of the bankrupt."(e) And therefore, where A. a trader, seised of lands in fee, gives a judgment to B. and then, in consideration of 5000*l.* paid down, 650*l.* to be paid at *Christmas*, articles to sell the lands to C. and let him into possession at *Michaelmas*, and afterwards becomes bankrupt, the judgment not being served and executed, and the 650*l.* remaining unpaid; B. shall only come in *pro rata* with the rest of the creditors: the words of the statute 21 Jac. 1, c. 19, § 9, being full and plain, that all the creditors of a bankrupt, unless there is a mortgage, shall be equally paid.(f) But if A. a trader, confess judgment to B. and then sell and convey the land, for a valuable consideration, to C. and afterwards become bankrupt, it seems that the judgment creditor shall extend the land in the hands of C. who bought prior to the bankruptcy, this not prejudicing the other creditors.

On a judgment against A. upon his own bond, a moiety only of his freehold property can be taken, in the hands of his heir.(g) But if a judgment be obtained against an heir, on the obligation of his ancestor, the plaintiff was at common law entitled to execution out of the whole of the property which he had by descent, at the time of issuing the original writ,(h) or filing the bill.(i) And by the statute 3 W. & M. c. 14, § 5, *in all cases where any heir at law shall be liable to pay the debt [*937] of his ancestor, in regard of any lands, tenements or hereditaments descending to him, and shall sell, aliene or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, in an action or actions of *debt*, to the value of the said land, so by him sold, aliened or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators: and such execution shall be taken out, upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts: saving that the lands, tenements, and hereditaments, *bona fide* aliened before the action brought, shall not be liable to such execution." A bond therefore, is in some cases a preferable security to a judgment.

And, for more effectually securing the payment of the debts of *traders*, it is enacted by the statute 47 Geo. III. sess. 2, c. 74, that "when any person, being at the time of his death a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with, or devised subject to or for the payment of his debts, and which before the passing of this act would have been assets for the payment of his debts due on any specialty

(d) Gilb. Exec. 55, 6; and see 16 Ves. 427. Patch, 293, 4.

(e) And see stat. 6 Geo. IV. c. 16, § 108. *Ante*, 570.

(f) 1 P. Wms. 737, 739.

(g) Dyer, 271, a. Carth. 107. 3 Bac. Abr. 25.

(h) Plowd. 441. Co. Lit. 162, a, b. 3 Co. 12, a. 2 Atk. 609, 10. Ambl. 16, 17, S. C.

(i) Carth. 245; and see 2 Wms. Saund. 5 Ed. 7, (4).

in which the heirs were bound, the same shall be assets, to be administered in courts of equity, for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees, of such debtor shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this act liable to, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by courts of equity, under and by the virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands."

The judgment against an heir, on the bond of his ancestor, is *general* or *special*.(a) In *debt* against an heir, who pleaded *riens per descent*, or any other plea which was false within his own knowledge, and found against him, the judgment at common law was general, to recover the debt; and not special, to be levied of the lands descended.(b) So, if judgment be given against an heir by *nihil dicit*,(c) or *non sum informatus*,(d) or by *confession*, without showing in certain what assets he has by descent, [*938] cent,(e) *the judgment is general: And if the profits of the lands descended, from the death of the ancestor to the time of bringing the action, are sufficient to satisfy the demand, and the plaintiff will show it to the court, in an action of *debt* against an heir, and the defendant cannot deny it, the plaintiff shall have a general judgment, and execution presently.(a) But in an action of *debt* against an heir, if he acknowledge the action, and show the certainty of the assets which he has by descent, the judgment shall be special, to recover the debt, to be levied of the lands descended:(b) And if the defendant plead *non est factum*, or any other plea which is not false within his own knowledge, there shall be a like judgment.(cc)

By the statute 3 W. & M. c. 14, § 6, "where any action of debt upon specialty is brought against an heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him; and the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestor, before the original writ brought, or bill filed; and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements or hereditaments so descended, and thereupon judgment shall be given, and execution awarded, as therein directed; but if judgment be given against such heir, by confession of the action, without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, tenements or hereditaments so descended." By this statute, the form of the judgment at common law is altered, on a plea of *riens per descent*, when a verdict is found for the plaintiff, on a replication that the de-

(a) 2 Rol. Abr. 70, 71; and see Vin. Abr. tit. *Heir*, C. Bac. Abr. tit. *Heir and Ancestor*, H. 2 Wms. Saund. 5 Ed. 7, (4).

(b) Dyer, 149, a. Bro. Abr. tit. *Assets per descent*, 3.

(c) Dyer, 344, a, b. Plowd. 440. Cro. Eliz. 692.

(d) Dyer, 344, a, b. Plowd. 440.

(e) Dyer, 344, b.

(cc) Cro. Car. 436, 7.

(e) *Id. ibid.*; but see Dyer, 149, a.

(b) 2 Rol. Abr. 70. Dyer, 149, a, 373, b.

fendant had assets: *(dd)* And the judgment against a devisee upon this statute, is the same as against an heir. *(ee)*

The relation of judgments at common law, to the first day of the term, is taken away, as against *purchasers*, by the statute of frauds and perjuries; *(f)* by which it is enacted, that "the judge or officer who shall sign any judgments, shall at the signing of the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record, which he shall sign; which day of the month and year shall be also entered, upon the margin of the roll of the record where the said judgment shall be entered: *(g)* And such judgments, as against *purchasers bonâ fide*, for valuable considerations, of lands, tenements or hereditaments to be charged thereby, shall in consideration of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail." This statute is confined to *purchasers*; and does not apply, as between the parties to the **suit*. Therefore, if the defendant die in vaca- [*939] tion, judgment may still be entered after his death, as of the preceding term, when he was living; and it will be a good judgment at common law, as of that term; *(a)* but then, the roll ought to be brought in and filed before the essoin day of the subsequent term: *(b)* And it seems, that if judgment be signed in term time, and in the subsequent vacation the defendant sell lands, and before the essoin day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser. *(c)*

The operation of judgments upon purchasers and mortgagees, is still further limited and restrained by the 4 & 5 W. & M. c. 20, § 3, by which it is enacted, that "no judgment not docketed and entered in the books kept for that purpose, according to that act, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestors', testators', or intestates' effects." By this statute, a debt on judgment against a testator or intestate, not docketed according to the direction of the statute, is put on a level with simple contract debts: and therefore, on a plea of *plene administravit*, to debt on judgment against the intestate, not docketed, the defendant may give in evidence payment of bond and other specialty debts, which exhausted all the assets. *(d)* And where leave was given to enter up judgment as of a preceding term, *nunc pro tunc*, the court of King's Bench, in order that it might not affect purchasers and mortgagees, ordered it to be docketed of the term in which the application was made. *(e)*

The dogget, or as it is commonly called, the *docket* or *docquet*, is an *index* to the judgment, invented by the courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the

(dd) 2 Wms. Saund. 5 Ed. 7, (4).

(ee) See the statute, § 3, 7.

(f) 29 Car. II. c. 3, § 14, 15, extended to *Wales*, and the counties *palatine*, by the 8 Geo. I. c. 25, § 6; and see 2 Wms. Saund. 5 Ed. 8, k. Sugd. V. & P. 7 Ed. 672, 3.

(g) See R. T. 29 Car. II. reg. 5, C. P., for the better observation of this statute. *Ante*, 731.

(a) 1 Salk. 87. 3 Salk. 116. 1 Ld. Raym. 695. 2 Ld. Raym. 766, 849, 869. 7 Mod. 2, 93. S. C. 1 Salk. 401. 7 Mod. 39. S. C. 3 Salk. 159. 3 P. Wms. 399. Willes, 428. 6 Durnf. & East, 368. 7 Durnf. & East, 20.

(b) 1 Salk. 87. 2 Ld. Raym. 850. 6 Mod. 191.

(c) 6 Mod. 191; and see Sugd. V. & P. 7 Ed. 674.

(d) 6 Durnf. & East, 384. 1 Esp. Rep. 313. S. C. 1 Bos. & Pul. 307; and see 2 Wms. Saund. 5 Ed. 9.

(e) *Baker v. Baker*, executrix, H. 35 Geo. III. K. B.; and see 2 Ken. 442.

rolls at large.(f) The practice of docketing judgments seems to have first obtained as early as the reign of King *Henry* the Eighth,(g) in the court of Common Pleas, where the dockets are entered on a separate roll, called the *docket* roll, or common docket; which is of so high an authority, as even to warrant an amendment of the judgment itself.(h) But, in the King's Bench, the docket was originally nothing more than a note on parchment or paper, containing the christian and surnames of the plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment roll.(i) By a subsequent regulation, the defendants' [*940] names were required to be entered in a remembrance or *docket alphabetically for better finding out the judgments.(aa) And at length, by the statute 4 & 5 W. & M. c. 20, § 2, made perpetual by the 7 & 8 W. III. c. 36, § 3, it was enacted, that "the clerk of the essoins of the court of Common Pleas, and the clerk of the doggets of the court of King's Bench, &c. shall make an alphabetical dogget, by the defendants' names, of all the judgments entered in their respective courts, of *Michaelmas* and *Hilary* terms, before the last day of the ensuing terms; and of the judgments of *Easter* and *Trinity* terms, before the last day of *Michaelmas* term; under the penalty of 100*l.*; which dogget shall contain the names of the plaintiff and defendant, with the addition of the latter, (if in the record of the judgment,) the debt, damages and costs recovered, the county, city, or town, in which the action was laid, and the number of the judgment roll; and shall be fairly put into and kept in books in parchment, to be searched and viewed by all persons, at reasonable times, paying for every term's search *four pence* and no more."(b)

This statute did not supersede the former practice, of docketing the judgment in parchment or paper, which is still necessary to be done by the attorneys, entering and bringing in their rolls; but was intended to operate, in addition to that practice, by requiring the dockets to be entered in alphabetical order, by the officers of the court.(c) Before the making of this statute, the judgment bound the lands, and the docket was nothing more than an *index* to find it readily.(d) But now it is deemed necessary, that the judgment should be docketed, in order to bind the lands, as to purchasers and mortgagees: And if it be not docketed,(e) or if there be a false docket, which is as none,(ff) though a right judgment, the purchasers or mortgagees will be safe; and in the latter case, the party grieved must take his remedy against the attorney or officer, for not docketing it truly.

The judgment should be docketed at the time of bringing in the roll, or entering it thereon, if already brought in: And it has been said, that judgments cannot be docketed after the time mentioned in the act; and that the practice of the clerk's docketing them after that time is only an abuse, for the sake of their fees, and ineffectual to the party.(gg) But though the judgment be not docketed, yet under circumstances, a purchaser with notice may be affected by it in a court of equity. Thus, where a bill in equity

(f) Gilb. C. P. 164, 5. Sugd. V. & P. 7 Ed. 673, 4.

(g) *Ante*, 731, 2; 731, (h).

(h) T. Raym. 39. 1 Sid. 70. Cro. Car. 574.

(i) R. E. 17 Jac. I. K. B.

(aa) R. E. 1657, reg. 1, K. B.

(b) See R. E. 5 W. & M. reg. 1 K. B., reg. 2 C. P., for the better observation of this statute. *Ante*, 732.

(c) Sugd. V. & P. 7 Ed. 674.

(d) Gilb. C. P. 165.

(e) 1 Str. 639; and see Barnes, 261, 2.

(ff) 1 Bac. Abr. 103. Gilb. C. P. 165. 1 Wils. 61. 2 Str. 1209, S. C.

(gg) 7 Vin. Abr. 54, pl. 6. 2 Eq. Cas. Abr. 592, pl. 8. Sugd. V. & P. 7 Ed. 674, 809.

was filed, to have satisfaction of a judgment, against a purchaser of the equity of redemption of land, or to redeem incumbrances, &c. and it appeared that the purchase was made in 1718, and the judgment not docketed till 1721; the defendant insisted on the statute 4 & 5 W. & M. c. 20: On the other hand it was contended, that the defendant (the purchaser,) had notice of this judgment, and an allowance for it in the *purchase, and that raised an equity for the plaintiff against him. [*941] By Lord Chancellor *Macclesfield*: "It is plain the defendant had notice of the judgment, and did not pay the value of the estate, and that is a strong presumption of an agreement to pay off the judgment; and since the plaintiff cannot proceed at law against the defendant upon the judgment, for want of docketing it in due time, he ought to be relieved in a court of equity:" Decreed, that the defendant pay to the plaintiff, the money *bonâ fide* due upon the judgment.(a) But it is said, that the statute being express and positive, a judgment shall not bind lands, without being docketed: notice to the purchaser, or no notice, is immaterial.(bb)

If an attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems that he is liable to an action:(cc) And Lord *Mansfield* intimated, that it very much concerned the chief clerk to take care that judgments be actually entered upon the roll in due time, and docketed; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser, who should have become charged with it, and had searched the roll, without finding it entered up: And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk; but still the chief clerk would be liable to the purchaser, who had suffered by this neglect.(d)

There is still another circumstance necessary to give effect to the judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*; namely, that it should be *registered*: for, by the 5 Ann. c. 18, § 4, and several subsequent statutes,(e) "no judgment shall affect or bind any manors, lands, tenements or hereditaments, in those counties, but only from the time that a *memorial* of such judgment shall be entered at the register office, in such manner as therein is directed. But none of the acts extend to *copyhold* estates; or to leases at rack rents, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. The act for the county of *Middlesex* does not extend to any of the chambers in Serjeants' Inn, the inns of court, or Inns of Chancery.(f) And although a judgment be not duly registered, yet a purchaser with notice will be affected by it, in a court of equity.(g) But docketing a judgment was holden, by Lord Chancellor *Talbot*, not to amount to constructive notice; for judgments he said are infinite.(h)

(a) 7 Vin. Abr. p. 53. 2 Eq. Cas. Abr. 684; and see Sugd. V. & P. 7 Ed. 675, 6.

(bb) 7 Vin. Abr. p. 54. 2 Eq. Cas. Abr. 692. *Tamen quære*; and see Cowp. 712. Sugd. V. & P. 7 Ed. 675, 6. 16 Ves. 419. 2 Cruise Dig. 53, 4.

(cc) 1 Str. 639. Sugd. V. & P. 7 Ed. 484.

(d) 2 Bur. 722.

(e) 6 Ann. c. 35, § 19. 7 Ann. c. 20, § 18. 8 Geo. II. c. 6, § 1, 18. For the mode of registering judgments, see 1 Sel. Pr. 2 Ed. 511. Imp. K. B. 10 Ed. 368, 9. Append. Chap. XXXIX. § 35, &c.

(f) Sugd. V. & P. 7 Ed. 686. And see further as to these exceptions, *id.* 692, &c.

(g) Cowp. 712; and see Sugd. V. & P. 7 Ed. 697, 8.

(h) 2 Eq. Cas. Abr. 682; but see Ambl. 680.

[*942] A mere miscalculation of the damages recovered *will not avoid a judgment.(a) And, during the same term in which the judgment is given, it is amendable at common law, in form or in substance;(b) but after that term, it is amendable no further than is allowed by the statutes of amendments.(c) Upon these statutes it has been holden, that if there be any thing to amend by, the judgment may be amended in point of form, for the misprision of the clerk;(dd) and it is amendable by the verdict.(ee) Where the defendant in *replevin* made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, without finding either the amount of the rent in arrear or the value of the cattle distrained, and judgment was entered for the damages assessed, the court of King's Bench, permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought.(ff) So, where the jury by mistake give damages in a penal action, the plaintiff may enter a *remittitur* of the damages on the record, after it is carried by writ of error to the King's Bench; and the transcript may be made conformable thereto.(gg) And where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, and a writ of error upon the judgment, assigning that for cause, the court allowed the plaintiffs to amend the judgment and transcript, in a term subsequent to that in which the judgment was signed, by entering a *remittitur* for the excess.(h) But where an executor pleaded a false plea of judgment recovered against himself, on which judgment was entered up against him for the debt and damages, *de bonis testatoris si, et si non, de bonis propriis*, and words were afterwards interlined in the judgment roll, by which the judgment *de bonis propriis* was confined to the damages only; the court of Common Pleas, on motion, would not strike out the words which had been interlined; it not appearing by whom the interlineation had been made, and the judgment being of six years' standing.(i) And where a plea was pleaded to the whole declaration, but the matter of the plea was in truth but an answer to part, and a verdict was obtained and judgment given for the plaintiff, and a writ of error brought, the court refused to allow an amendment in the record, by inserting a judgment by *nil dicit* to the part unanswered, on the ground that such amendment was unnecessary.(k) In a *qui tam* action for penalty, on the statute of usury, [*943] it is not cause of error to enter a judgment of **misericordia*;(aa) or, in other actions, that the plaintiff is adjudged to be in *misericordia*, instead of the defendant.(bb) The want of a *capiatur* or *misericordia*, or the substitution of one for the other, is aided by the statutes of Jeofails;(cc) which have been construed to extend to the addition of a *capiatur*.

(a) 7 Moore, 137. 3 Brod. & Bing. 309, S. C.

(b) 8 Co. 157. Gilb. C. P. 108. 3 Reeves, 472. Bac. Abr. tit. *Amendment* and *Jeofail*, A.

(c) 1 Wils. 61. 2 Str. 1209, S. C. 4 Bur. 1988. 1 Marsh. 183.

(dd) 2 Str. 1132, 1156, 1182. 5 Bur. 2730. 1 Durnf. & East, 783. 6 Durnf. & East, 1. 6 Moore, 135.

(ff) 3 Durnf. & East, 349.

(ee) 2 Str. 787. *Ante*, 713.

(gg) 1 Marsh. 180.

(h) 1 H. Blac. 643. 4 Maule & Sel. 94; and see 2 Barn. & Cres. 902, &c. 4 Dowl. & Ryl. 566, &c., S. C. 11 Price, 410. 3 Bing. 346. 1 Moore & P. 330. *Ante*, 713, 14; but see 2 Chit. Rep. 24.

(i) 5 Taunt. 554. 1 Marsh. 211, S. C.

(k) 2 Chit. Rep. 30.

(aa) 6 Durnf. & East, 255.

(bb) 2 H. Blac. 312.

(cc) 16 & 17 Car. II. c. 8. 4 Ann. c. 16, § 2. And as to the *capias pro fine*, in actions

ter, where none lies: (d) And the loss of the judgment roll may be supplied by a new entry. (e)

When the existence of a judgment is put in issue, upon a plea or replication of *nil tiel record*, it must be proved by the production of the record itself; which is inspected by the court wherein it is, if it be a record of the same court, or, if of a different court, a *certiorari* must be sued out for bringing it in: (f) And if it be a record of an inferior court, the *certiorari* may be issued out of the superior one; but if it be of a superior court, or court of equal jurisdiction, there is no way to have it, but by *certiorari* and *mittimus* out of Chancery. (f) When the existence of a judgment however is not denied, but it is merely stated by way of inducement to the action or wanted to prove the fact of the recovery, a sworn copy of it will be sufficient evidence for a jury; (g) and it may be proved, as other transcripts, by a witness who has compared the copy, line for line, with the original, or has examined the copy, while another person read the original: (hh) But no copy of the copy so examined, however authenticated, is admitted. (ii) And it is necessary that the record should be drawn up in form, before a copy of it is given in evidence; for though, by the practice of the courts at *Westminster*, the party may take out execution immediately after the judgment is signed by the proper officer, yet it is not a perfect and permanent record, till the roll is brought into court and filed. (kk) A judgment paper therefore, signed by the officer, is not evidence of a judgment: (l) And the judgment book produced by the officer of the court, is not evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action. (m) It is also a rule, that a verdict will not be admitted in evidence, without also producing a copy of the judgment founded thereon: The production of the *postea* alone is not sufficient: for it may happen that the judgment was arrested, or a new trial granted. (n) But this rule will not apply to the case of a verdict on an issue directed out of Chancery, as it is not usual to enter up judgment in such case: and therefore the decree of the court must be shown, which will be a sufficient proof that the verdict was satisfactory, and stands in force. (o) *And though [*944] the *nisi prius* record, with the *postea* indorsed thereon, is not evidence of the verdict, it is sufficient to prove that the cause came on to be tried, (a) or the day of trial. (b) It is also a rule, that when, by the practice of the court, the minutes are considered as the judgment itself, and it is not usual to make any further entry, copies of such minutes may be given in evidence; as is always done in the case of minutes in the House of Lords, of the judgment given by them on an appeal from the court of Chancery. (c)

of trespass, &c., and the abolition of it by statute 5 W. & M. c. 12; see 2 Wms. Saund. 5 Ed. 193, (1).

(d) 1 Str. 313.

(e) *Id.* 141. 2 Str. 833. 2 Bur. 722.

(f) *Ante*, 745.

(g) Peake's Evid. 5 Ed. 32.

(hh) 1 Campb. 459, 471, *in notis*. 2 Taunt. 52.

1 Phil. Evid. 6 Ed. 366.

(ii) Giff. Evid. 9.

(kk) *Id.* 22.

(l) Bul. Ni. Pri. 228.

(m) 2 New Rep. C. P. 474; and see 1 Moore & P. 236. *Ante*, 556.

(n) Bul. Ni. Pri. 234. Willes, 367.

(o) Bul. Ni. Pri. 234; and see 1 Phil. Evid. 6 Ed. 369.

(a) 1 Str. 162. Willes, 368.

(b) 6 Esp. Rep. 80, 83; and see 9 Price, 359. *Ante*, 902.

(c) Cowp. 17. Peake's Evid. 5 Ed. 26.

In order to prove the proceedings in a county court, court baron, or other inferior court not of record, the general practice has been to produce the book containing the original minutes of such proceedings, as well those previous to the judgment, as the judgment itself; (d) for in the case of all inferior jurisdictions, it must be shown that the proceedings are regular: And as it is not usual to draw up such judgments in form, this evidence has been deemed sufficient to support an action on a judgment of the county court; (e) or to prove the proceedings on a foreign attachment in the mayor's court of London. (f) In an action upon the judgment of a court in a foreign country, the sentence must be proved by producing it, and proving the handwriting of the judge of the court who subscribed it, and the authenticity of the seal affixed. (g) A copy of a judgment in the supreme court of Jamaica, made by the chief clerk of the court, is not receivable in evidence here; although it appear that such copies are usually received as evidence in the island of Jamaica: (h) And in an action on a judgment obtained in the island of Grenada, though the plaintiff proved the handwriting of the judge subscribed to the judgment, yet as he could not prove the seal affixed to be the seal of the island, he was considered as having failed in his proof; and the court on motion confirmed the nonsuit on that ground. (i) It has even been holden, that if a colonial court possess a seal, it must be used for the purpose of authenticating a judgment of the court, although it be so much worn as to be no longer capable of making any impression. (k) [A]

(d) Com. Dig. tit. *Evidence*, C. 1; and see 2 Stark. Ni. Pri. 473. *Ante*, 801.

(e) *Chandler v. Roberts*, T. 39 Geo. III. in *Scac*.

(f) 2 Blac. Rep. 836; and see Peake's Evid. 5 Ed. 72.

(g) 1 Phil. Evid. 6 Ed. 331, &c. 379, 80. *Ante*, 801.

(h) 2 Stark. Ni. Pri. 6. 6 Maule & Sel. 34. S. C. *Id.* 39. S. P.

(i) 3 East, 221; and see Peake's Evid. 5 Ed. 70, 71. *Id.* (t.) 1 Phil. Evid. 6 Ed. 379, 80. Ry. & Mo. 306. 2 Car. & P. 106, S. C.

(k) 1 Stark. Ni. Pri. 525. And for the effect of a judgment in a colonial court, see 4 Barn. & Cres. 625. 7 Dowl. & Ry. 25, S. C.

[A] "It is everywhere held, that the judgments of the courts of each state are conclusive in every other, in all instances in which they had jurisdiction of the cause and the parties at the time when the judgment was rendered. *Hampton v. McConnell*, 3 Wheaton, 334. *Warmag v. Pauling*, 5 Gill & Johnson, 500. *Reed v. Ross*, 1 Baldwin, 36. *Greene v. Sarmento*, 1 Peters, C. C. R. 74. *Spencer v. Brockway*, 1 Ohio, 259. *Goodrich v. Jenkins*, 6 Id. 43. *Evans v. Justine*, *Id.* 117; 7 *Id.* 273. *Evans v. Talen*, 9 S. & R. 252, 260. *Benton v. Burget*, 10 *Id.* 240. *Hozie v. Wright*, 2 Vermont, 269. *Starkweather v. Loomis*, *Id.* 573. *Blodget v. Jordan*, 6 *Id.* 580. *Boston India Rubber Factory v. Hall*, 14 *Id.* 92. *Newcomb v. Peck*, 17 *Id.* 302. *Davis v. Connelly's Ex'ors.*, 4 B. Monroe, 136. This rule holds good against privies as well as parties. Thus in *Fletcher v. Terrel*, 9 Dana, 372, it was decided that a purchaser of personal property in one state is bound by a prior decree in equity in another against the title of the party from whom the purchase is effected, and a similar point was decided in *Marsh v. Peir*, 4 Rawle, 273. It is, however, essential that the parties against whom the judgment is sought to be enforced should be the same or in privity with those against whom it was rendered, and it has been held, that an administrator acting under an authority derived from one state is not bound by the result of judicial proceedings against a collateral administrator of the same estate in another." *Stacy v. Thrasher*, 6 Howard, 44. 2 Amer. Lead. Cases, 777, 2 Ed. Consult. also, 1 Greenl. on Evid. § 546, 551. Story on Conf. Laws, § 410, et seq.

* CHAPTER XL.

Of Costs.

INCIDENT to the judgment are the *costs*, or expenses of the suit; which are *interlocutory* or *final*: the former, or such as are awarded on interlocutory matters arising in the course of the suit, have been already considered, in treating of the matters to which they relate; the latter, or such as depend on the final event of the suit, will be the subject of the present chapter. (a)

No final costs were recoverable, by the plaintiff or defendant, at common law. (b) But, by the statute of *Gloucester*, (6 *Edw. I.*) c. 1, § 2, it is provided, that "the *demandant* may recover against the tenant, the costs of his *writ* purchased, (which, by a liberal interpretation, has been construed to extend to the *whole* costs of his suit,) (c) together with the damages given by that statute; and that this act should hold place, in all cases where a man recovers damages." This was the origin of costs *de incremento*: (d) which are considered, in a legal sense, as being parcel of the damages. (e) And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages antecedent to, or by the provisions of the statute of *Gloucester*; (f) as in *assumpsit*, covenant, debt on contract, case, trover, trespass, assault and battery, replevin, ejectment, dower *unde nihil habet*, (g) &c.; or where, by a subsequent statute, double or treble damages are given, in a case where single damages were before recoverable; (h) as upon the 2 *Hen. IV.* c. 11, for wrongfully suing in the admiralty court, (i) &c.: And he has also a right to costs, in all cases where a certain penalty is given by statute to the party grieved; (k) for otherwise the remedy might prove inadequate.

*But the statute of *Gloucester* did not extend to cases where no damages were recoverable at common law, or by the provisions of [*946] the statute, as in *real* actions; (aa) nor where double or treble damages were given by a subsequent statute, in a new case where single damages were not before recoverable; as in *waste*, against tenant for life or years, (bb) upon the statute of *Gloucester*, (6 *Edw. I.*) c. 5; for not setting out tithes, (cc) upon the 2 & 3 *Edw. VI.* c. 13; or for driving a distress out

(a) The subject of *Costs*, interlocutory as well as final, is treated of in a clear and perspicuous manner by Mr. Baron *Hullock*: And the Table of costs, by Mr. *Palmer*, will also be found a valuable acquisition to the profession, as containing a full collection of bills of costs, accurately drawn, and methodically arranged, by which the practiser may not only know what charges to make for his business, but may see before-hand in what order it is to be conducted. See also Mr. *Beames's* Summary of the doctrine of courts of Equity with respect to costs, which he has very ably deduced from the leading cases on the subject. [*Frederick C. Brightly, Esq.*, of Philadelphia, has also laid the profession under obligations to him for an excellent treatise on the Law of Costs in Pennsylvania, published in 1847.]

(b) 2 *Inst.* 288. *Hardr.* 152.

(d) *Gilb. Eq. Rep.* 195.

(f) 10 *Co.* 116, a.

(h) 10 *Co.* 116, a. 2 *Inst.* 289. *Cowp.* 368.

(k) *Cro. Car.* 560. 1 *Rol. Abr.* 574. *Skin.* 363, 367. *Comb.* 224. 12 *Mod.* 46. *S. C.*

Carth. 230. 1 *Salk.* 206. *Comb.* 449. 5 *Mod.* 355. *S. C.* 1 *Ld. Raym.* 172. *Willes*, 440. *Say. Costs*, 11. 1 *H. Blac.* 10. 7 *Durnf. & East*, 267.

(aa) *Ante*, 870. But costs have been allowed, on an interlocutory proceeding, in a writ of entry. 9 *Moore*, 745. 2 *Bing.* 387, *S. C.*

(bb) 2 *Hen. IV.* 17. 9 *Hen. VI.* 68, b. 10 *Co.* 116, b. 2 *Inst.* 289. *Ante*, 870.

(cc) *Moore*, 915. *Noy*, 136. *Hardr.* 152.

(c) 2 *Inst.* 288.

(e) 9 *East.* 298. 1 *Ohit. Rep.* 137, (a).

(g) 2 *Bac. Abr.* 148. *Ante*, 870.

(i) *Ante*, 893.

of the hundred,(d) upon the 1 & 2 Ph. & M. c. 12; nor to writs of *scire facias*, founded on the statute Westm. 2. c. 45;(e) nor to cases where the crown is the prosecutor, as in *prohibition*,(f) *mandamus*, or *quo warranto*. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer;(g) as upon the 5 Eliz. c. 4, § 31, for exercising a trade, without having served an apprenticeship; or upon the statute of usury, 12 Ann. stat. 2. c. 16. In these and such like cases therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

When *single* damages are given by a statute, subsequent to the statute of Gloucester, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's case*(h) is, that he shall not: and accordingly it is holden, that he is not entitled to costs in *quare impedit*,(i) wherein damages are given by the statute of Westm. 2. (13 Edw. I.) c. 5, § 3. But the rule in *Pilfold's case* is contradicted by lord Coke himself:(k) who says, that "this clause (respecting the statute of Gloucester's holding place, in all cases where a man recovers damages,) doth extend to give costs, where damages are given to any demandant or plaintiff in any action, by any statute made after this parliament:" And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved,(l) although costs are not particularly mentioned in the statute.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by the statute 8 & 9 W. III. c. 11, § 3, by which it is enacted, that "in all ac-
[*947] tions of *waste*, and actions of *debt* upon the statute for not setting forth *tithes*, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *ficri facias* or *elegit*;" with a proviso,(a) that nothing therein contained shall be construed to alter the laws in being as to *executors* or *administrators*, in such cases where they were not then liable to the payment of costs of suit.

In an action of debt for the *penalty* of the statute 2 & 3 Edw. VI. c. 13, § 1, for not setting out tithes, with a count for the *single* value, the parties,

(d) 2 Inst. 289. Dyer, 177; but see Cro. Car. 560. 1 Rol. Abr. 574.

(e) *Ante*, 870. 3 Bur. 1791.

(f) Comb. 20. 6 Barn. & Cres. 538.

(g) 1 Rol. Abr. 574. 1 Vent. 133. Carth. 231. 1 Salk. 206. Comb. 449. 5 Mod. 355. S. C. 1 Ld. Raym. 172. Cas. Pr. C. P. 87. Barnes, 124. S. C. Cowp. 366. 1 H. Blac. 10. Bul. Ni. Pri. 333.

(h) 10 Co. 116, a.

(i) 2 Hen. IV. 17. 27 Hen. VI. 10. 10 Co. 116, a. 2 Inst. 289, 362. Barnes, 140. 3 Bing. 404; and see Cro. Car. 560. Carth. 231. Cowp. 367, 8. *Ante*, 870.

(k) 2 Inst. 289.

(l) 2 Wils. 91. 2 Ken. 474. S. C. Barnes, 151. S. C. 3 Bur. 1723. Say. Costs, 10. S. C. 1 Durnf. & East, 71. 6 Durnf. & East, 355. 7 Durnf. & East, 267; but see Cowp. 367, 8.

(a) § 5; and see 1 Str. 188. 3 East, 202.

after a demurrer to the declaration, submitted to arbitration, and the arbitrator awarded the single value to be less than twenty nobles (6L 13s. 4d. ;) the court held, that the plaintiff was not entitled to costs on the counts for the penalty, under the statute 8 & 9 W. III. c. 11, the value not having been found by a jury: but they allowed him to have costs taxed on the count for the single value.(b) And full costs were allowed, in an action on the statute of *Edw. VI.* for treble the value of tithes not set out, where there was a verdict for the plaintiff, subject to a reference, and the arbitrator directed a verdict to be entered for 80s. treble value.(c) The plaintiff, however, is only entitled to costs in such an action, by the statute 8 & 9 W. III. c. 11, § 3, after plea pleaded, or demurrer joined.(d)

When a *scire facias* is not an original, distinct and independent proceeding, but connected with and forming a part of the proceedings in another action, the plaintiff, it seems, is entitled to costs thereon, as a part of the general expenses of the suit, by an equitable construction of the statute of *Gloucester*; as upon a *scire facias ad audiendum errores*, or when a *scire facias* is brought on the statute 8 & 9 W. III. c. 11, § 6, for assessing damages upon the death of a plaintiff or defendant, after interlocutory and before final judgment. And, after judgment by default in debt on bond to secure an annuity, payable quarterly, and *scire facias* thereon, suggesting a breach in non-payment of a quarter's arrears, and damages assessed to that amount on the statute 8 & 9 W. III. c. 11, § 8, the court of King's Bench held, that the plaintiff was entitled to his costs on the latter section, which directs a stay of proceedings, on payment of future damages, costs and charges, *toties quoties*, though the third section only gives costs in *scire facias*, after plea or demurrer.(e) In the King's Bench, the plaintiff must pay costs, on quashing his own writ of *scire facias*, after the defendant has appeared thereto:(f) But, in the Common Pleas, the plaintiff may move to quash his own writ, without paying costs, at any time *before the defendant has pleaded;(a) [*948] nor are any costs payable on its being quashed after a plea in abatement:(bb) And the statute 8 & 9 W. III. c. 11, § 3, does not extend to a *scire facias* to repeal a patent, prosecuted in the name of the king.(cc)

On a *prohibition* being granted to the ecclesiastical court, in a suit for tithes, it is enacted by the statute 2 & 3 *Edw. VI.* c. 13, § 14, "that in case the suggestion be not proved true, by two honest and sufficient witnesses at the least, in the court where the prohibition shall be granted, within six months next after it is so granted and awarded, then the party who is hindered of his suit in the ecclesiastical court by such prohibition, shall upon his request and suit, without delay, have a consultation granted in the same case, in the court where the prohibition was granted; and shall also recover double costs and damages, against the party that pursued the prohibition, to be assigned or assessed by the court where the consultation shall be granted." This act has been construed to extend to prohibitions in suits for small tithes, as well as great:(dd) and the six months allowed for proving the suggestion, are to be reckoned by calendar, not by lunar months.(dd) But the act

(b) 1 H. Blac. 107; and see Barnes, 150.

(c) 2 Chit. Rep. 155.

(e) 11 East, 387; and see 1 Man. & Ry. 490, 91.

(d) 1 Bing. 182. 7 Moore, 602, S. O.

(f) 1 Barn. & Ald. 486.

(a) Cas. Pr. C. P. 74, 109. Pr. Reg. 378, 418. Barnes, 431; and see 1 Str. 638.

(bb) 1 Str. 638; and see 2 Wms. Saund. 5 Ed. 72. w.

(cc) 7 Durnf. & East, 367.

(dd) 2 Ld. Raym. 1172. 2 Salk. 554, S. O.

only applies to cases where the party, who is hindered of his suit in the ecclesiastical court by the prohibition, acquiesces in it: and then the party obtaining it must, within six calendar months, verify his suggestion, by the depositions of two witnesses, in the court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages: and therefore, where a plaintiff is put to declare in prohibition, and nonsuited at the assizes, the defendant is only entitled to his *single* costs, under the statute 8 & 9 W. III. c. 11, § 3, and not to *double* costs, under the 2 & 3 Edw. VI. c. 13, § 14.(e) It has been doubted, whether the writ of consultation can now be granted on the latter statute;(f) and if the six months relate to the trial only, it must be understood with some latitude, as in the case of suits in the *northern* counties, or of prohibitions issuing in *Trinity* term.(g)

The rule as to costs in *prohibition*, on the statute 8 & 9 W. III. c. 11, is, that the plaintiff, succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion, or first motion for a prohibition, and all costs incident and subsequent thereto.(h) And where the defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, the court ordered the defendant to pay the plaintiff's costs of the proceedings in prohibition.(i) When the defendant by prohibition lets judgment go by default, the plaintiff is entitled,

[*949] by the common law, to a writ to inquire of his *damages*, *for the contempt in proceeding after the prohibition delivered; and of consequence, by the statute of *Gloucester*, to his *costs*.(a)

In this case, however, the plaintiff is only entitled to costs from the time that the rule for a prohibition was made absolute, as the defendant could not possibly be in contempt before:(b) And where the plaintiff was nonsuited, it was holden that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to show cause why the writ of prohibition should not be granted.(c) If judgment be given for the plaintiff, as to *part* of what is in issue, he is entitled to costs, although a consultation be granted as to the residue:(d) And in like manner, if the defendant prevail as to *part*, he is entitled to costs.(ee) But it seems that if the defendant succeed upon demurrer, he is not entitled to costs;(ff) this being a *casus omissus* out of the statute. So, where the judgment on demurrer to a declaration in *prohibition* was, that a writ of prohibition should issue, as to proceeding on part of the matters contained in the libel, with a view to a particular object, and a writ of consultation as to proceeding upon them for any other purpose, and as to all other matters in the libel; the court of King's Bench held, that this was not a case within the statute.(gg) There is *proviso* in the statute,(hh) that it shall not extend to executors or administrators; and hence it has been determined, that in prohibition they are not liable to the payment of costs.(ii)

On moving for a *mandamus*, or information in nature of a *quo warranto*,

(e) 15 East, 574.

(f) *Salter v. Greenway*, T. 22 Geo. III. K. B.

(h) Cas. Pr. C. P. 11. 1 Str. 82. 2 Str. 1062.

(a) Cas. Pr. C. P. 20.

(c) Say. Costs, 137.

(ee) Barnes, 138, 9.

(ff) *Brymer & Atkins*, H. 22 Geo. III. C. P.

(gg) 6 Barn. & Cres. 538.

(ii) Cas. Pr. C. P. 158. Pr. Reg. 118. Barnes, 127, 129. S. C. 3 East, 202.

(g) *Id. per Buller, J.*

(i) Barnes, 148.

(b) *Id.* 21.

(d) 2 Str. 1062, 3.

(hh) § 5.

a rule is either granted or refused in the first instance; [A] and if a rule to show cause be granted, it is either made absolute or discharged: In the latter case, the court will discharge it with or without costs, according to circumstances. (k) But on showing cause against a rule for information in nature of a *quo warranto*, the court under particular circumstances, suffered a disclaimer to be entered by the defendant, without costs. (l) If the rule be made absolute, a *mandamus* issues, which should regularly be returned; or an information is filed by the master of the crown office, in nature of a *quo warranto*.

As a plaintiff, at common law, might have recovered damages in an action upon the case for a false return to a *mandamus*, he is now entitled to costs, when he succeeds in such action, by the statute of *Gloucester*; and when he fails therein, the defendant has a right to costs, under the 4 *Jac. I. c. 3.* (m) And, by the statute 9 *Ann. c. 20, § 1, 2*, after reciting that divers persons who had a right to the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs and places, within that part of *Great Britain* called *England* and *Wales*, or to be burgesses *or freemen of such cities, &c., have either been illegally turned [*950] out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive; it is enacted, that "as often as, in any of the cases aforesaid, any writ of *mandamus* shall issue out of the Queen's Bench, the courts of sessions of counties palatine, or any of the courts of grand sessions in *Wales*, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus*, to plead to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ, had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same, in such place as an issue joined in such action on the case should or might have been tried: and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*; and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such

(k) 3 *Bur.* 1453. 1 *Durnf. & East*, 396, 405, on a *mandamus*; 2 *Str.* 1039. 2 *Bur.* 780. 4 *Bur.* 1963, on a *quo warranto*.

(l) 2 *Chit. Rep.* 366.

(m) *Hul. Costs*, 3 *Ed.* 325.

[A] See *Com. v. Jones*, 2 *Jones, Penn. Rep.* 365. *Per Gibson*, *Ch. J.* p. 372. *Murphy v. Farmer's Bank*, 8 *Harris*, 420.

return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid."

But no provision being made for costs by this statute, when the writ is obeyed, the statute 12 Geo. III. c. 21, after reciting, that although a writ of *mandamus*, to admit any person to the franchise of being a citizen, burgess or freeman of any city, town corporate, borough, cinque port, or place within *England* or *Wales*, be obeyed, the person applying for the same is nevertheless put to great trouble, delay and expense; and that by the laws in being, in many cases, no provision is made for giving costs to the party suing out any such writ, when the same is obeyed: enacts, that "where any person shall be entitled to be admitted a citizen, burgess or freeman, of any such city, &c. and shall apply to the mayor or other person, officer or officers, in such city, &c. who have or hath authority to admit citizens, burgesses and freemen therein, to be admitted a citizen, burgess or freeman thereof; and shall give notice, specifying the nature of his claim, to such mayor or other officer or officers, that if he or they shall not so admit such person a citizen, burgess or freeman, within one month [*951] from the time of such notice, the court of *King's Bench will be applied to, for a writ of *mandamus* to compel such admission; and if such mayor, or other officer or officers shall, after such notice, refuse or neglect to admit such person, and a writ of *mandamus* shall afterwards issue, to compel such mayor, or other officer or officers, to make such admission, and, in obedience to such writ, such person shall be admitted by the said mayor, or other officer or officers, a citizen, &c. of such city, &c. then such person shall (unless the court shall see just cause to the contrary,) obtain and receive from the said mayor, or other officer or officers, so neglecting or refusing as aforesaid, all the costs to which he shall have been put, in applying for, obtaining and serving such writ of *mandamus*, and enforcing the same, by a rule to be made by the court out of which such writ shall issue, for the payment thereof, together with the costs of applying for, obtaining and enforcing the said rule; and if the rule so to be made, shall not be obeyed, then the same shall be enforced, in such manner as other rules made by the said court are or may be enforced by law."

Before the exhibiting of an information in nature of a *quo warranto*, the relator ought to enter into a recognizance in 20*l.* to prosecute the same with effect, &c. pursuant to the statute 4 & 5 *W. & M.* c. 18, § 2.(a) And if he do not proceed to trial within a year after issue joined, the defendant is entitled to costs, to the extent of such recognizance.(b) It is also enacted, by the statute 9 Ann. c. 20, § 5, that "in case any person or persons, against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases" (which have been already mentioned, in treating of the costs on a writ of *mandamus*),(c) "be exhibited in any of the said courts of Queen's Bench, &c. shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of *ouster* against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or her

(a) 1 Salk. 376. Carth. 503, S. C.

(b) Cas. temp. Hardw. 247. 2 Str. 1042.

(c) *Ante*, 949, 50.

usurping, &c. any of the said offices or franchises; and also to give judgment, that the relator or relators in such information named, shall recover his or their costs of such prosecution: and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended, against such relator or relators; such costs to be levied in manner aforesaid.⁵

The statute is confined to *corporate* offices: (d) And therefore, upon a *quo warranto* information, for usurping the office of bailiff (he being the returning officer) of a borough sending burgesses to parliament, but not a town *corporate*, judgment having been given for the crown, the court *held, that the relator was not entitled to costs by the above [*952] statute. (a) But, in the cases to which it applies, if any one of several issues on a *quo warranto* information be found for the prosecutor, upon which judgment of *ouster* is given, he is entitled to costs on all the issues. (b) The prosecutor of an information in nature of a *quo warranto* shall pay costs on this statute, for not proceeding to trial according to notice. (c) And a defendant in execution for the contempt, and for costs on a *quo warranto* information, is entitled to be discharged under the lord's act. (dd) Lastly, it is observable, that by the statute 32 Geo. III. c. 58, which gives the defendant a right to plead the statute of limitations, &c. to an information in nature of a *quo warranto*, (e) "if, upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendant or defendants, or any of them, he or they shall be entitled to judgment, and to such and the like costs, as he or they would by law have been entitled to, if a verdict and judgment had been given for him or them, upon the merits of his or their title. Provided always, that in every such case, the prosecutor of such information may reply to such plea, any forfeiture, surrender or avoidance by the defendant, of such office or franchise, happening within *six* years before the exhibition of such information; whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid."

The plaintiff's general right to costs being settled and established as before mentioned, upon the footing of the statute of *Gloucester*, has been since altered, restrained, and modified, by subsequent statutes. The first statute that restrained the plaintiff's right to costs, was the 43 *Eliz.* c. 6, (extended to *Wales*, and the counties *palatine*, by the 11 & 12 *W.* III. c. 9, § 1:) by which it is enacted, that "if, in any personal action to be brought in any of her majesty's courts of *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of *forty* shillings; that in every such case the judges or justices before whom such action shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion." The intention of

(d) 1 Bur. 402. 1 Blac. Rep. 93. S. C. 5 Durnf. & East, 375. 1 Barn. & Cres. 237. 2 Dowl. & Ry. 341, S. C.; and see 9 East, 469. *Ante*, 656, 7.

(a) 5 Barn. & Cres. 640. 8 Dowl. & Ry. 393, S. C.

(b) 1 Durnf. & East, 453.

(c) 1 Str. 33. Say. Rep. 130. *Ante*, 758, 9.

(dd) 4 Durnf. & East, 809.

(e) *Ante*, 656, 7.

this statute was to confine trifling actions to inferior courts; (f) and a certificate may be granted upon it, at any time after the trial of the cause. (g) The first instance of a certificate being granted upon this statute, was in the case of *White v. Smith*, E. 17 Geo. II.; wherein *Willes*, Ch. J., certified in an action for taking sand: (h) since [*953] which time, there have been *many instances of such certificates. (aa) When a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify, under 43 *Eliz.* c. 6, that the damages are less than forty shillings: (b) And accordingly, a judge's certificate upon that statute, is sufficient to deprive a plaintiff of his right of costs, notwithstanding the action be brought on stat. 11 Geo. II. c. 19, § 19, by which, in case the plaintiff obtain a verdict, he is entitled to full costs. (c) The judge may certify upon the 43 *Eliz.* though there be pleas of justification. (d) And a certificate may be granted upon this statute, in an action on the case for an injury done to the plaintiff's right of common, by digging turves: (e) or in an action of assault, battery and imprisonment, if not actual battery be proved: (ff) and even if a battery be proved, this will not prevent the judge from certifying with respect to the imprisonment, under the 43 *Eliz.*; and though he cannot certify as to the battery, yet the plaintiff will not be entitled to full costs for that, unless the judge certify under the 22 & 23 *Car.* II. c. 9. (gg) So, in an action of assault and battery, with a separate count for false imprisonment, where the verdict was for one shilling damages, and the judge certified under the 43 *Eliz.* the court of Common Pleas refused to allow the plaintiff his costs. (hh) And where the plaintiff recovered five shillings damages, in an action of trespass *vi et armis* for taking his cart, and the judge certified under the statute 43 *Eliz.* c. 6, the court of Common Pleas would not refer it to the prothonotary, to tax the plaintiff his costs; although the cause of action arose within the jurisdiction of an inferior court, empowered to hold pleas of any suit not exceeding fifty shillings. (i) But where, in an action of *trespass* for breaking and entering the plaintiff's close, and digging a ditch, and cutting down a tree, with a count on an *asportavit*, the defendant pleaded not guilty, and *liberum tenementum*, upon which the plaintiff took issue: and the material question on the trial was, whether the tree grew on the plaintiff's or the defendant's ground; the jury having found a verdict for the plaintiff, with thirty-seven shillings damages, the value of the tree, and the judge certified under the 43 *Eliz.*; the court held, that the plaintiff was notwithstanding entitled to his full costs; for upon this record, the freehold must necessarily have come in question, and (which was considered as a conclusive criterion in cases of this sort,) the action was one which could not have been tried in an inferior court. (k) If there be a certificate upon this statute, the plaintiff, we have seen, (l) shall not have the costs of any plea pleaded with

(f) *Gilb. Eq. Rep.* 196. *Gilb. C. P.* 261, 2.

(g) *Say. Costs*, 18. 3 *Durnf. & East*, 38, (d). 5 *Barn. & Ald.* 536.

(h) 2 *Str.* 1232. 1 *Wils.* 93. S. C. 3 *Wils.* 325.

(aa) Same cases, 1 *Ken.* 245. *Say. Rep.* 250. S. C. 2 *Wils.* 258. 3 *Durnf. & East*, 37.

(b) 1 *Taunt.* 400.

(c) 5 *Barn. & Ald.* 796. 1 *Dowl. & Ryl.* 413, S. C.

(d) 1 *Wils.* 93, 4. *Broadbent v. Woodhead*; *York Lent Ass.* 1794, *cor. Heath*, J.

(e) 8 *East*, 294.

(gg) 2 *New Rep. C. P.* 471.

(i) 8 *Moore*, 450.

(l) *Ante*, 659.

(ff) 1 *New Rep. C. P.* 255.

(hh) 2 *Bing.* 333. 9 *Moore*, 628, S. C.

(k) 9 *Price*, 314.

leave of the court: although the issue thereupon joined be found for him, and the judge have *not certified that the defendant had [*954] a probable cause for pleading the matter therein pleaded.

As the judges, however, were for a long time unwilling to certify upon this statute, thinking it hard to deprive a plaintiff of his right to costs, merely because he had resorted to a superior court, when perhaps he could not have obtained justice in an inferior one, the legislature was obliged to interpose its authority, still further to guard against trifling and vexatious actions. Thus, by the 3^d Jac. I. c. 15, § 4, it is enacted, that "if in any action of *debt*, or action upon the case upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the city of *London*, or any other person, being a victualler, tradesman or labouring man, inhabiting within the said city or the liberties thereof, in any of the King's courts at *Westminster*, or elsewhere out of the court of requests for the same city, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff shall not amount to the sum of *forty* shillings, and the defendant shall duly prove, either by sufficient testimony or his own oath, that at the time of commencing such action, the defendant was inhabiting and resident in the city of *London* or the liberties thereof, the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant, as the defendant shall justly prove, before the said judge or judges, it hath truly cost him in defence of the suit."

The jurisdiction of the court of requests for *London* was extended, by the 14 Geo. II. c. 10, to "every citizen and freeman of the city of *London*, and every other person and persons inhabiting within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall or stand, or seeking a livelihood there, who have debts owing them, not exceeding the sum of *forty* shillings, by any person or persons inhabiting or seeking a livelihood within the said city or its liberties, during their respective inhabitancy or seeking a livelihood as aforesaid." (a) And, by the 39 & 40 Geo. III. c. civ. (b) it was still further extended to "debts not exceeding the sum of 5*l*. (c) due to any person or persons, whether residing within the city of *London* or elsewhere, or to bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, from any person or persons residing or inhabiting within the said city or its liberties, or keeping any house, warehouse, shop, shed, stall or stand, or seeking a livelihood, or trading or dealing within the same city or liberties." (d) And if any action or suit shall be commenced in any other court than the said court of requests, for any debt not exceeding the sum o. 5*l*., and recoverable by virtue of the former acts, or of this act, in the said court of requests, the plaintiff *or plaintiffs in such ac- [*955] tion or suit shall not, by reason of a verdict for him, her or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in

(a) See 5 Durnf. & East, 535. 1 East, 353, (a), S. C. cited.

(b) This act of parliament took effect from the 30th of *September*, 1800, and not from the passing of the act, which was on the 9th of *July* preceding, 2 East, 135.

(c) § 2.

(d) § 5.

the said court of requests, then such defendant or defendants shall have double costs, and shall have such remedy for recovering the same, as any defendant or defendants may have for his her or their costs, in any cases by law."(*aa*)

This act of parliament has been construed to extend to an action of *debt* for less than *five* pounds, on the judgment of a superior court.(*bb*) And the court of requests have jurisdiction under it, over a contract for the retention of tithes by the tenant, the value of which was under 5*l.*: and therefore, if the vicar sue for the same, and recover less than 5*l.* upon a count in *assumpsit* on a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs.(*c*) The criterion in these cases is the sum recovered by the verdict: and if that be under 5*l.* the defendant is entitled to a suggestion for costs, though the action was brought for the recovery of a larger sum.(*d*)

There are some distinctions deserving notice, between the former acts of parliament, for the recovery of small debts in *London*, and the 39 & 40 Geo. III. c. civ. By the former acts, the court of requests had no jurisdiction in a suit, unless both the plaintiff and defendant were resident within the city;(e) but this is not necessary under the 30 & 40 Geo. III. c. civ. which extends the jurisdiction of the court to debts not exceeding 5*l.* due to *any* person or persons, whether residing within the city or *elsewhere*. It is necessary however, under the latter act, that the defendant should be a person residing or inhabiting within the city or its liberties, or keeping a house, &c. or seeking a livelihood there: and if a party's residence be out of the jurisdiction of the court of requests for *London*, his occasionally underwriting a policy at *Lloyd's* coffee-house, where he has a seat, is not his seeking a livelihood within the city, so as to subject him to the jurisdiction of the court: it must be followed as a trade or business.(*f*) So, where a defendant resided in *Middlesex*, and kept a warehouse in the city of *London*, jointly with another person, but told the plaintiff that he did not keep the warehouse, and the plaintiff, upon inquiry in the [*956] neighbourhood where it was, could obtain no intelligence respecting him; the court of Common Pleas would not, under the above act of parliament, exempt the defendant from paying costs, on the ground of the verdict being under *five* pounds, and that he ought to have been summoned to the court of requests.(*a*) So a market gardener, who rented a stand, with a shed over it, in *Fleet Market*, at an annual rent, which he occupied three times a week on market days, till ten o'clock in

(*aa*) § 12.

(*bb*) 2 Bos. & Pul. 588. But see 3 Esp. Rep. 280, where an article of *debt* was brought in a superior court, for less than *five* pounds, on a judgment of the court of requests for *London*. *Sed quare*, whether the plaintiff would have been entitled to costs in such action?

(*c*) 5 East, 194.

(*d*) 2 Taunt. 169. 5 Dowl. & Ry. 371. 4 Barn. & Cres. 769. 7 Dowl. & Ry. 229, S. C.; and see *Pratt's* Courts of Requests, p. 1, 3, 5, &c., for decisions on the above acts.

(*e*) 2 H. Blac. 220, and see 5 Durnf. & East, 535. 1 East, 353, (*a*). 1 Chit. Rep. 635, 6, (*a*). 8 Moore, 429. 1 Bing. 388, S. C.

(*f*) 5 Esp. Rep. 19; and see 1 Smith, R. 334.

(*a*) 1 New Rep. C. P. 153. But where a person rented a counting house in the city of *London*, jointly with another person, and received orders there for his business, the court of Common Pleas held, that he was within the jurisdiction of the court of requests for the city of *London*, though he slept and resided in *Southwark*. 5 Taunt. 648. 1 Marsh. 269, S. C.

the morning, after which, and on all other days, it was occupied by others, was held not to keep a stand, within the meaning of the *London* court of requests act, so as to be privileged to be sued there for a debt under *five* pounds.(b) And, in a late case, a person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, was holden not to be a person seeking his livelihood in *London*, within the meaning of the above act.(cc) It became a question in one case,(dd) which was not decided, whether the clerk of a solicitor, attending at his master's office within the city, during the hours of business throughout the day, but lodging in *Middlesex*, should be said to seek a livelihood in *London*, within the meaning of the act: But in a subsequent case,(ee) the court held, that a husband domiciled in *Middlesex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London*, as a person seeking his livelihood there; for that means seeking the *whole* of his livelihood within the city. And so, where a coal merchant resided and carried on his business at *Lambeth* in *Surrey*, but kept a counting house in the city of *London*, for the purpose of receiving orders, the court held, that he was not entitled to the privilege of being sued only in the *London* court of requests, as a person seeking his livelihood in the city.(f)

It should also be observed, that under the former acts, the plaintiff is not only prevented from recovering his costs, upon a suggestion that the debt is under *forty* shillings, but shall pay costs to the defendant: but the statute 39 & 40 Geo. III. c. civ. only prevents the plaintiff from recovering his costs, on a verdict in his favour for less than *five* pounds, and does not give any costs to the defendant; though if a verdict be given for the latter, he is entitled by the act to *double* costs, on the judge's certifying that the debt ought to have been recovered in the court of requests.

The court of requests for *London* having been found extremely beneficial, courts of a similar nature were established by act of parliament, in various populous districts; as in the cities of *Bristol* and *Gloucester*, by *the 1 W. & M. sess. 1, c. xviii.; in the town and [*957] borough of *Southwark*, &c. by the 22 Geo. II. c. 47, (explained and amended by the 32 Geo. II. c. 6, 46 Geo. III. c. lxxxvii. and 4 Geo. IV. c. cxxiii.) in the city and liberty of *Westminster*, and part of the duchy of *Lancaster*, by the 23 Geo. II. c. 27, (explained and amended by the 24 Geo. II. c. 42;) in the *Tower Hamlets*, by the 23 Geo. II. c. 30, (explained and amended by the 19 Geo. III. c. 68;) in the city of *Lincoln*, &c. by the 24 Geo. II. c. 16; in the town of *Birmingham*, &c. by the 25 Geo. II. c. 34; in the town and port of *Liverpool*, &c. by the 25 Geo. II. c. 43; in the borough of *Great Yarmouth*, by the 31 Geo. II. c. 24; and in the town and county of the town of *Kingston upon Hull*, by the 2 Geo. III. c. 38. The county court of *Middlesex* was also put on a different footing, by the 23 Geo. II. c. 33, for the more easy and speedy recovery of small debts.(a) And, in the late reign, the jurisdiction of these courts was in several instances extended to sums not exceeding *five* pounds; as

(b) 8 East, 336.

(cc) 2 Taunt. 196.

(dd) 13 East, 161.

(ee) 16 East, 147; and see 15 East, 647. Post, 957, 8.

(f) 5 Dowl. & Ryl. 626.

(a) For the fees of the county clerk of *Middlesex*, see 4 Dowl. & Ryl. 273. And for decisions on the above statute, see *Pratt's Courts of Requests*, 39, 40. 5 Barn. & Cres. 532. 8 Dowl. & Ryl. 155, S. C.

in *London*, by the 39 & 40 Geo. III. c. civ. before mentioned; in the Isle of *Wight*, by the 46 Geo. III. c. lxvi.; in the town and borough of *Southwark*, and the eastern half of the hundred of *Brixton*, by the 46 Geo. III. c. lxxxvii.; (b) in the western division of the same hundred, by the 46 Geo. III. c. lxxxviii.; in the hundreds of *Blackheath*, *Bromley*, and *Beckenham*, &c. by the 47 Geo. III. sess. 1, c. iv.; in the town and port of *Sandwich*, and the vills of *Ramsgate*, &c. by the 47 Geo. III. sess. 1, c. xxxv.; in the parishes of *St. John the Baptist*, &c. in the isle of *Thanet*, by the 47 Geo. III. sess. 2, c. vii.; in the town of *Gravesend*, &c. by the 47 Geo. III. sess. 2, c. xl.; in the city of *Rochester*, &c. by the 48 Geo. III. c. li.; in *Birmingham*, by the 47 Geo. III. sess. 1, c. xiv.; in *Manchester*, by the 48 Geo. III. c. xliii.; in the manors of *Sheffield* and *Ecclesall*, by the 48 Geo. III. c. ciii.; (c) and in the town and county of the town of *Kingston upon Hull*, by the 48 Geo. III. c. cix. In the city of *Bath* and its environs, the jurisdiction of the court of requests has been extended to sums not exceeding *ten* pounds, by the statute 45 Geo. III. c. lxvii.; and in the city of *Bristol*, &c., to sums exceeding *two* pounds, and not amounting to any sum for which an arrest on *mesne* process may by law take place, in all actions or causes of *debt* or *contract*, whereon money would be recoverable in the courts of common law, under the common money counts in an action of *assumpsit*, by the 56 Geo. III. c. lxxvi. (d)

In order to proceed under the court of requests acts for *Southwark*, both plaintiff and defendant must be resident within the jurisdiction of the court. (e)

But where a defendant lodged within the jurisdiction of that [*958] *court, he was holden to be entitled to the benefit of the statutes; (a) although he carried on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it, till after the process was sued out. (bb) And no person to whom a debt is owing, not exceeding *five* pounds, and recoverable by the statutes 25 Geo. II. c. 34 & 47 Geo. III. sess. 1, c. xiv. from any person resident within the jurisdiction of the *Birmingham* court of requests, can recover costs, if he sue elsewhere than in that court: wheresoever the plaintiff may reside, or the cause of action accrue. (cc) So a defendant, residing within the jurisdiction of the court of requests for the city of *Bath*, is entitled to be sued in that court, for a debt under *ten* pounds, though the cause of action accrued, and the plaintiff resided, out of the jurisdiction; and if such an action be brought elsewhere, the court on motion will deprive the plaintiff of costs. (dd)

In the above acts of parliament there are exceptions, relating to particular causes, and persons, of which, and over whom the courts have no jurisdiction. Thus, in the *London* act, (3 Jac. I. c. 15,) there is an exception or

(b) But see the statute 4 Geo. IV. c. cxxiii. § 12, &c.

(c) A writ of *accedas ad curiam* does not lie from this court to the Common Pleas. 10 Moore, 32.

(d) For an alphabetical list of the names of the places having courts of conscience, with the statutes by which they are created, see Man. Ex. Append. 135, &c.

(e) 8 Moore, 429. 1 Bing. 388, S. C.

(a) 22 Geo. II. c. 47. 46 Geo. III. c. lxxxvii.; and see 4 Geo. IV. c. cxxiii.

(bb) 15 East, 647; but see stat. 4 Geo. IV. c. cxxiii. § 14, 16, by which, the clauses in the *Southwark* acts respecting costs being repealed, the plaintiff obtaining a verdict for any sum, however trifling, is entitled to costs, as in other cases.

(cc) 4 Taunt. 150. 1 Chit. Rep. 636, *in notis*.

(dd) 3 Barn. & Ald. 210. 1 Chit. Rep. 635, S. C.; and see 3 Dowl. & Ry. 51.

proviso, (ee) that "it shall not extend to any debt for *rent*, upon any lease of lands or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, although the same be under forty shillings." And there is a similar exception in the court of conscience acts for *Southwark*, (f) *Westminster*, (g) the *Tower Hamlets*, (h) and other places. The exception in the *London* act has been extended to an action for use and occupation; (i) and also to an action for money had and received, brought against the receiver of an estate, to recover money received by him for rent, for the purpose of trying the title of the estate: (k) And this act does not extend to cases where the plaintiff recovers less than the limited sum, in a special action on the case, for the breach of an agreement; (l) nor to an action on the case for negligence, in driving the plaintiff's carriage, contrary to an implied *assumpsit*. (m) The jurisdiction of the courts of conscience does not extend to contracts made on the high seas: (n) And it is a *constant and invariable rule, that none of the court of conscience acts extend to cases, where the debt, being originally above the limited amount, is reduced under it, by means of a set off, (a) or tender. (b) But where the debt originally was under *five* pounds, the defendant is it seems entitled to the benefit of the court of requests act for *London*, though he has pleaded a tender, (c) or paid money into court. (d) And in general, where the reduction is made by payments in part, (e) or the defence of infancy, (ff) or the statute of limitations, (gg) the plaintiff is not entitled to costs, where the damages are under the limited amount. It is not a sufficient ground for refusing a suggestion, under the 22 Geo. II. c. 47, that a court of conscience has no authority to try a question of bankruptcy. (hh) And where a cause is referred to arbitration, and the costs are directed to abide the event of the suit, the plaintiff, we have seen, (ii) is not entitled to them, if it appear by the award that his original demand was under *forty* shillings, and he might have recovered it in a court of conscience.

In the *Southwark* act (46 Geo. III. c. lxxxvii.) (kk) there is a clause, that it shall not extend to any debt for any sum, being the balance of an account on demand, originally exceeding *five* pounds: And if a debt originally above *five* pounds, be reduced under that sum by partial payments, it is

(ee) § 6; and see the statute 39 & 40 Geo. III. c. civ. § 11, 13. 1 Smith, R. 396.

(f) 22 Geo. II. c. 47, § 16; but see the statute 4 Geo. IV. c. cxxiii. § 14, by which the above exception is repealed; and, by § 12, 13, the jurisdiction of the court is further restrained.

(g) 23 Geo. II. c. 27, § 20.

(h) 23 Geo. II. c. 30, § 20. Doug. 245; but see 19 Geo. III. c. 68, § 20.

(i) Doug. 244; and see 13 East, 161; but it is otherwise in *Middlesex*; 2 Bos. & Pul. 29; and in the city of *Bath*, 3 Dowl. & Ryl. 51.

(k) 1 Barn. & Cres. 283.

(l) 5 Durnf. & East, 529.

(m) 1 Taunt. 396.

(n) 1 Bos. & Pul. 223.

(a) 2 Str. 1191. 1 Wils. 19. S. C. 2 Wils. 68. Barnes, 470. S. C. 3 Wils. 48. Say. Costs, 65. S. C. 1 Bos. & Pul. 223. 2 Price, 19. 2 Chit. Rep. 394. 9 Moore, 625.

(b) Doug. 448, 9. 3 Bing. 289.

(c) 5 Maule & Sel. 196.

(d) 5 East, 194.

(e) Barnes, 353. 4 Bur. 2133. 8 East, 28, 347. 7 Moore, 68. 2 Price, 19. 5 Barn. & Cres. 532. 8 Dowl. & Ryl. 155, S. C. 3 Brod. & Bing. 257, S. C.; but see 1 Bos. & Pul. 223, *semb. contra*.

(ff) 14 East, 301.

(gg) 4 Barn. & Cres. 769. 7 Dowl. & Ryl. 229, S. C.

(hh) 1 Bos. & Pul. 11.

(ii) *Ante*, 831.

(kk) § 12; and see stat. 4 Geo. IV. c. cxxiii. § 12.

within the exception of the act.(l) But where a demand for plumber's work and materials, to the amount of *eight* pounds, was reduced below *five* pounds, by the plaintiff's taking and allowing for the old lead; the court of King's Bench held, that he was not entitled to his costs under the *Southwark* act; and that this was not a demand reduced below *five* pounds by balancing an account, within the exception of the *twelfth* section.(mm) So, where the plaintiff in *assumpsit* recovered less than *five* pounds, upon the balance of an account which contained *items* both on the *debit* and *credit* side, the defendant was allowed to enter a suggestion on the roll, to deprive him of his costs, on the *London* act:(nn) And it is no objection to entering a suggestion on that act, that the plaintiff *believed* he had a cause of action for more than *five* pounds.(o) A person resident within the jurisdiction of the court of requests for the isle of *Wight*, and owing a sum of *five* pounds on the balance of an account, is privileged to be sued for the debt [*960] in that court: And therefore, if the *creditor proceed, and recover a verdict to that amount, in a superior court, the defendant is entitled to have a suggestion entered on the roll, to deprive him of costs, pursuant to the statute 46 Geo. III. c. lxxv. § 11, 17, 40, notwithstanding the contract was made elsewhere, and although the plaintiff was ignorant that the defendant resided within the jurisdiction, and claimed a larger sum.(a)

The court in one instance permitted a suggestion to be entered on the roll, in an action brought by an *administrator*:(b) But, in an action brought against an *executor*, they refused it;(c) saying, it could not be meant to give the court of conscience a jurisdiction over executors; and that if there was no express exception, there was one implied from the nature and reason of the thing. An *attorney*, when plaintiff, is not obliged to sue for a debt under *five* pounds, in the court of requests for *London*;(d) and, when defendant, is not subject to the jurisdiction of the county court of *Middlesex*:(e) but in *London*, *Westminster*, the *Tower Hamlets*, *Southwark*, and the *eastern* half of the hundred of *Brixton*,(f) he is expressly subjected thereto.(g) And when a person is sued in a superior court, for a debt under forty shillings, he may move the court to stay the proceedings.(h)

The mode of taking advantage of these statutes is by *plea*, *suggestion*, or *motion*. When there is a prohibitory clause in the act of parliament, as in *Westminster*,(i) declaring that "no action for any debt under forty shillings, and recoverable in the court of requests, shall be brought against any person within the jurisdiction thereof, in any other court whatsoever," the proper mode of taking advantage of the act is by pleading it, or giving it in evidence under the general issue:(k) And if that mode be not adopted,

(l) 1 Taunt. 60.

(mm) 14 East, 344; and see 7 Moore, 68. 3 Brod. & Bing. 257. S. C. 4 Barn. & Cres. 769.

(nn) 1 Maule & Sel. 393; and see 5 Dowl. & RyL 371.

(o) 6 Taunt. 452. 2 Marsh. 145, S. C.

(a) McClell. 582.

(b) Doug. 246; and see 1 Bos. & Pul. 12.

(c) Doug. 263. Stat. 14 Geo. II. c. 10. 5 Durnf. & East, 535. Id. 529.

(d) 7 East, 47. 3 Smith, R. 52, S. C.; and see 5 Moore, 622. 2 Brod. & Bing. 698, S. C. *Ante*, 80.

(e) 2 Wila. 42. Doug. 380. 3 Bur. 1583, *sens. contra*; and see 2 Bos. & Pul. 29.

(f) 4 Geo. IV. c. cxxiii. § 7.

(g) *Ante*, 80. And see the case of *Robinson v. Vickers & another*, T. 56 Geo. III. K. B. 1 Chit. Rep. 636, *in notis*; wherein the court stayed the proceedings, in an action brought against attorneys, for a debt under *five* pounds, on payment of the debt, without costs.

(h) *Ante*, 516.

(i) 23 Geo. II. c. 27, § 21. 2 H. Blac. 352.

(k) 2 H. Blac. 352.

the court will not, after verdict, enter a *suggestion* on the record, that the defendant lived within the jurisdiction, or stay the proceedings.(l) The acts for the *Tower Hamlets*,(m) and other places,(n) have the same prohibitory clause; and though they give no form of plea, yet they may be pleaded, or the facts which bring a case within them may be given in evidence under the general issue, to nonsuit the plaintiff,(o) or obtain a verdict against him.(p) In the *London* act, as well as in the acts for *Southwark* and *Middlesex*, there is no such prohibitory *clause; [*961] and therefore the proper mode of proceeding upon these acts is, for the defendant to apply to the court by affidavit,(aa) for leave to enter a *suggestion*(bb) on the roll, of the facts necessary to entitle him to the benefit of the acts:(cc) which suggestion may be traversed, or demurred to:(dd) And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed, as well as of the trial and former proceedings,(ee) though not, strictly speaking, costs of the defence.

The application for leave to enter a suggestion should be made promptly: and therefore, where a motion for obtaining such leave might have been made in *Easter* term, but instead of that, a negotiation respecting the costs was then entered into, and the motion was made in *Trinity* term, the court held that it was too late.(f) The application for such leave must be made before final judgment signed.(g) And where the plaintiff had declared in *assumpsit* on a bill of exchange, with the common money counts, and the jury had found a general verdict for the plaintiff for 2*l.* 12*s.* 6*d.* without specifying on what counts it should be entered, the court of Common Pleas, with a view to a suggestion, to deprive the plaintiff of his right to costs, on the *London* court of conscience act, allowed the verdict to be entered, under particular circumstances, on the common counts only.(h) The affidavit in support of the application must state that the parties were within the jurisdiction, at the time of the commencement of the suit;(i) and, in *Middlesex*, it should be sworn that the defendant was liable to be summoned to the court of requests;(k) but this does not seem to be necessary in *London*.(l) After judgment by default, and damages assessed under five pounds upon a writ of inquiry, a suggestion cannot it seems be properly entered on the roll;(mm) but the defendant may come into court, under the *London* act, and move to stay proceedings, on payment of the damages assessed, without costs:(nn) and the distinction is said to be this: that where

(l) 3 Durnf. & East, 453. 1 East, 354, (a), & C. cited. *Turton v. Chambers*, M. 43 Geo. III. K. B.

(m) 23 Geo. II. c. 39, § 21.

(n) 18 Geo. III. c. 36, § 24. 1 East, 352.

(o) 2 H. Blac. 352.

(p) 1 East, 352.

(aa) Append. Chap. XL. § 1, 4; and for the rule of court for entering the suggestion, see *id.* 2, 3.

(bb) *Id.* Chap. XXXIX. § 32, 3.

(cc) 1 Str. 47, 50. 2 Str. 1120, 1191. Barnes, 353, 470, 71. Say. Rep. 273. Say. Costs, 64. S. C. 2 Wils. 62. Barnes, 470. S. C. Doug. 244.

(dd) Barnes, 471. 2 H. Blac. 354.

(ee) 2 Str. 1120.

(f) 4 Barn. & Cres. 863. 7 Dowl. & Ry. 265, S. C.

(g) 2 H. Blac. 354. 8 East, 239. 5 Maule & Sel. 510.

(h) 1 Bing. 100. 7 Moore, 427, S. C.; and see 13 Price, 499. *Ante*, 869, (d).

(i) 2 H. Blac. 220. 2 Taunt. 169.

(k) 2 H. Blac. 356. 5 Barn. & Cres. 532. 8 Dowl. & Ry. 155, S. C. (l) 2 Taunt. 169.

(mm) 1 Str. 46. 4 Maule & Sel. 171. 1 Chit. Rep. 636, *in notis*.

(nn) 8 East, 239; and see 2 H. Blac. 351. 2 Bos. & Pul. 588. 1 Chit. Rep. 636, *in notis*. 3 Dowl. & Ry. 371. 1 Man. & Ry. 322, 3, (a).

the intent is to call upon the other party to pay costs, it is necessary to enter a suggestion; but where the intent is to exonerate the party applying, and the other party is not entitled to costs, a motion is sufficient to take them from him.(o) So, in an action for a debt recoverable in a court of requests, where the plaintiff might, after verdict, be deprived of costs, the court of King's Bench, we have seen, will stay the proceedings, on payment of the debt, without costs. 1 Man. & Ryl. 321. *Ante*, 516. It is too late, however, for the defendant, in the term after judgment signed and execution levied, to apply to enter a suggestion on the roll, to [*962] deprive the *plaintiff of his costs, if he could have applied in the same term.(a) And the defendant is not at liberty to enter a suggestion on the roll, under the *Middlesex* court of conscience act, when a verdict is found for one shilling damages, on an issue taken on a plea in abatement of misnomer.(b)

By the 21 *Jac.* I. c. 16, § 6, it is enacted, that "in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at *Westminster*, or in any court whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs, as the damages so given or assessed amount unto, without any further increase of the same; any law, statute or usage to the contrary notwithstanding." The operation of this statute is confined to actions for slanderous words spoken of the person; and does not extend to an action for a libel,(c) or for slander of title,(d) &c., wherein the special damage is the gist of the action: neither, for the same reason, does it extend to an action for special damage, in consequence of words not in themselves actionable;(e) though, when the words are actionable in themselves, a special damage will not take the case out of the statute.(f) This statute extends to actions brought in inferior courts, having power to hold plea to the amount of forty shillings: And though it was holden, that courts baron and other inferior courts, wherein the jury are precluded from legally assessing damages to that amount, were not within the meaning or intent of the statute, but that such courts had still a power of allowing full costs in actions for slander prosecuted therein, however small the *quantum* of damages found or assessed might be;(g) yet now, by the statute 58 Geo. III. c. 30, § 2, "in all actions or suits for slanderous words, to be sued or prosecuted in any court whatsoever, which hath not jurisdiction to hold plea to the amount of forty shillings in such actions or suits, if the jury, upon the trial of the issue in such action or suit, or the jury that shall inquire of the damages, do find or assess the damages under thirty shillings, then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs, as the damages so given or assessed shall amount to, without any further increase of the same." The statute 21 *Jac.* I. c. 16, also applies to a writ of *inquiry*, as well as a *trial*, where the damages are under

(o) 1 Taunt. 397, *per Best*, serjeant.

(a) 2 Maule & Sel. 348.

(b) *Welchen v. Le Pelletier*, H. 49 Geo. III. K. B. 1 Chit. Rep. 636, *in notis*.

(c) *Hall v. Warner*, T. 24 Geo. III. K. B.

(d) Cro. Car. 141, 163. 1 Str. 645.

(e) 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. S. C. Willes, 438. Barnes, 132. S. C. *Id.* 135. 2 H. Blac. 531.

(f) 2 Ld. Raym. 1588. 2 Str. 936. S. C. Willes, 438. Barnes, 132. S. C. *Id.* 142. 3 Bur. 1688. 2 Blac. Rep. 1062. Say. Costs, 25. S. C. Cas. Pr. Q. P. 137, *contra*.

(g) 1 Ld. Raym. 181; and see Hul. Costs, 2 Ed. 33.

forty shillings; (h) and a justification found for the plaintiff will not, in that event, entitle him to full costs. (i)

*But the principal statute made for restraining the plaintiff's right to costs, is the 22 & 23 Car. II. c. 9, [A] (extended to Wales, [*963] and the counties palatine, by the 11 & 12 W. III. c. 9, § 1,) by which it is enacted, that in all actions of *trespass, assault and battery, and other personal actions*, wherein the judge at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of *forty shillings*, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff should have no more costs than damages, in any personal action whatsoever, if the damages were under forty shillings, except in cases of battery, or freehold; and not even in these, without a certificate: and this construction was adopted in some of the first cases that arose upon the statute. (a) But a different construction soon prevailed: and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question. (b) Therefore it does not extend to actions of *assumpsit*, debt, covenant, trover, (c) false imprisonment, or the like; or to actions for a mere assault; (d) or for criminal conversation, (e) or battery of the plaintiff's servant, (f) *per quod consortium, vel servitium amisit*.

In actions for *local* trespasses, the statute applies, whenever an injury is done to the *freehold*, (gg) or to any thing *growing* (hh) upon, or *affixed* (ii) to the freehold; and in a modern case, (kk) it was carried still further. That was an action of trespass *quare clausum fregit*: the first count stated, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled and consumed; and dug up and got divers large quantities of turf, peat, sods, heath, stones, soil and earth of the plaintiffs, in and upon the place in which, &c., and took and carried away the same, and converted and disposed of the same to their own use: There was another count, upon

(A) 2 Str. 934.

(i) Barnes, 128. Cas. Pr. C. P. 22. 2 Wils. 258. 4 East, 567.

(a) 2 Keb. 849. 3 Keb. 121, 247.

(b) T. Raym. 487. T. Jon. 232. 2 Show. 258. S. C. 3 Mod. 39. 1 Salk. 208. 1 Str. 577. Gilb. Eq. Rep. 195. Barnes, 134. 3 Wils. 322. S. C. 1 H. Blac. 294. 2 East, 162, per Lawrence, J. 7 East, 328.

(c) 3 Keb. 31. 1 Salk. 208.

(d) 3 Durnf. & East, 391; but see 6 Durnf. & East, 562.

(e) 2 Blac. Rep. 854. 3 Wils. 219, S. O.

(f) 3 Keb. 184. 1 Salk. 208. 1 Str. 192.

(g) 2 Vent. 48. Com. Rep. 19. 1 Salk. 208. 1 Str. 577, 633, 645. Gilb. Eq. Rep. 195. 2 Str. 726. 2 Ld. Raym. 1444. S. C. 6 Durnf. & East, 281.

(hh) *Hill v. Reeves*, Bul. Ni. Pri. 330. Barnes, 144. 7 East, 325.

(ii) *Birch v. Daffey*, Bul. Ni. Pri. 330. 1 Str. 633. Cas. Pr. C. P. 86. Barnes, 121. 6 Durnf. & East, 281. 7 East, 325.

(kk) Doug. 779; and see 1 Str. 633, 645. Gilb. Eq. Rep. 197, 8. S. C. 3 Bur. 1282. Say. Costs, 50, S. O. accord; but see 2 Vent. 215. Skin. 66. Com. Rep. 19. 1 Salk. 208. 1 Str. 192, *sens. contra*.

[A] See Brightly on Costs, p. 20.

a similar trespass in another close. The defendants pleaded the [*964] *general issue to the *whole* declaration, and two special pleas to the *second* count; and on the trial, a verdict was found for the plaintiffs on the general issue, with one shilling damages, and for the defendants on the special pleas: and the judge had not certified. *Per Lord Mansfield*: "The question on this record is, whether the plaintiffs are entitled to any more costs than damages, under the statute 22 & 23 Car. II. c. 9? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports: and as the question is a general one, we thought it proper to consult all the judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode or qualification of the injury done to the land: The trespass is laid to have been committed on the land, by digging, &c., and the *asportavit* as part of the same act; and on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which therefore is not within the act: Thus, after trees are cut down, and thereby severed from the freehold, if a trespasser come and carry them away, that case is not within the statute, because the freehold cannot come in question; here it might."

In an action for *mesne* profits, if the plaintiff recover less than forty shillings damages, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages.^(a) And where, to a declaration in *trespass* for throwing down, *burning* and *destroying* the plaintiff's hedge or fence, affixed to the freehold, the defendant pleaded the general issue, and a justification of throwing down the hedge, under a right of common, which was found for him, and there was a verdict for the plaintiff, with twenty shillings damages, on the general issue; the court held, that the facts stated in the special plea could not be taken into consideration, to show that the title to the freehold could not come in question; and as it might have been in issue on the declaration, and the judge did not certify, the plaintiff was entitled to no more costs than damages.^(b) But in *trespass* for breaking and entering a *free warren*, the plaintiff shall have full costs, though the damages be under forty shillings.^(c)

When an injury is done to a *personal* chattel, it is not within the statute:^(d) nor where an injury to a *personal* chattel is laid in the same declaration with an assault and battery, or local trespass:^(e) and consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs, without a certificate. But then it must be a substantive and independent injury: for where it is laid or [*965] proved merely in *aggravation of damages, as a mode or qualification of the assault and battery, or local trespass,^(aa) or there is a verdict for the defendant upon that part of the declaration which charges

(a) 1 Esp. Rep. 359. 6 Durnf. & East, 593, S. C.

(b) 7 East, 325. *Sed vide post*, 966.

(c) 2 Blac. Rep. 1151.

(d) 3 Keb. 389, 469. T. Jon. 232. 1 Salk. 208. 1 Str. 534. Gilb. Eq. Rep. 197. S. O. 1 Stark. Ni. Pri. 55. 7 Moore, 269.

(e) 3 Mod. 39. 1 Salk. 208. 1 Str. 192, 551. Gilb. Eq. Rep. 127. S. C. Barnes, 119, 20; 134. 3 Wils. 322. S. C. 2 Str. 1120. Say. Costs, 39. 1 Stark. Ni. Pri. 55. 7 Moore, 269; but see 1 Esp. Rep. 255.

(aa) 1 Str. 624. *Powell v. Elliot*, T. 21 Geo. III. K. B. *Ante*, 964.

him with an injury to a personal chattel, (bb) it is within the statute. So where a *laceravit*, or tearing of the plaintiff's clothes, is laid in the declaration, or found by the jury, to be merely consequential to, (cc) or committed at the same time (dd) as an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate. And, in a late case, it was holden by the court of Common Pleas, that if the plaintiff declare in one count for assaulting him, and beating his horse on which he was riding, whereby it was injured, and the jury gave a verdict with general damages under forty shillings, the plaintiff shall have no more costs than damages. (ee)

The certificate required by this statute need not, it seems, be granted at the trial of the cause; (f) but may be granted within a reasonable time after the trial. (g) And where the defendant lets judgment go by default, (h) or justifies the assault and battery, (i) or pleads in such a manner as to bring the freehold or title of the land in question, on the face of the record, (k) a certificate is holden to be unnecessary. So where, to a declaration stating that the defendant made an assault on the plaintiff, and beat, bruised, wounded and ill treated him, the defendant pleaded the general issue, and a justification as to the assaulting and ill treating only, by a plea of *molliter manus imposuit*; the court of Common Pleas held, that the latter plea admitted a battery, and that the plaintiff was entitled to full costs, although he had obtained a verdict for one shilling damages only, and the judge had not certified at the trial. (l) But the plaintiff in trespass *quare clausum fregit*, recovering less than forty shillings damages, is not entitled to costs of increase, merely because a *view* was granted before trial, though upon the application of the defendant: (m) And where, in an action for an assault and battery, the defendant justifies the assault only, (n) or an assault only is certified by the judge, (o) the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 W. III. c. 11, § 4, that the assault was wilful and malicious. (p)

The award of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 Car. II. c. 9. (q) Therefore, where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and the costs were *directed to abide the event, if the arbitrator find less than [*966] forty shillings damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs: for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs under the 22 & 23 Car. II. c. 9, when the trespass is wilful, is not transferred to the arbitrator under such a rule of reference. (a)

Where the plaintiff recovered less than forty shillings damages, and the

(bb) 2 Vent. 180, 195. Cas. Pr. C. P. 118. (cc) Say. Rep. 91. 1 Durnf. & East, 655.

(dd) 1 H. Blac. 291. 5 Durnf. & East, 482; and see 3 Bing. 135.

(ee) 1 Taunt. 357.

(f) 11 Mod. 198. Post, 968.

(g) 2 Barn. & Cres. 621. 4 Dowl. & Ry. 156, S. C.

(h) Bul. Nl. Pri. 329.

(i) 6 Durnf. & East, 562.

(k) 9 Price, 314.

(l) 7 Taunt. 689. 1 Moore, 420, S. C.

(m) 11 East, 184. 1 Ld. Raym. 76. 2 Salk. 665, S. C. contra.

(n) 3 Durnf. & East, 391; and see 1 Taunt. 16.

(o) 2 Lev. 102.

(p) 3 Wils. 326.

(q) 3 Durnf. & East, 138. Ante, 831; and see 1 Marsh. 235.

(a) 5 East, 489; but see 6 Dowl. & Ry. 481.

plea or issue, though special, was *collateral* to the question of freehold or title to the land, as where the defendant justified an entry as bailiff under process, and issue was joined upon the doors being shut, (b) or where upon a plea of distress for rent, there was an issue on the defendant's being bailiff, (c) a certificate was formerly holden to be necessary, to entitle the plaintiff to full costs: for it was considered, that the plaintiff, who recovered less than forty shillings damages in trespass *quare clausum fregit*, was not entitled to full costs, unless the freehold or title appeared to have come in question, either by the judge's certificate, or by the pleadings. But it has since been determined in several cases, (d) that if the defendant, in trespass *quare clausum fregit*, plead a license, or other justification which does not make title to the land, and it is found against him, the plaintiff is entitled to full costs, though he do not recover forty shillings damages: The principle on which these determinations have proceeded is, that where the case is such that the judge who tries the cause cannot in any view of it grant a certificate, it is considered to be a case out of the statute. (e) So, on a plea of not guilty to a new assignment of *extra viam*, the plaintiff obtaining a verdict for less than forty shillings damages, is entitled to full costs, without a judge's certificate; (f) unless the way pleaded be set forth by metes and bounds. (g) And when the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings. (h) But if a defendant plead a justification in *trespass*, and the plaintiff, without traversing it, new assign a trespass not concerning his title, &c., on which issue is joined, and found for him, the plaintiff, obtaining a verdict for less than forty shillings, is entitled to no more costs than damages, under the statute 22 & 23 Car. II. c. 9. (i)

None of the statutes made for restraining the plaintiff's right to costs, except the 21 Jac. I. c. 16, (k) extended to actions brought in an *inferior* court: And though the defendant removed the cause, and a verdict was given in the court above for the plaintiff, with damages under [*967] *forty* *shillings, yet it was holden, that the plaintiff should have his full costs; because he had made his election to sue in the inferior court, where he would have had such costs, and the defendant could not deprive him of that advantage by removing the cause. (a) But now, by the statute 58 Geo. III. c. 30, § 1, "in all actions or suits of trespass for assault and battery, to be commenced in any court having, or which by his majesty's writ of *justices* may have, jurisdiction to hold pleas in actions or suits to the amount of *forty* shillings, (other than his majesty's courts at *Westminster*, the court of Great Sessions for the principality of *Wales*, or the county palatine of *Chester*, the court of Common Pleas for the county palatine of *Lancaster*, or the court of Pleas for the county palatine of *Durham*,) if the jury, upon the trial of the issue in such action, or the jury that

(b) 2 Barnard, K. B. 277.

(c) Say. Rep. 250. 1 Ken. 245, S. C.

(d) 2 H. Blac. 2, 341. 7 Durnf. & East, 659; but see 7 East, 325, *semb. contra*.

(e) 7 Durnf. & East, 660.

(f) 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. *Id.* 1168. Say. Rep. 251. *Cockerill v. Allanson*, T. 22 Geo. III. K. B. Hul. Costs, 2 Ed. 76. S. C. 1 East, 350. 3 Barn. & Ald. 443; but see Barnes, 124, 129. S. C. *Id.* 149. Bul. Ni. Pri. 330, *contra*.

(g) *Cockerill v. Allanson*, T. 22 Geo. III. K. B. Hul. Costs, 2 Ed. 76. S. C. 1 East, 351; and see 9 Price, 336. *Post*, 973.

(h) 1 Durnf. & East, 636.

(i) 4 Taunt. 98.

(k) *Ante*, 962.

(a) Cas. Pr. C. P. 45, (a); and see 2 Lev. 124. 4 Mod. 378, 9. 1 Ld. Raym. 395. Hul. Costs, 2 Ed. 33, 38.

shall inquire of the damages, do find or assess the damages under *forty* shillings; or if the action be sued or prosecuted in any court whatsoever, which hath not jurisdiction to hold plea to the amount of *forty* shillings, if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under *thirty* shillings; then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs, as the damages so given or assessed shall amount to, without any further increase of the same." It has however been holden, that the statute 22 & 23 Car. II. c. 9, (b) as well as the 21 Jac. I. c. 16, (c) only restrain the *court* from awarding more costs than damages; but the *jury*, not being restrained thereby, may give what costs they please.

The restraint put upon the plaintiff's general right to costs, by the 22 & 23 Car. II. c. 9, has been since *partly* taken off, by subsequent statutes. Thus, by the statute 4 & 5 W. & M. c. 23, § 10, after reciting that great mischiefs ensued by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that "if any such person shall presume to hunt, hawk, fish or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person shall be subject to the penalties of this act, and shall or may be sued or prosecuted for his wilful trespass, in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his *full* costs of suit; any former law to the contrary notwithstanding." It has been holden that a *clothier* is an inferior tradesman within the meaning of this statute; (d) and it is said, that the words "*inferior tradesmen*" extend to every tradesman who is not qualified to kill game: (d) but this was doubted in a subsequent case, (e) wherein the judges were divided in opinion upon the question, whether a *surgeon* *and *apothecary* should be considered [*968] as an inferior tradesman. And in *trespass* for hunting, laid upon the statute 4 & 5 W. & M. against the defendant as a *dissolute* person, &c., if the plaintiff prove the trespass, but not the circumstances under the statute, he shall nevertheless recover as in a common action of trespass. (a)

So, by the 8 & 9 W. III. c. 11, § 4, for the preventing of *wilful* and *malicious* trespasses, it is enacted, that "in all actions of trespass, to be commenced or prosecuted in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the back of the record, that the trespass, upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit; any former law to the contrary notwithstanding." (bb) The certificate required by this statute, need not be granted at the trial of the cause; (cc) and if it appear on the trial, that the trespass, however trifling, was committed after notice, and the jury give less than forty shillings damages, it has been usual for the judge to consider himself bound to certify that the

(b) Cas. Pr. C. P. 45. Pr. Reg. C. P. 112, S. C.

(c) 1 Salk. 207.

(d) Barnes, 125; and see 1 Ld. Raym. 149. Com. Rep. 26, S. C.

(e) 2 Wils. 70. Say. Costs, 54, S. O.

(a) 2 Blac. Rep. 900.

(bb) For the exposition of this statute, see 3 Wils. 325.

(cc) *Swinerton v. Jarvis*, E. 22 Geo. III. C. P. 1 Durnf. & East, 636. 6 Durnf. & East, 11. 7 Durnf. & East, 449. 2 Barn. & Cres. 580. 4 Dowl. & Ry. 147, S. C. K. B.; but see 3 Wils. 21. Doug. 108, n. *contra*.

trespass was wilful and malicious, in order to entitle the plaintiff to his full costs. (d) The granting of a certificate however, upon this statute, seems to be discretionary in the judge before whom the trial is had, who may certify or not, according as it appears to him under the circumstances proved, that the trespass was wilful and malicious: And the judge having declined to certify, in a case where notice was given by the plaintiff's wife to the defendant, not to enter the *locus in quo* in his cart, there being no road there, notwithstanding which the defendant persisted in going on, in the exercise of a disputed right of common in an adjoining inclosure of the plaintiff, which right was found for the defendant on a justification pleaded, the court refused to interfere. (e)

The plaintiff's right to costs is still further abridged, by several modern acts of parliament. Thus in actions or prosecutions on the *revenue* laws, it is enacted by the statute 28 Geo. III. c. 37, § 24, that "in case any information or suit shall be commenced and brought to trial, on account of the seizure of any goods, wares or merchandize, seized or forfeited, by virtue of any act or acts of parliament relating to his majesty's revenues of *customs* or *excise*, or of any ship, vessel or boat, or of any horse, cattle or carriage, used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried or heard, that there was a probable cause of seizure, the judge or court shall certify that [*969] there was a probable cause for making such *seizure; and in such case, the claimant shall not be entitled to any costs of suit whatsoever." (aa) And in actions against *justices* of the peace, on account of a conviction, or any thing done by them for carrying the same into effect, in case such conviction shall have been quashed, the plaintiff, we have seen, (bb) besides the value and amount of the penalty, in case the same shall have been levied, shall not be entitled to recover any costs of suit; unless it shall be expressly alleged in the declaration, that such acts were done maliciously, and without any reasonable or probable cause; nor in case it shall be proved at the trial, that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

In actions upon *judgments*, it is enacted by the statute 43 Geo. III. c. 46, § 4, that "the plaintiffs shall not recover or be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order." (c) Upon this statute, judgment signed and execution taken out for costs, in an action upon a judgment, without leave of the court or a judge, is irregular. (dd) But the statute does not extend to an action brought by the defendant, to recover the costs of a judgment of nonsuit, but only to judgments recovered by plaintiffs. (ee) And where a defendant, against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment pleaded *nul tiel re-*

(d) 6 Durnf. & East, 11; and see 7 Durnf. & East, 449.

(e) 3 East, 495. *Wood v. Watkins*, H. 43 Geo. III. K. B.; but see 5 Durnf. & East, 273, *semb. contra*.

(aa) And see the statutes 19 Geo. II. c. 34, § 16. 23 Geo. III. c. 70, § 29, which statutes, however, were repealed by the 6 Geo. IV. c. 105; but there is a similar clause in the statute 6 Geo. IV. c. 108, § 92. See also *Reynolds v. Cowper*, E. 22 Geo. III. K. B. *Ante*, 892.

(bb) *Ante*, 892, 3.

(c) 2 Blac. Rep. 785.

(dd) 1 Chit. Rep. 190.

(ee) 14 East, 343.

cord, the court of Common Pleas allowed the plaintiff his costs of the action upon the judgment.(f) So, where recognizances of bail were taken in the Common Pleas, and bail were sued in that court to judgment, but having no property, actions were brought on the judgment in the King's Bench, in order to take their persons, costs were allowed by the court *nunc pro tunc*:(g) And, in an action on a judgment, the latter court refused to stay proceedings, on payment of the debt without costs, where there was probable ground for the plaintiff's also claiming *interest* on part of the debt.(h)

By the *Welsh judicature act*, 5 Geo. IV. c. 106,(i) "in all actions upon the case for words, actions of debt, trespass on the case, assault and battery, or other *personal* action,(k) and all *transitory* actions, which shall be brought in any of his majesty's courts of record, out of the principality of *Wales*, and the debt or damages found by the jury shall not amount to the sum of *fifty* pounds, and it shall appear, upon the *evidence given on the trial of the said cause, that the cause of action arose [*970] in the said principality of *Wales*, and that the defendant or defendants was or were resident in the dominion of *Wales*, at the time of the service of any writ, or other meane process, served on him, her or them in such actions, and it shall be so testified under the hand of the judge who tried such cause, upon the back of the record of *nisi prius*, (on such facts being suggested on the record or judgment roll,) a judgment of nonsuit shall be entered thereon against the plaintiff or plaintiffs,(a) who shall pay to the defendant or defendants in such action, his, her or their costs of suit, and the defendant or defendants shall have like remedy to recover the same, as in the case of a verdict given for the defendant or defendants in such action; and in the taxation of all costs allowed and given to the defendant or defendants, the proper officer shall allow to the plaintiff or plaintiffs, out of the defendant's costs, the full sum given by the verdict to the plaintiff or plaintiffs, for his, her or their debt or damages; and although no judgment shall be entered for the plaintiff or plaintiffs upon such verdict, yet nevertheless such verdict without any judgment entered thereon, shall be an effectual bar to any action or actions commenced in any court whatsoever, by the plaintiff or plaintiffs, for the same: Provided, that nothing in this act contained shall bar or preclude any person or persons from commencing and carrying on any action, and which may be tried at the assizes at the nearest *English* county to that part of the said dominion of *Wales* in which the cause of action shall be laid to arise, against any defendant or defendants so resident in the dominion of *Wales*, and obtaining full costs in such action, if the judge before whom the cause shall be tried shall certify, on the back of the record, that the title or freehold of land was chiefly in question, or that such cause was proper to be tried in such *English* county."(b)

Lastly, by the statutes 7 & 8 Geo. IV. c. 29, § 75, and c. 30, § 41, "in

(f) 5 Taunt. 284.

(g) 1 Chit. Rep. 190.

(h) *Id.* 473.

(i) § 21, 2; and see stat. 13 Geo. III. c. 51, § 1, 2.

(k) An action of *covenant* for not levying a fine, would it seems be considered as a *personal* action, within the meaning of this statute. 1 New Rep. O. P. 267.

(a) Append. Chap. XXXIX. § 27.

(b) This statute, which wholly repealed the 13 Geo. III. c. 51, from the 24th June, 1824, did not come into operation till the 6th November following: so that, in all actions tried between those days, neither of the statutes applied, and the plaintiff consequently obtained the same costs, as if the cause of action had arisen in *England*, 1 Car. & P. 468.

all actions, for any thing done in pursuance of the acts for consolidating and amending the laws relative to larceny, &c. or malicious injuries to property, if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the like remedy for the same, as any defendant hath by law in other cases: And though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

[*971] *Many cases have occurred, independently of the statute 4 Ann. c. 16, in which the question has been made, both in the King's Bench and Common Pleas, whether a defendant is entitled to any costs, where, there being several counts in a declaration, the plaintiff has obtained a verdict upon one only; and it has been uniformly holden, that in such case costs shall not be taxed for the defendant on such counts as may have been found for him, not only in cases where the substantial cause of action is the same in all the counts, and only varied by the manner of stating it,^(a) but also where, to different counts of a declaration, there have been different pleas, and issues on those pleas, and one or more of the issues have been found for the plaintiff, and the rest for the defendant: In such case it has also been determined, that the defendant shall not have costs taxed on the issues found for him. Thus, where the defendant in *trespass* pleaded several justifications to two counts, for different trespasses in different places, and on the trial all the issues were found for him, except an issue on not guilty to a new assignment, which was found for the plaintiff; the court, on argument, held the plaintiff was entitled to one penny damages and one penny costs, the jury having found the verdict for him with one penny damages, and that the defendant was not entitled to any costs.^(bb) So, where the defendant in *trespass* pleaded three different justifications, to three different counts, and on issue joined in the Common Pleas, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law, on the whole declaration.^(c) So, where a declaration, in an action on the *case*, contained one count in *trover*, and another for *words*, and the defendant pleaded not guilty to the first count, and a justification to the second count, and there was a verdict for the plaintiff on the count in *trover*, and for the defendant on the other count, the court held that the defendant should not have costs taxed on the issue found for him: and *Buller, J.* said, the practice of the court is uniform, not to allow the defendant costs in cases of this sort.^(d) And where an action of *trespass* was brought against two defendants, for taking the plaintiff's goods; and they pleaded, first, the general issue; and secondly, separate justifications, under a judgment and execution against the goods of a third person; and at the trial, a verdict was found for both the defendants, on their pleas of justification, as to the greater part of the goods; but it turned out that there were some goods taken, the property of the plaintiff, and a verdict was consequently found against them, as to those goods, upon the general issue;

(a) 2 Blac. Rep. 800, 1199.

(c) Bul. Ni. Pri. 335.

(bb) Barnes, 149.

(d) Doug. 677.

which verdict was afterwards ordered to be entered for one of the defendants generally, but as to the other defendant, it was left undisturbed; the court held, that the latter defendant was not entitled to any costs, on the issue found for him.(e)

So, in *assumpsit*, where the defendant pleads *non assumpsit* as to all but a particular sum, and as to that sum a *tender*; and on the trial, the *fact of the tender is found for him, but that the sum [*972] tendered was not sufficient, by which the plaintiff has a verdict on the general issue, and judgment for his damages and costs; in such case, there is not an instance of the costs of the issue, on the plea of tender, ever having been taxed for the defendant.(a) So where, in a similar case, the issue on the plea of tender was found for the plaintiff, and on *non assumpsit* for the defendant, the plaintiff was holden to be entitled to the general costs of the cause.(b) And in a subsequent case, where, in *assumpsit* against an executrix, the defendant pleaded the general issue and the statute of limitations to the whole declaration, and as to a particular sum, that the promises were made by the defendant's testator and one A. B. jointly, which A. B. survived the testator, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; the court, after a full investigation of the subject, held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial, which the plaintiff was entitled to on the issues found for him.(cc)

From these authorities, the practice appears to have been settled, in both courts, that wherever a plaintiff succeeds on a trial, as to any part of his demand, divided into different counts in his declaration, whether the defendant has pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded, yet he has never been allowed costs, on that part of the plaintiff's demand which has been found against the plaintiff.(dd)[A] And

(c) 4 Barn. & Ald. 43, 700.

(a) 5 East, 262.

(cc) 5 East, 261; and see 1 Marsh. 235.

(b) 5 Taunt. 660.

(dd) 5 East, 265.

[A] Except in the action of replevin, if the pleading is at common law, and issues are found for both parties, he who prevails on the whole record recovers his costs, without any deduction for the issues found against him. So, where a defendant pleads double under the statute, and some of the issues are found for him, but the plaintiff prevails on the whole record, the plaintiff has full costs, unless the judge certify that there was probable cause for the double pleas. If the judge so certifies, neither party recovers costs of the issues found against the plaintiff. *Wright v. Williams*, 2 Wend. 632. In debt on a recognizance and several issues joined, where all the issues were found for the plaintiff except one upon the plea of *plene administravit*, which was found for the defendant, the plaintiff was held entitled to costs upon the whole record, and not liable to costs on the issue found for the defendant. *People v. Treter*, 12 Wend. 480. Where a declaration in *assumpsit* contained the money counts and three special counts which were demurred to specially, issues in fact being joined on the money counts, and the plaintiff carried the cause down to trial on those issues and obtained a verdict, and the defendant afterwards had judgment on the demurrer, it was held, as the counts demurred to were bad in form only, that the defendant was not entitled to costs on his judgment. *Osborne v. Lawrence*, 9 Wend. 445. It would have been otherwise, it seems if the counts demurred to had been ill in substance, or if the demurrer had embraced the whole cause of action; and in the latter case it seems that the plaintiff would not have been entitled to the costs of the issues in fact. *Id.* Where there was an issue and a trial on the plea of *non assumpsit*, and also on the plea of discharge under the statute abolishing imprisonment for debt, and a verdict for the plaintiff on the first and for the defendant on the second, judgment was given for the defendant for the costs of the second plea, and

the same rule has prevailed, where a defendant has succeeded on a *demurrer*, as to part of the plaintiff's demand. *(ee)* Thus, where the declaration consisted of two counts, and the defendant demurred to one, and obtained judgment thereon, and pleaded to the other, and on trial of the issue there was a verdict for the plaintiff: the court held, that the plaintiff was entitled to costs upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff having prevailed upon one of his counts, had a right to have his costs upon that count, without any deduction on account of the defendant's having got judgment upon his demurrer to the other count. *(f)*

But if there be two distinct causes of action in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. *(g)* So, where the declaration in [*973] *trespass* *consisted of one count only, to which there were several pleas of justification, on which issues were taken, and a new assignment, on which judgment passed by default, and a *venire* was awarded, as

(ee) 5 East, 264.

(f) 2 Bur. 1232. Say. Costs, 211, S. C., but differently reported. *Tamen quere*; and see stat. 8 & 9 W. III. c. 11, § 2.

(g) 3 Durnf. & East, 654; and see 6 Durnf. & East, 602, 3. The same point was also ruled in another case, of *Wright, clerk, v. Smithies*, T. 49 Geo. III. K. B. with this difference only; that the two distinct causes of action, which in the former case were stated in two counts, were in the latter comprised in one count, 13 East, 193, *(b)*.

of the trial of the issue upon it. *Germain v. Dakin*, 1 Cow. 207. But in *Conklin v. Stepto*, 1 Wend. 30, the defendant in such case had costs of the verdict only, and not for the plea of discharge. Where a declaration in an action of slander contained four counts, the last of which was for malicious prosecution, the jury found a verdict for the plaintiff on the first count and for the defendant on the others; held that the defendant was entitled only to recover such costs as were incurred in the trial of the issue joined upon the first count, and that the defendant was entitled to his costs incurred in the trial of the issue on the last count, although they were incurred in part for testimony, applicable as well to the first issue as to the last. *Nichols v. Hays*, 13 Conn. 155. On the other hand, in case where the declaration contained four counts, and the verdict was for the plaintiff on all the counts but one, and on that for the defendant, and it did not appear from the record or from any thing which took place at the trial, that this count was intended to enforce the recovery of any other demand than that set forth in the other counts, it was held that the defendant was not entitled to costs. *Stoddard v. Mix*, 14 Conn. 12.

This subject is much regulated by statutes in this country; thus in Maine, by the statute of 1821, when there are several issues in the same cause, though some of them are found against the prevailing party, yet he is entitled to his costs on all of them. *O'Brien v. Dunlap*, 5 Greenl. 281. And the same point has been decided in Massachusetts, where a new trial was granted to the defendant on the ground of a misdirection by the judge, as to several of the plaintiff's counts, and the direction was overruled as to some of the counts, and confirmed as to the others, the plaintiff was held entitled to costs as the prevailing party. *Fowler v. Shearer*, 7 Mass. 24. And, in the same State, in an action of slander, where the declaration contained two counts, alleging the utterance of similar words at different times, and a verdict was returned for the plaintiff on one count, and for the defendant on the other, the counts are not on several and distinct causes of action, so as to entitle the defendant to costs, within Revised Statutes of Massachusetts, c. 121, § 16. *Sayles v. Briggs*, 1 Met. 291. *Elder v. Bennis*, 2 Ib. 599. But, in New Hampshire, in an action of trespass, where the plaintiff includes several distinct trespasses in several counts, and prevails as to part, while the defendant succeeds as to the residue, each party will be allowed the costs on the issues found for him. *Meachem v. Jones*, 10 N. Hamp. 126. The New York, 2 Revised Statutes, § 26, giving costs to defendants where some issues are determined in their favour, and some in favour of the plaintiff, applies only to cases where a verdict is rendered for the defendant, not to the withdrawal by the plaintiff of certain counts, by which the defendant was precluded from giving evidence on certain counts, and the plaintiff obtained a general verdict. *Briggs v. Allen*, 4 Hill, 538. *Crittenden v. Crittenden*, 1 Hill, 359.

well to assess the damages on the judgment by default, as to try the issues: all the issues being found for the defendant, it was holden that he was entitled to the costs of them.(a) And in like manner, where one of the issues in a similar case was found for the defendant, he was holden to be entitled to the general costs of the trial, though another issue was found for the plaintiff.(b) So where, in *trespass* for breaking and entering the plaintiff's close, the defendant pleaded a public right of way over the *locus in quo*, and the plaintiff took issue thereon, and new assigned the trespass *extra viam*, upon which the defendant suffered judgment to go by default; and at the trial, the jury found a verdict for the defendant on the right of way, and one shilling damages on the new assignment; the court held, that the defendant was entitled, on the issue found for him, to the general costs of the trial, and that the plaintiff was entitled, on the new assignment, to no more costs than damages.(c) But where the defendant, in trespass *quare clausum fregit*, pleaded not guilty, and also a justification under a right of way: and the plaintiff traversed the right of way, and new assigned *extra viam*; and issue was taken, as well on the new assignment as on the right of way; after verdict for the plaintiff, with one shilling damages on the new assignment, and for the defendant on the justification, the plaintiff was holden to be entitled to full costs, deducting only the defendant's costs on the issue found for him.(d) So where, in *trespass* for cutting down trees, the defendant pleaded not guilty, and several pleas justifying cutting down the trees as a nuisance, for obstructing a highway; to which the plaintiff replied, joining issue on the plea of not guilty, and denying the highway, and new assigned cutting down the trees *extra viam*; and the defendant joined issue on the special pleas, and suffered judgment by default on the new assignment; the jury having found a verdict for the plaintiff on the general issue, and for the defendant on the issues on the special pleas, and assessed damages on the new assignment, it was holden, that the plaintiff was entitled to full costs, except upon the issues on the special pleas, and that the defendant was not entitled to costs, even on those issues.(e)

The rule established by the foregoing cases, seems to amount to this: that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to the other part, the plaintiff is entitled to the costs of the issues found for him, which include the general *costs of the trial, but do not include the costs of the [*974] issues found for the defendant, on which last mentioned issues, however, the defendant is not entitled to claim any costs from the plaintiff:[A] But where the defendant suffers judgment by default, as to part of the plaintiff's demand, and pleads only as to other part, and the plaintiff takes issue on the pleas, and at the trial *all* the issues are found for the defendant, then the defendant is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default.(aa) And accordingly, in an action of *trespass*, for trespasses charged

(a) 8 Durnf. & East, 466; and see 5 East, 265.

(b) 13 East, 191.

(c) 9 Price, 336.

(d) 1 East, 350. 13 East, 194, (a). 1 Brod. & Bing. 222. 3 Moore, 555, S. C.; but see *id.* 465. 11 East, 263. 8 Moore, 239. 1 Bing. 275. S. C. *Post*, 976.

(e) 1 Barn. & Cres. 278.

(aa) 6 Moore, 330. 3 Brod. & Bing. 119, S. C.

[A] See note [A], p. 972, *ante*.

in some named and some un-named closes of the plaintiff, and also for taking his goods and chattels, where the defendant pleaded first, not guilty to the whole declaration; 2dly, as to part, a special plea of license; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict; and 5thly, as to the un-named closes, *liberum tenementum*: The plaintiff, by his replication, took issue on the plea of not guilty; traversed the license mentioned in the second plea, and also new assigned on that plea; and, as to the un-named closes, entered a *nolle prosequi*: the defendant, by his rejoinder, took issue on the traverse, and suffered judgment by default on the new assignment; and the cause went to the assizes, as well to try the issues joined, as to assess the plaintiff's damages on the new assignment: At the trial, the jury found a verdict for the plaintiff on the general issue, (without assessing any damages thereon;) for the defendant on the plea of license; and, on the new assignment, they assessed to the plaintiff one shilling damages, and one shilling costs: the court held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs were allowed to the defendant on that issue.(b) So where, in an action of *trespass*, the defendant pleads the general issue to the whole declaration, and justifies as to part of the trespasses, and the plaintiff newly assigns, to which the defendant suffers judgment by default; and at the trial the jury find a verdict for the plaintiff upon the general issue, with one shilling damages, and assess the damages upon the new assignment at one farthing, with forty shillings costs; the plaintiff, being bound to go down to trial to get rid of the general issue, which would otherwise have barred his whole action, is entitled to his full costs of the trial; although the jury find a verdict for the defendant upon the special pleas, which cover part of the trespasses; the costs of the issues on such pleas being deducted, but not allowed to the defendants.(c)

There was formerly a distinction as to the costs on several counts, between the practice of the King's Bench and Common Pleas: In the former court, where the declaration consisted of several counts, the plaintiff was only entitled to the costs of such as were found for him; and neither party was allowed the costs of those which were found for the defendant. [*975] ant.(d) *But it was otherwise in the Common Pleas: for there, if the plaintiff succeeded upon any one of the counts, he was entitled to the costs of his whole declaration, though the defendant succeeded upon the others.(a) This distinction, however, is now abolished; and it is settled in both courts, that neither party is entitled to costs on those counts which are found for the defendant:(bb) and there being several defendants, some of whom suffered judgment by default, makes no difference.(cc) In the Exchequer, when several issues have been directed, and some are found for the plaintiff, and others for the defendant, each party will be allowed costs on the issues found in his favour, and must pay them on those which are found against him.(dd)

(b) 6 Moore, 324. 3 Brod & Bing. 117, S. C.

(c) 1 Younge & J. 354.

(d) Say. Costs, 212. Doug. 677. 6 Durnf. & East, 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 50. (b); but see 1 Wils. 331.

(a) Bul. Ni. Pri. 335. 2 Blac. Rep. 800, 1199. 6 Durnf. & East, 602, 3. 5 East, 262, 3. 2 Bos. & Pul. 49; but see the case put by *Le Blanc*, J. 8 Durnf. & East, 467.

(bb) 2 Bos. & Pul. 334. 16 East, 129. 6 Taunt. 398. 2 Marsh. 201. S. C. 7 Moore, 120. 3 Brod. & Bing. 292, S. C.; and see 1 Chit. Pl. 4 Ed. 354, 5.

(cc) 6 Taunt. 398. 2 Marsh. 201, S. C.

(dd) 2 Price, 272.

An inclosure act directed, that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, that "if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large:" a proprietor brought an action, claiming *nine* distinct rights, and recovered for *three* only; and the court held that he should have his costs only on those issues which were found for him, and that the defendant should have his costs of the other issues.^(e) But where, by an inclosure act, any person dissatisfied with the determination of the commissioners, might bring an action against the person in whose favour such determination should have been made, and if it should appear that the party claiming was entitled to a qualified or less interest, the jury might declare the same on their verdict, to be indorsed on the *postea*, in addition to the verdict given on the issue joined, *but the costs of such action should abide and be determined by the verdict given upon the issue joined*; and an action was brought against the defendant, who claimed a right of common in respect of *ninety* acres, and upon the general issue, the declaration consisting only of one count, a verdict was given for the plaintiff as to *thirty* acres, and for the defendant as to the residue, and there was an indorsement on the *postea*, that the jury found the right of common in respect of *sixty* acres, &c.; the court held, that the plaintiff was entitled to general costs.^(f)

It should be remembered, however, that the plaintiff has in no case a right to costs, except where he is entitled to judgment on the whole record: and, therefore, where the defendant, in *trespass* for breaking and entering the plaintiff's free fishery in A., and also in B., and also in A. and B., pleaded first not guilty, and secondly, that the said free fisheries were parcel of a navigable harbour, &c., common to all the king's subjects, *to which the plaintiff replied, prescribing for free fishery in the [*976] said place, in right of his manor; and the defendant rejoined, taking issue on such prescription; it was holden, that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff was not entitled to costs.^(aa) So where, in *trespass* for breaking and entering the plaintiff's close covered with water, and fishing in his several and free fishery, the defendant pleaded the general issue of not guilty, and several special pleas of justification, on which the plaintiff new assigned, and the defendant pleaded thereto the general issue, and pleas of justification; and the jury found for the plaintiff on the general issues, with *one* shilling damages and *forty* shillings costs, and for the defendant on the pleas of justification, which covered the whole of the trespasses; the court of Common Pleas held, that the defendant was entitled to the general costs of the cause, on the issues which were found for him, and the plaintiff to costs on the other issues only.^(b) And where an executrix pleaded first *non assumpsit*, secondly, *ne unques executrix*, and thirdly, *plene administravit*; and issues on the two first pleas were found for the plaintiff, and on the last for the defendant; it was holden, that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial.^(c)

(e) 6 Durnf. & East, 599.

(f) 3 Maule & Sel. 323.

(aa) 11 East, 263; and *vide ante*, 659.

(b) 4 Moore, 110. 1 Brod. & Bing. 465, S. C.; and see 8 Moore, 239. 1 Bing. 275, S. C. accord.

(c) 1 Barn. & Ald. 254. 8 Taunt. 129.

It has already been observed, (d) that no costs were recoverable by a *defendant* at common law : And the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marlberge*, (52 Hen. III.) c. 6. Afterwards, costs were given to the defendant in *error*, by the 3 Hen. VII. c. 10, and 19 Hen. VII. c. 20, and in *replevin*, by the 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3, &c. But in one of these cases, the defendant is to be considered as an actor ; and in the other of them, the provision is virtually for the benefit of the plaintiff, in the original action. (e)

In *replevin*, when a defendant removes proceedings, by *recordari facias loquelam*, from a county court into one of the superior courts, and signs judgment of *non pros* in default of the plaintiff's appearing, he is entitled to costs : (f) And, by the 7 Hen VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3, the defendant, in *replevin* or second deliverance, making avowry, cognizance or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred ; which statutes, we have seen, (g) extend to avowries, &c. made by an *executor*, (h) [*977] or for *an estray*, (a) and, as it should seem, for an *amercement* by a court leet ; (bb) but not to pleas of *prisel en auter lieu*, upon which the writ is abated, (cc) or to pleas of *property* in the thing distrained. (dd) By the 17 Car. II. c. 7, § 2, the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full costs* of suit : And, by the 11 Geo. II. c. 19, § 22, if the plaintiff in an action of *replevin*, founded upon a *distress* for rent, relief, heriot, or other service, shall become nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double costs* of suit. On this latter statute, where a defendant in *replevin* avows as landlord for rent in arrear, and obtains a verdict, he is entitled to double costs, although the action be really and *bona fide* brought to try the title to the land. (ee) But this statute does not extend to a *distress* for a rent-charge, (ff) or *seizure* for a heriot *custom* : (gg) And where, by a canal act, the company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross, and the persons from whom the land were to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums ; an avowant, stating a *distress* under this act of parliament, was holden not to be entitled, on obtaining a verdict, to double costs, under the statute 11 Geo. II. c. 19, § 22. (hh) This statute gives

(d) *Ante*, 945.

(e) *Say. Costs*, 70.

(g) *Ante*, 887.

(a) *Cro. Eliz.* 330.

(bb) *Cro. Jac.* 520 ; but see *Cro. Eliz.* 330, *semb. contra* ; and see 6 *Maule & Sel.* 129.

(cc) *Com. Rep.* 122. 2 *Ld. Raym.* 788, S. C.

(dd) *Hardr.* 153.

(ee) 4 *Barn. & Cres.* 889. 7 *Dowl. & Ryl.* 484 ; and see 9 *Moore*, 642. 2 *Bing.* 341, S. C.

(ff) *Willes.* 429. 1 *Bos. & Pul.* 214 ; and see 1 *New Rep. C. P.* 56 ; but see 9 *Moore*, 667. 2 *Bing.* 349, S. C. by which it seems that a rent charge is within the meaning of the 23d section of the above statute.

(gg) *Barnes*, 148. 2 *Wils.* 28. *Say. Costs*, 107.

(hh) 7 *Durnf. & East*, 500 ; and see 1 *Bos. & Pul.* 213, S. P.

(f) 1 *Durnf. & East*, 371. *Ante*, 418.

(h) 2 *Rol. Rep.* 457.

double costs against a plaintiff in *replevin*, only in three cases; viz. where he is nonsuit, discontinues his action, or has judgment given against him: And therefore where, in *replevin*, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant; it was holden, that he was not entitled to double costs under the statute.⁽ⁱ⁾ On a distress for rates, made on plaintiff's lands under the statute 50 Geo. III. c. xlvii. the avowant is entitled on a nonsuit in *replevin*, to treble costs.^(k)

By the statute 28 Hen. VIII. c. 15, § 1, it was enacted, that "in trespass upon the statute 5 Ric. II. stat. 1, c. 8, debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his *costs against the plaintiff, to be assessed and taxed by the dis- [*978] cretion of the judge or judges of the court where such action shall be commenced or sued; and shall have such process and execution for the recovery of the same against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff."

Executors and administrators are not particularly excepted out of the statute 28 Hen. VIII. c. 15; yet as that statute only relates to contracts made with, or wrongs done to the plaintiff,^(a) it has been uniformly holden,^(b) that they are not liable to costs, when plaintiffs, upon a nonsuit^(c) or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a *contract* entered into with the testator or intestate,^(d) or for a *wrong* done in his life-time.^(ee)[A] So, where the plaintiff sued as executor, and was nonsuited upon evidence being given at the trial, that the supposed testator was still alive, the court refused to allow costs to the defendant; it appearing from affidavits on both sides, to be still at least doubtful whether the supposed testator was living or not:^(f) And where a plaintiff sued as executor, for a debt which appeared on the trial to be claimable, if at all, in the character of surviving partner of the deceased, and was nonsuited; the court refused to refer it to the master to tax the defendant's costs, it being doubtful whether justice would be done by such an order.^(g) But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though

(i) 1 Barn. & Ald. 670; but see 6 Dowl. & Ry. 481, by which it seems, that if the cause had been referred at the trial, and the arbitrator had thereupon awarded a verdict to be entered for the defendant, he would have been entitled, under the statute, to double costs.

(k) 6 Maule & Sel. 128.

(a) 2 Str. 1107.

(b) Cro. Eliz. 503. Cro. Jac. 229. 2 Bulst. 261. 1 Salk. 207, 314. 3 Bur. 1586. Say. Costs, 97.

(c) *Smith, executor, v. Rhodes*, T. 26 Geo. III. K. B.

(d) T. Jon. 47. 1 Vent. 92. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Cas. Pr. C. P. 157. Pr. Reg. 118. S. C. Barnes, 141. 1 H. Blac. 128. 1 Bos. & Pul. 445. 2 Bos. & Pul. 253. 2 East, 395. *Cook & others, executors, v. Lucas*, E. 42 Geo. III. cited in 2 East, 398.

(ee) Barnes, 129.

(f) 1 Barn. & Ald. 386.

(g) 3 Barn. & Ald. 213. 1 Chit. Rep. 628, S. C.

he bring the action as executor or administrator; as upon a *contract*,^(h) express or implied, or in *trover*,⁽ⁱ⁾ for a conversion after the death of the testator or intestate. And where a declaration in *trover* by an executor consisted of two counts, one on a conversion in the life-time, and another after the death of the testator, for which latter the plaintiff might have declared in his own right, he was holden to be liable to costs on a nonsuit.^(k) The reason why an executor, suing in his representative character, shall not be liable to costs, if he fail, is because he is supposed not to be cognizant of the contracts made by his testator: *but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is no reason why he should be exempt from costs, in case he fail in his action: (a) And for a similar reason, executors or administrators are not necessarily exempted from costs, on interlocutory motions.^(b) But though an executor or administrator, necessarily suing as such upon a contract entered into with the testator or intestate, is not made liable to costs by the statute, and no costs can be awarded against him on record; yet, in a late case, where the plaintiff sued as administrator, upon a contract made with his intestate, and assigned by the plaintiff to J. S., for whose benefit the action was brought, and it appeared in evidence that the contract had been annulled, with the privity both of the plaintiff and J. S., and the former was indemnified by the latter; a verdict being found for the defendant, the court of Common Pleas made a rule upon the plaintiff, to pay the defendant his costs, as for a contempt, in fraudulently abusing the process of the court.^(c) An executor or administrator is liable to costs, upon a judgment of *non pros*:^(d) And where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance,^(e) or for not proceeding to trial according to notice:^(ff) but otherwise he is not liable to costs in either of these cases:^(gg) nor, where he merely sues *en auter droit*, is he liable to costs, upon a judgment as in case of a nonsuit.^(hh) A plaintiff, suing as *assignee* of an insolvent debtor, is not, by analogy to the case of executors and administrators, within the exemption of the statute 23 Hen. VIII. c. 15; but if nonsuited, must pay the defendant's costs:⁽ⁱⁱ⁾ Nor will the court suspend the payment of such costs, until the plaintiff has received sufficient assets, to be paid *quando acciderint*.⁽ⁱⁱ⁾

(h) 6 Mod. 91, 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119. 2 Str. 1106. 4 Durnf. & East, 277. 5 Durnf. & East, 234. 2 East, 396. 8 Moore, 146. 1 Bing. 249, S. C.

(i) Com. Rep. 162. Cas. Pr. C. P. 61. Barnes, 132. Cas. temp. Hardw. 204. 7 Durnf. & East, 358. *Monkland v. De Grainge*, M. 41 Geo. III. K. B. 10 East, 293. 2 Taunt. 116; but see 3 Lev. 60, *semb. contra*.

(k) 2 Taunt. 116; and see 7 Durnf. & East, 358.

(a) 6 East, 412, *per Lawrence*, J.

(b) *Per Cur. M.* 42 Geo. III. K. B.

(c) 3 Bos. & Pul. 115.

(d) Cas. Pr. C. P. 14, 157, 8. 3 Bur. 1585. 6 Durnf. & East, 654. 1 Chit. Rep. 628, 9, *in notis*.

(e) Cas. Pr. C. P. 79. 3 Bur. 1451. 1 Blac. Rep. 451. S. C. 2 New Rep. C. P. 72. 1 Chit. Rep. 629, *in notis*. *Ante*, 679.

(ff) Cas. Pr. C. P. 157, 8. Pr. Reg. 119. S. C. Barnes, 133. 3 Bur. 1585. 1 H. Blac. 217.

(gg) 2 Str. 871. Barnes, 133. 4 Bur. 1927. Say. Costs, 96, 7. S. C. *Per Cur. T.* 44 Geo. III. K. B. *Wright v. Jones*, H. 45 Geo. III. K. B. 2 Smith, R. 260. S. C. 1 Chit. Rep. 629, *in notis*. 8 Moore, 687. *Ante*, 679, 759.

(hh) 4 Bur. 1928. *Per Cur. T.* 37 Geo. II. K. B. Barnes, 130. 2 H. Blac. 277. 2 East, 396; but see 7 Price, 709.

(ii) 8 Price, 212.

Executors and administrators, when defendants, have no privilege with respect to costs: (k) And if there be a nonsuit or verdict against them, the judgment is, that the costs be levied of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*. (l) A bankrupt, sued as executor, pleaded a false plea, and it being found against him, the plaintiff had judgment for the costs *de bonis propriis*, after which he obtained his certificate; and the court held, that this judgment for the costs was not *discharged by [*980] the certificate. (a) And when an executor or administrator pleads *non assumpsit*, and *plene administravit*, if the plaintiff take judgment of assets *in futuro* upon the latter plea, and go to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtain a verdict; and therefore in such case, unless the defendant has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do, upon payment of costs. (b) So, where an executor pleaded *non assumpsit*, and *plene administravit*, on which the plaintiff took issue, and a bond and mortgage outstanding, and *plene administravit præter*, on which latter plea the defendant took judgment of assets *quando acciderint*, and there was a verdict for the plaintiff on the plea of *non assumpsit*, and for the defendant on the issue of *plene administravit*; the court held, that the plaintiff, being at all events entitled to judgment of assets *quando*, and having been compelled by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to retain the *postea*, and to have the general costs of the trial, though the issue of *plene administravit* was found against him. (c) But when an executor or administrator pleads *plene administravit*, or judgments outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs: (d) nor does he seem to be liable thereto, when he pleads *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro*. (e) And when an executor or administrator pleads several pleas to the whole declaration, as *non assumpsit* and *plene administravit*, and one of them is found for him, he is entitled to the *postea* and costs, though the other plea be found against him. (f)

There being still many cases, in which the defendant was not aided by the provisions of the before mentioned statutes, (g) it was enacted by the statute 4 Jac. I. c. 8, that "if any person shall commence, in any court, any action of *trespass*, *ejectione firmæ*, or any other action whatsoever,

(k) Plowd. 183. Hut. 69, 79.

(l) 4 Durnf. & East, 648. 7 Durnf. & East, 359.

(a) 3 Bur. 1368. 1 Blac. Rep. 400, S. C. *Ante*, 210.

(b) 2 Blac. Rep. 1275.

(c) 12 East, 232; and see 5 East, 261. *Ante*, 972.

(d) *Batt v. Deschamps*, T. 24 Geo. III. C. P. after two arguments, and consulting with the judges of the King's Bench, whose practice had been to allow costs out of the future assets, and on looking into the precedents: and the judges of the King's Bench signified their intention not to allow them in future in that court. Imp. K. B. 10 Ed. 447, S. C. But, in the case of *De Tastet v. Andrade*, M. 58 Geo. III. K. B. 1 Chit. Rep. 629, 30, *in notis*, the court of King's Bench held, that though an administrator in such case was not personally liable to pay costs, yet that judgment might well be entered for them, to be recovered *de bonis testatoris, quando acciderint*.

(e) Rast. Ent. 323. 8 Co. 134. 2 Wms. Saund. 5 Ed. 226. 1 Sid. 448, S. C.

(f) *Garmans v. Hesket*, E. 22 Geo. III. K. B. *Cockson v. Drinkwater*, T. 23 Geo. III. K. B. 1 Barn. & Ald. 254. 8 Taunt. 129. *Ante*, 976.

(g) 2 Leon. 9. 3 Leon. 92. Bul. Ni. Pri. 334.

wherein the plaintiff or demandant might have costs, in case judgment should be given for him, and the plaintiff or demandant shall be [*981] *nonsuited therein, after the appearance of the defendant, or a verdict shall pass against him by lawful trial, that then the defendant, in every such action, shall have judgment to recover his costs against the plaintiff or demandant, to be assessed and levied in like manner as upon the 23 Hen. VIII. c. 15." By the above statute, the defendant is entitled to costs, on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment; as in *assumpsit*, (a) &c. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless entitled to costs, for the unjust vexation: (b) But this statute, being framed upon the model of the 23 Hen. VIII. c. 15, does not extend, any more than that, to actions brought by executors or administrators. (c)

The statutes which have been hitherto mentioned, as giving costs to defendants, only relate to cases where the plaintiff is nonsuited, or has a verdict against him. But there are other statutes, by which the defendant is entitled to costs upon a discontinuance, *nolle prosequi*, *non pros*, or demurrer; or when the plaintiff does not recover the amount of the sum for which the defendant was arrested, provided it appear that he had not any reasonable or probable cause for arresting him to that amount, and the court shall thereupon make a rule or order for the allowance of such costs.

By the 8 Eliz. c. 2, § 2, "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in *three* days after bail put in; or if, after declaration, he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein; the judges, by their discretions, shall award to the defendant his costs, damages and charges, in that behalf sustained." If the plaintiff enter a *nolle prosequi*, as to the whole cause of action, the defendant is entitled to costs upon this statute. (d) And where, in *trespass* against two defendants, one of them suffered judgment by default, and a writ of inquiry was executed as against him, and the plaintiff entered a *nolle prosequi* as to the other, the court of Common Pleas held, that the latter was entitled to costs. (e) But where, in *assumpsit* against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other defendant, who pleaded the general issue, the court of King's Bench held, that the former was not entitled to costs. (ff) When a *nolle prosequi* is entered on any of the counts in a declaration, the plaintiff is not entitled to costs on such counts: (g) And the statute 8 Eliz. does not extend, any more than the 23 Hen. VIII. c. 15, to actions brought by executors and administrators in their representative character. (h)

[*982] *By the 13 Car. II. stat. 2. c. 2, § 3, it is enacted, that "upon an appearance entered for the defendant by attorney, of the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration against the

(a) *Ante*, 945.

(b) Moore, 625. 1 Bulst. 189. 3 Bulst. 248. Hob. 219. Hut. 16. S. C. Cro. Car. 175; but see Cro. Jac. 258, 9, *semb. contra*. (c) Gilb. C. P. 271.

(d) 3 Durnf. & East, 511; and see 16 East, 129. *Ante*, 681.

(e) 8 Taunt. 643. 2 Moore, 718, S. C.

(ff) *Harewood v. Matthews & another*, H. 56 Geo. III. K. B.

(g) 16 East, 129. *Ante*, 681.

(h) Cro. Eliz. 69. Cro. Jac. 361.

defendant, in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 Hen. VIII. c. 15." It has been observed, that the provision contained in the statute 8 Eliz. c. 2, § 2, with respect to the costs of a defendant, when the plaintiff in the King's Bench discontinues after declaration, is not extended by the 13 Car. II. to the case of a similar discontinuance in the Common Pleas.(a) The reason generally assigned for this seeming omission is, that as a plaintiff could not discontinue his suit in the Common Pleas, without an application to the court for that purpose, it was customary to make the payment of costs to the defendant one of the conditions of compliance with a motion for leave to discontinue; and therefore it was unnecessary in such case, to make any provision by statute for the costs of a defendant.(b)

And, still further to discourage the bringing of frivolous and vexatious actions, it is enacted by the statute 8 & 9 W. III. c. 11, § 2, that "if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*." This statute does not extend to demurrers to pleas in abatement:(c) nor any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict.(d)

And for the more effectual prevention of frivolous and vexatious arrests and suits, it is enacted by the statute 43 Geo. III. c. 46, § 3, that "in all actions to be brought in *England or Ireland*, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear, to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the *defendant or defendants to be arrested [*983] and held to special bail in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants: And the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant or defendants in such action: And in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or de-

(a) Hul. Costs, 2 Ed. 136.

(b) *Id. ibid.*; and see 2 Crompt. 3 Ed. 453. 4 Say. Costs, 83.

(c) 1 Ld. Raym. 337. 1 Salk. 194. 12 Mod. 195. Comb. 482. S. C. 2 Ld. Raym. 992. 1 Salk. 194. 6 Mod. 88, S. C.

(d) Cas. Pr. C. P. 25. 1 H. Blac. 530; but see Cas. Pr. C. P. 4, *contra*.

fendants, to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his or their costs, so to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases."^(a)

Upon this statute, the defendant was allowed his costs, where the plaintiff arrested him for the price of coals, considered as full measure; the plaintiff having, previously to the arrest, compounded a penal action for delivering the same coals, as being short of measure.^(b) And where a verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide the event of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested; the court held, that the sum so found, and for which judgment was afterwards given, was to be considered as a sum *recovered*, within the meaning of the act, so as to entitle the defendant to apply for costs.^(c) So, where an attorney brought an action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing, the court held, that this was a case within the statute; and that if not, still the court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.^(d) And where a defendant was arrested for a sum of money, in respect of the greater portion of which the plaintiff knew at the time that the defendant had obtained a discharge under the insolvent debtors' act, the court held, that the defendant was entitled to have his costs taxed under the above statute, as upon an arrest without probable cause.^(e) But where a defendant was arrested and holden to special bail for 28*l.*, and paid 2*l.* into court, and afterwards the cause, before it came on for trial, was referred, with all matters in difference, to an arbitrator, who had power to examine [*984] the parties, *and call for books, &c. and it was agreed that the costs should abide the event: the arbitrator having awarded to the plaintiff the sum of 1*l.* 19*s.*, upon which a motion was made to allow the defendant his costs; the court held, that this was not a case within the statute, and that the defendant was not entitled to costs.^(aa)

Executors, who have holden a party to bail, without reasonable or probable cause, for a debt due to their testator, are within the act.^(bb) And where a plaintiff arrested a defendant, and held him to bail for 20*l.*, knowing that the latter had a cross demand which would reduce the debt to 6*l.*, and upon the trial, he recovered the latter sum only; the court of King's Bench held, that the defendant was entitled to his costs under the above statute, as having been arrested and held to bail, without any probable cause.^(cc)

(a) Append. Chap. XXXIX. § 34. And for the form of a *fiery facias* on this statute, see Append. Chap. XLI. § 39.

(b) 2 Smith, B. 261.

(c) *Neale v. Porter*, T. 44 Geo. III. K. B. *Burns v. Palmer*, in *Scac. M.* 44 Geo. III. S. P. 3 Barn. & Cres. 491. 5 Dowl. & Ryl. 383, S. C.; and see 1 Moore, 92. 5 Barn. & Ald. 663, 4. 1 Barn. & Cres. 101.

(d) 5 Barn. & Ald. 661.

(e) 1 Dowl. & Ryl. 369.

(aa) 3 Barn. & Cres. 491. 5 Dowl. & Ryl. 383, S. C.; and see 6 Barn. & Cres. 193.

(bb) 5 Barn. & Ald. 515, (a).

(cc) *Id.* 513. 1 Dowl. & Ryl. 67, S. C.; and see 1 Barn. & Cres. 91; but see 2 Campb. 594.

But, on the other hand, where the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a less sum than *fifteen* pounds; the court of Common Pleas, upon an application to allow the defendant his costs pursuant to the above statute, held that in order to entitle him to such costs, he must show that the arrest was vexatious and malicious. *(d)* So, where a defendant was arrested in that court for *fifteen* pounds, for goods sold, and was indebted to the plaintiff in the sum of *fourteen* pounds only, on a promissory note payable by instalments, the court would not allow the defendant his costs, pursuant to the above statute, as he might have been arrested on the note. *(e)* This statute does not extend to an action of *debt* on bond, where the plaintiff obtains a verdict for nominal damages, and takes his judgment for the penalty, exceeding the sum for which the defendant was arrested. *(f)* And it has been holden not to apply to cases, where the defendant pays into court, upon the common rule, a less sum than he was arrested for, and the plaintiff takes it out of court: *(g)* and it must be a strong case against an *executor*, to bring him within the meaning of the act. *(h)* An application for costs, under this statute, cannot be supported by a reference to the notes of the judge before whom the cause was tried; but an affidavit must be made, showing there was no reasonable or probable cause for the arrest: *(i)* And the court will not make an order for costs to be paid to the defendant upon this statute, where it appears, on showing cause, that under the circumstances, the plaintiff had a reasonable or probable cause for arresting the defendant, to the full *amount of the sum [*985] for which he was arrested. *(a)* If a defendant's attorney apply for costs on this statute, without sufficient grounds, the court of Common Pleas, on discharging the rule, will make him pay the costs of the application. *(b)*

The plaintiff, we may remember, is not entitled to costs in a *popular* action, for the whole or part of the penalty given by statute to a common informer, unless they are expressly given him by the statute. *(cc)* [A] Nor was the defendant entitled to costs in such an action, until the statute 18 Eliz. c. 5, § 3, (made perpetual by the 27 Eliz. c. 10,) by which it is enacted, that "if any *common informer* shall willingly delay his suit, or shall discontinue, or be nonsuit, or shall have the matter pass against him therein by verdict or judgment in law, the said informer shall pay to the defendant his costs, charges and damages, to be assigned by the court in which the suit shall be attempted:" with a *proviso*, that "this act shall not extend to any officers, who, in respect of his office, has heretofore usually sued upon penal laws: nor to any officer, suing only for matters concerning his office." *(dd)* This act of parliament, which seems to give costs upon an arrest of judg-

(d) 1 Moore, 92; and see 5 Price, 1. 3 Moore, 605. 1 Brod. & Bing. 278, S. C.

(e) 3 Moore, 590.

(f) 10 East, 525. 7 Taunt. 251. 2 Marsh. 527, S. C.

(g) 1 Smith, R. 428. 2 Smith, R. 667. 13 East, 90. 2 Dowl. & Ryl. 266. 2 Barn. & Cres. 711. 4 Dowl. & Ryl. 186. S. C. 3 Barn. & Cres. 491. 5 Dowl. & Ryl. 383. S. C. 3 Moore, 327. 1 Brod. & Bing. 66. S. C. 6 Price, 126; but see 2 New Rep. C. P. 76, *contra*.

(h) 1 Marsh. 21.

(i) 1 Taunt. 60.

(a) 1 Smith, R. 521; and see 1 Moore, 92. 2 Chit. Rep. 147.

(b) 4 Taunt. 191.

(cc) *Ante*, 946.

(dd) 2 Ld. Raym. 1333. Bul. Ni. Pri. 333, 4. And see the statute 24 Hen. VIII. c. 8, which

[A] See Brightly on Costs, p. 130.

ment,(e) extends to actions brought upon a *subsequent* statute,(f) or one that is *repealed*:(g) and also to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer:(h) But it does not extend to actions brought by the party grieved, upon a *remedial* statute:(i) nor to give costs to one of several defendants who has been acquitted, where a verdict has been given against his co-defendants.(k)

When there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases:(l) And if they fail, each of them is answerable for the whole costs:[A] Thus, where an *ejectment*

exempts plaintiffs, suing to the use of the King, in any action whatsoever, from the payment of costs, in case they be nonsuited, or a verdict pass against them. See also 7 Durnf. & East, 367.

(e) Gibb. O. P. 271; but see Hul. Costs, 2 Ed. 215.

(f) Willes, 392, 440. 1 Wils. 177.

(g) Hut. 35, 6. 2 Keb. 106.

(h) Cowp. 366. Say. Costs, 15, S. C.; and see 2 Str. 1103. 6 Vin. Abr. 341, 2, S. C.

(i) 1 And. 116. 2 Leon. 116. 4 Leon. 55. Cro. Eliz. 177. Hut. 22. 1 Salk. 30.

(k) 1 Car. & P. 439, 446, 7.

(l) 1 Str. 516. 2 Str. 1203. Ad. Eject. 2 Ed. 301; and see 5 Barn. & Cres. 528, 9. 8 Dowl. & Ryl. 285, S. C.

[A] In actions *ex delicto* against several defendants, if they plead severally, and all prevail against the plaintiff, each defendant is entitled to costs. *Alster*, if they join in their pleas. *Crosby v. Lovejoy*, 6 N. H. 458. And where a verdict is found in favour of either defendant, he is entitled to costs in such case. *Galloway v. Pitman*, 3 Mass. 408. *Trapp v. M'Kinzie*, 2 N. & M. 511. *Hidas v. Gilmore*, 3 Blackf. 49. Where some of the defendants prevail and others are found guilty, the former will recover several costs for travel, attendance and attorney's fee; but for witnesses' fees, depositions, &c., which are jointly incurred, they will have single costs only, to be taxed wholly in either of their bills, or distributively according to the advances made therefor by each. *Mason v. Waite*, 1 Pick. 452. *Stockhill v. Shufford*, 1 Murph. 39. *Durghton v. Loughton*, 10 Mass. 56. And whether defendants in actions of tort, plead jointly or severally, if some are found guilty and others are acquitted, those who are acquitted are entitled to costs, as a verdict severs defendants in such case as effectually as several pleading would. *Brown v. Stearns*, 13 Mass. 536. *Griswold v. Sedgwick*, 3 Wend. 326. *Oanfield v. Gaylord*, 12 Wend. 236. S. P. If separate suits are brought against several joint trespassers, the plaintiff may have costs against each defendant, though he can have but one satisfaction. *Livingston v. Bishop*, 1 Johns. 290. *Knickerbocker v. Colver*, 8 Cow. 3. And where several defendants in an action of tort, who had pleaded jointly in the Common Pleas, pleaded severally in the Supreme Court, and filed a joint specification of defence, it was held upon a nonsuit of the plaintiffs, that the defendants were entitled only to joint costs in the common pleas, but to several costs for travel and attendance in the supreme court, and also that an aliquot part of the costs for witnesses, court-dues, &c., might be taxed for each defendant, or that those items might be otherwise so distributed that taking them together, the plaintiffs should be charged no more than if the defendants had recovered only joint costs. *Hales v. Stone*, 9 Met. 316. In tort against two defendants, a verdict was rendered against one carrying costs, but the other was acquitted, Held, that he was entitled to full costs against the plaintiff. *Albany Railroad v. Cady*, 6 Hill, 265. *Tenbroek v. Paige*, 6 Hill, 267. *Anon.* 6 Hill, 268. S. P. Where, in a joint action of ejectment by five plaintiffs who claim the whole of the premises in question, three recover judgment for a part of the premises and two fail in maintaining their action, the parties succeeding are entitled to a full bill of costs, deducting such charges as exclusively relate to the two plaintiffs who have been defeated. *Heriman v. Booth*, 20 Wend. 666. Where two defendants appear by different attorneys, and each moves for a nonsuit, but one bill of costs will be allowed. *Trowbridge v. Sharp*, 4 Hill, 38. *Jones v. Williams*, 4 Hill, 34. And although the defendants in an action of trespass, sever in their pleas, yet, where there is but one judgment in their favour, they shall recover but one set of costs. *M'Namara v. Kerns*, 2 Iredell, 68.

Where in trespass, two defendants severed in their pleas, and the jury on the first count in the declaration, found one guilty and the other not guilty, and found both guilty on the second count, and assessed several damages, both defendants were charged with full costs. *Kempon v. Cook*, 4 Pick. 305. *Proprietors of Kennebec Purchase v. Boulton*, 4 Mass. 421. *Ewer v. Beard*, 3 Pick. 64. S. P. In South Carolina, when a verdict is found for one of two joint defendants, he is entitled to costs. But where their costs have been joint, as a joint plea, &c., he is entitled to half cost only. If he has incurred a particular expense, as if a witness has been examined by commission for him alone, he has full costs for such items. *M'Clure v.*

was brought against several defendants, who defended severally, and at the assizes one of them confessed lease, entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court.(m)

When one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shows that *the plaintiff had no cause of action, if this plea be found for [*986] the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and not pay costs to the plaintiff:(a) But when the plea does not go to the whole, but is merely in *discharge* of the party pleading it, there the other party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiff.(b)

Before the statute 8 & 9 W. III. c. 11, if one of several defendants had been *acquitted*, he was not entitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal of all the defendants.(c) This being found inconvenient, it was enacted by the above statute, § 1, that "where several persons shall be made defendants to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for making such person a defendant." This statute is confined to the particular actions mentioned therein; and does not extend to an action of trespass upon the *case*,(dd) nor consequently to an action of *trover*:(e) neither does it extend to an action of *replevin*;(f) nor to an action of *debt* on bond against executors, one of whom is acquitted on the plea of *plene administravit præter*.(g) On a joint plea of not guilty to *trespass* and *assault*, if one defendant be found guilty, with one shilling damages and one shilling costs, and the other acquitted, the latter is only entitled to forty shillings costs.(h)

When a *feigned* issue is ordered by a court of law, whether it be in a

(m) Bul. Ni. Pri. 335, 6. Ad. Eject. 2 Ed. 296, 7.

(a) Co. Lit. 125. Cro. Jac. 134. 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217. S. C. Cas. Pr. C. P. 107. Pr. Reg. 102. S. C. 2 H. Blac. 28. 2 Chit. Rep. 153.

(b) Same cases; 1 Wills. 89. 3 Durnf. & East, 656. 2 Chit. Rep. 153.

(c) 2 Str. 1005; and see 1 Salk. 194. (dd) 2 Str. 1005.

(e) Barnes, 139.

(f) 3 Bur. 1284. 1 Blac. Rep. 355. Say. Costs, 215, S. C.

(g) *Duke of Norfolk v. Anthony & another*, E. 42 Geo. III. K. B.

(h) 2 Maule & Sel. 172; and see 4 Barn. & Ald. 43, 700.

Sutherland, 4 M'Cord, 158. And in New York, when an action *ex contractu* is brought against several defendants, some of whom succeed and others have a verdict against them, the former do not recover costs. *Avery v. Curtis*, 3 Cow. 369. And when a *nol. pros.* is entered as to one of several defendants, and costs are refused him, a *mandamus* will not be granted to compel an allowance of costs to him. *Ex parte Nelson*, 1 Cow. 417. In the same kind of action against several defendants on a joint contract, though they plead severally and all prevailed, yet several costs shall not be taxed. *Meagher v. Batchelder*, 6 Mass. 444. *Ward v. Johnson*, 13 Mass. 148.

civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it.(i) But when a feigned issue is ordered by a court of *equity*, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered the issue, and the costs there are in the discretion of the [*987] court.(i) *When the issue is ordered by a court of law, on a rule for an information,(a) or a motion for an attachment,(b) the costs of the original rule or motion do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to.(c) Yet, where it was ordered by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it.(d)

Having thus shown, in what cases the parties are entitled to costs, I shall proceed to consider, what costs they are respectively entitled to; with the means of taxing and recovering them, as between *party* and *party*.

When the *plaintiff* recovers *single* damages, he is only entitled to *single* costs, unless more be expressly given him by statute: And *single* damages only are recoverable, in an action against a tenant, to recover the value of *three years'* improved rent of the premises, for secreting an ejectment, on the statute 11 Geo. II. c. 19, § 12.(ee) But if *double* or *treble* damages are given by a statute, subsequent to the statute of *Gloucester*, in a case wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them;(ff) as in an action upon the 2 Hen. IV. c. 11,(gg) &c. So, *treble* costs are recoverable by the plaintiff, in an action on the case for *treble* damages, against the sheriff, on the statute 29 Eliz. c. 4, for extortion.(hh) But the avowant in *replevin*, on a distress for poor rates, is only entitled to *single* costs, under the statute 43 Eliz. c. 2, § 19.(ii) And where, on a declaration in *trespass*, consisting of six counts, two of which were for a forcible entry on the statute 8 Hen. VI. c. 9, § 6, and the rest at common law, judgment having gone by default, the plaintiff obtained general damages on a writ of inquiry, and sixpence costs; the court held, that he was not entitled to *treble* costs on all the counts of the declaration, but could only enter his judgment on the counts at common law, with *single* costs.(k) In some cases, *double* or *treble* costs are expressly given to the *plaintiff*; as upon the game laws, by the statute 2 Geo. III. c. 19, § 5; And whenever a plaintiff is entitled to *double* or *treble* costs, the costs given by the court *de incremento* are to be

(i) *Still & Rogers*, 1 Lil. Pr. 344, *per Holt*, Ch. J. Barnes, 130. 1 Wils. 261, 331. Say. Rep. 24. 1 Wils. 324, S. C.; and see Burt. Prac. Excheq. 248, 9. Peake's Cas. Ni. Pri. 3 Ed. 100, 270. 7 Taunt. 31. 2 Marsh. 355, S. C. But in the case of *Hoskins v. Ld. Berkeley*, (4 Durnf. & East, 402,) the court strongly intimated an opinion, that as feigned issues were only granted with the leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court.

(a) Say. Rep. 229. 1 Bur. 603. Say. Costs, 144, S. C.

(b) Say. Rep. 253.

(c) 1 Bur. 604. 2 Ken. 292, S. C.

(d) 2 Bur. 1021; and see 3 Maule & Sel. 323.

(ee) 2 Barn. & Ald. 662, (a).

(ff) Say. Costs, 228; and see Hul. Costs, 2 Ed. 17, 479, &c.

(gg) *Ante*, 893, 4; 945.

(hh) 2 Barn. & Ald. 393. 1 Chit. Rep. 137, S. C. And for the judgment in this case, see *Append. Chap. XXII. § 90*.

(ii) 4 Moore, 296. 1 Brod. & Bing. 517, S. C.; and see the case of *Hempson v. Josselyn & others*, 4 Moore, 297, (b).

(k) 2 Moore, 238. *Ante*, 893, 4.

doubled or trebled, as well as those given by the jury.^(l) But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. When a statute gives *double* costs, the true mode of estimating them is, first to allow the plaintiff or defendant the single costs, including the expenses of *witnesses, counsel's fees, &c., and then to allow him one *half* the amount of [*988] the single costs, without making any deduction on account of

those expenses.^(a) If *treble* costs are given, they are calculated thus: 1, the common costs: 2, half of these; and then half of the latter.^(b)

Double or treble costs are also in some cases expressly given to the *defendant*; as, in actions against justices of the peace, constables, &c., by the 7 Jac. I. c. 5,^(c) (made perpetual by the 21 Jac. I. c. 12, § 2;) for distresses for rents and services, by the 11 Geo. II. c. 19, § 21, 2;^(d) where the plaintiff recovers less than 40s. damages, by the 23 Geo. II. c. 33, § 19;^(e) on the building act, 14 Geo. III. c. 78, § 100;^(f) against officers of the excise or customs, by the 23 Geo. III. c. 70, § 34. 28 Geo. III. c. 37, 23, and 6 Geo. IV. c. 108, § 97, or officers of the army, navy, or marines, by the last-mentioned statute; against persons holding public employments, &c., and having power to commit to safe custody, by the 42 Geo. III. c. 85, § 6; against any person or persons, for any thing done in pursuance of the act for consolidating the provisions of the acts relating to the duties under the management of the commissioners for the affairs of taxes, or any act for granting duties to be assessed under the regulations of that act,^(g) or of the act to amend the laws relating to bankrupts,^(h) or for consolidating and amending the laws relative to jurors, and juries;⁽ⁱ⁾ in *replevin*, on a distress for rates made by commissioners on plaintiff's lands, under the statute 50 Geo. III. c. xlvii.;^(kk) and in actions on the mutiny act,^(ll) or for non-residence.^(m) Also, under the *Birmingham* paving act, (52 Geo. III. c. 113,) some of several defendants, in whose favour a verdict has been given, are entitled to *treble* costs, though the verdict may have gone against others.⁽ⁿ⁾ And, by the statute 1 Geo. IV. c. 87, § 6, "in all cases wherein the landlord shall elect to proceed in *ejectment*, under the provisions of that act, and the tenant shall have found bail as ordered by the court, if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him, with *double* costs."

In the foregoing and similar cases, where it does not appear, on the face

(l) 2 Leon. 52. Cro. Eliz. 582. 3 Lev. 351. Carth. 297, 321. 1 Salk. 205. 1 Ld. Raym. 19, S. C. 2 Str. 1048; but see 1 Durnf. & East, 252.

(a) 4 Barn. & Cres. 889. 7 Dowl. & Ry. 484, S. C.

(b) Table of Costs, in *principio*. 1 Chit. Rep. 137, (a). 4 Barn. & Cres. 154. 6 Dowl. & Ry. 1, S. C.

(c) This statute does not extend to actions for a mere *non-feasance*, but only where something is *done* by the officers. 2 Lev. 250. 3 East, 92. And accordingly, parish officers, or persons acting on their behalf, are not entitled under this statute to double costs, upon a judgment as in case of a nonsuit, in an action brought against them, for the price of goods sold and delivered to them for the use of the poor. 3 Maule & Sel. 131.

(d) For determinations on this statute, *vide ante*, 977.

(e) 4 Maule & Sel. 171.

(f) 9 East, 322. 6 Dowl. & Ry. 481.

(g) 43 Geo. III. c. 99, § 70.

(h) 6 Geo. IV. c. 16, § 44.

(i) 6 Geo. IV. c. 50, § 58.

(kk) 6 Maule & Sel. 128.

(ll) 5 Taunt. 820. 1 Marsh. 382. S. C. 3 Maule & Sel. 591; and see stat. 3 Geo. IV. c. 13, § 149. 7 & 8 Geo. IV. c. 4, § 155. 9 Geo. IV. c. 4, § 155.

(m) 57 Geo. III. c. 99, § 45.

(n) 2 Bing. 267.

of the record, that the defendant is entitled to the benefit of the [*989] act, *(as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll;(a) which suggestion should be entered before the entry of final judgment:(b) And it cannot be done by rule of court,(c) unless where the plaintiff moves for leave to discontinue, on payment of costs; in which case, the court may make it part of the rule, that he shall pay double or treble costs.(d) But when the facts entitling the plaintiff to double or treble costs, appear on the face of the record by pleading, or on a special verdict,(e) &c. a suggestion is unnecessary: And if a particular mode be appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on the 7 Jac. I. c. 5, there that particular mode must be observed:(f) so that if the judge certify, there is no need of a suggestion: and if he do not, it is of no avail, except where judgment goes by default.(g) When a defendant is entitled to treble costs, under a statute, by a judge's certificate, and judgment is entered up for treble costs *generally* without stating on what ground the defendant is entitled to them, this is a substantial defect; and the court of Common Pleas would not amend the judgment, by striking out the word "*treble*:"(h) But the court of King's Bench, in the same case, allowed an amendment to be made on the record, by inserting the certificate of the judge who tried the cause, allowing the plaintiff treble costs, which had been omitted by the clerk in entering judgment in the Common Pleas.(i)

Costs are taxed by the master, in the King's Bench and Exchequer, or prothonotaries in the Common Pleas, upon a bill made out by the attorney for the prevailing party;[A] or more frequently without a bill, upon a view of the proceedings; and if there have been any *extra* expenses, which do not appear on the face of the proceedings, there should be an affidavit made of such expenses, to warrant the allowance of them; which is called an affidavit of increased costs.(k) In country causes, such an affidavit is generally made; and if sworn before a commissioner, it must be filed with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas: and, in the former court, the clerk of the rules makes a copy of it for the master; but in the latter court, it is usual for the secondaries, on being paid for a copy, to mark the affidavit, and permit the original to be taken to the prothonotaries, who keep it till the costs are taxed, and then send it to the [*990] secondaries to be filed. It is also usual to give notice *to the opposite attorney, of the time when the costs are intended to be taxed; but in order to enforce it, there must be a side-bar rule to be present at taxing costs:(aa) which rule is obtained from the clerk of the rules

(a) 1 Str. 49, 50. Cas. Pr. C. P. 16. Cas. temp. Hardw. 126. *Id.* 138. 2 Str. 1021. S. O. Bay. Rep. 214. 3 Wils. 442. 9 East, 322. Append. Chap. XXXIX. § 28, 31, 2, 3.

(b) 5 Taunt. 820. 1 Marsh. 382. S. C. 3 Maule & Sel. 591.

(c) 1 Str. 50.

(d) 2 Str. 974. Cas. temp. Hardw. 125.

(e) Doug. 308, (n).

(f) 2 Vent. 45. Doug. 307, 8. 7 Durnf. & East, 448; but see Doug. 308, n.

(g) Cas. temp. Hardw. 138, 9.

(h) 5 Taunt. 820. 1 Marsh. 382, S. C.

(i) 3 Maule & Sel. 591.

(k) Append. Chap. XL. § 7.

(aa) Append. Chap. XL. § 5, 6.

[A] See Brightly on Costs, p. 299.

in the King's Bench, or secondaries in the Common Pleas, and a copy of it should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment. If either party be dissatisfied with the allowance of costs, he may apply to the court, for a rule to show cause why the master or prothonotaries should not review their taxation: (b) And where an attorney had charged for a declaration as containing more *folios* than it really contained, and this charge was allowed by the master, the court of King's Bench held it to be a good ground for reviewing the taxation. (c) But the affidavit, in support of the rule, must be confined to the objections alleged against the taxation, and not enter into the merits of the cause. (d) And where an attorney's clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed, was conducted by his employer from motives of charity, on behalf of the plaintiff, the court of King's Bench held, that the clerk was such an agent as to bind his master by such admission. (e) In the Exchequer, an affidavit to ground an order *nisi* for the master to review his taxation, on account of overcharge, must point out the specific *items* thereof, and distinctly show that they are erroneous. (f) And, in that court, it is not necessary that a party applying for an order upon the master to review his taxation of costs, should first pay into court the amount of the *items* in the bill of costs, to which no objection has been made. (g) But that court would not interfere with the province of the master, in the taxation of costs *de incremento*, by ordering a new taxation in favour of a defendant, on the ground that the plaintiff had been himself the cause of increasing the amount of costs, by proceeding to trial, after an offer by the defendant to give a *cognovit*. (h)

The means of recovering costs, as between party and party, are by *execution* or *action*, upon a judgment obtained for them; or by *attachment*, upon a rule of court. (i) In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, should be *personally* (k) served on the party liable to the payment of costs; and at the same time the original rule should be shown to him, (k) and a demand of payment made: (l) And when the costs are ordered to be paid to the attorney, the demand may be by the acting attorney in the cause, although he act in the name of another attorney. (m) If the costs be not paid, the court, upon an affidavit of the circumstances, (n) will grant *an attachment; (aa) [*991] the rule for which is absolute in the first instance, (bb) and may be moved for on the last day of term. (cc) In the Exchequer, the defendant, after a personal demand and refusal, may proceed against the plaintiff by *subpoena* and attachment, for non-payment of costs on a *non pros*, or for not proceeding to trial, (dd) or in *ejectment*, on a nonsuit, (ee) &c.

To assist the parties in the recovery of costs, and do justice between

(b) 5 Taunt. 660.

(c) 1 Chit. Rep. 544.

(d) *Id.* 321.

(e) Dowl. & Ry. NI. Pri. 48. 3 Stark. NI. Pri. 185, S. C.

(f) M'Clel. 61. 13 Price, 129, S. C. (g) 11 Price, 510.

(h) 9 Price, 344; and see M'Clel. 12. 13 Price, 211.

(i) 2 H. Blac. 248.

(k) 3 Durnf. & East, 351. Pope v. Smith, K. B. *per Cur.*

(l) Hubbard v. Horton, H. 36 Geo. III. K. B.

(m) Say. Rep. 95.

(n) Append. Chap. XL. § 8.

(aa) Append. Chap. XL. § 9, 10.

(bb) Per Buller, J. M. 24 Geo. III. K. B. 1 Bos. & Pul. 477. *Ante*, 480.

(cc) 5 Bur. 2686.

(dd) Append. Chap. XL. § 11, 12, 13, 14.

(ee) Append. Chap. XLVI. § 127, 8.

them, they are allowed to deduct or set off the costs, or debt and costs, in one action, against those in another. This practice, however agreeable to natural justice, does not seem to have formerly obtained in the court of King's Bench: (f) But, in the Common Pleas, it has been frequently allowed; and that, not only where the parties have been the *same*, (g) but also where they have been in some measure *different*. Thus, a party has been permitted to set off a *separate* demand, for costs payable to himself alone, against a *joint* demand, for costs payable by himself and others; (h) or a *joint* demand, for costs payable to himself and another, against a *separate* demand, for damages and costs payable by himself only. (i) And the costs of a bill in equity, dismissed in favour of the defendant, may be set off against the plaintiff's costs of an action at law in the King's Bench, for the same cause, subject to the lien of the attorney. (k) But the court on motion, will not enable a prisoner to set off, in a summary way, a debt for which he has obtained no judgment, against the plaintiff's execution: (l) And where, in an action of *trespass* against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented. (m) So, the costs of a judgment as in case of a nonsuit, entered up against the plaintiff after he had become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees, against the defendant in the former action. (n) So, a judgment recovered by A. against B. and C. cannot be set off, on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B. under an insolvent [*992] debtor's act; the interest of third persons intervening, who have *peculiar claims by the statute. (a) And where a defendant was by a judge's order, allowed to proceed to trial, upon payment to the plaintiff of a certain sum of money, with costs incurred up to the date of the order, and the plaintiff consented to the trial proceeding on those terms, before the costs had been paid; the court held, that the defendant having obtained a verdict, was bound to pay those costs, and could not set them off against the costs afterwards taxed for him on the *postea*. (b) In the King's Bench, we have seen, (c) the court will not in general suffer the debt and costs in one action to be set off against those in another, until the attorney's bill, for business done in the cause wherein he was concerned, be first discharged; but, in the Common Pleas, the attorney's lien for his costs is holden to be subject to the equitable claims that exist between the parties

(f) 2 Str. 891, 1203. Bul. Ni. Pri. 336. 4 Durnf. & East. 124. 8 Durnf. & East. 69.

(g) Barnes, 145. 2 Blac. Rep. 826, 869. 3 Wils. 396. Say. Costs, 256. S. C. Bul. Ni. Pri. 336. 2 H. Blac. 440, 587. 2 Bos. & Pul. 28. 4 Taunt. 634; but see 1 New Rep. C. P. 311.

(h) Barnes, 146; but see *id.* 130.

(i) Say. Costs, 254. 2 Blac. Rep. 827, S. C. cited. *Cawthorne v. Thompson & another*, T. 24 Geo. III. K. B. S. P.; and see 1 H. Blac. 217, 657. 2 H. Blac. 587. 1 Moore & P. 141. 4 Bing. 423, S. C.

(k) 4 Dowl. & Ryl. 363. 4 Barn. & Cres. 800, S. C.; and see 4 Bing. 16.

(l) 6 Taunt. 176.

(m) Barnes, 145. Bul. Ni. Pri. 336. 4 Barn. & Ald. 43, 700; but see 1 H. Blac. 23, 217, 657. 2 H. Blac. 587.

(n) 10 Moore, 154. 2 Bing. 455, S. C.

(a) 3 East, 149.

(b) 3 Barn. & Cres. 108. 4 Dowl. & Ryl. 716, S. C.

(c) *Ants*, 339.

in the cause.(d) When the application is made by the party to whom the larger sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the less sum:(e) but where the less sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance.(f)

*CHAPTER XLI.

[*998]

Of EXECUTION by FIERI FACIAS, CAPIAS AD SATISFACIENDUM, and ELEGIT; and in the ACTION of REPLEVIN.

EXECUTION, in civil actions, is the mode of obtaining the debt or damages, or other thing recovered by the judgment:(a)[A] and it is either for the plaintiff or defendant. For the former, upon a judgment in debt, the execution is for the debt and damages, or, in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; to be levied, in an action against an executor or administrator, of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the damages or costs to be levied *de bonis propriis*.(b) Upon a judgment in *detinue*, the execution is for the goods, or their value, with damages and costs. For the defendant, upon a judgment in *replevin*, the execution at common law is for a return of the goods:(c) to which damages are superadded, by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; or, upon the statute 17 Car. II. c. 7, for the arrearages of rent, and costs:(dd) and, in other actions, upon a judgment of *non pros*, nonsuit,(ee) or verdict,(ff) the execution is for the costs only.

In the present chapter, it is proposed to consider the ordinary modes of execution for the debt or damages and costs, in *debt* or *assumpsit*, &c. by *feri facias*, against the goods and chattels of the party against whom the judgment is given: by *capias ad satisfaciendum*, against his person; or by *elegit*, against his goods and a moiety of his lands: and for a return of the goods in *replevin*, by *retorno habendo*.

At common law, when a subject sued execution upon a judgment for debt or damages, he could not have the body of the defendant or his land in execution, unless it were in special cases; but could have execution only of his goods and chattels, and of his corn and other present profits of his

(d) *Id. ibid.*; and see Lee's Prac. Dic. 2 Ed. 136, 7; 406, 7. 4 Taunt. 632. 1 Dowl. & Ry. 168.

(e) Bul. Ni. Pri. 336. 8 Durnf. & East, 69. 1 Taunt. 426. 1 Maule & Sel. 696.

(f) 2 Blac. Rep. 869. 3 Wils. 396. -S. C. Say. Costs, 254; and see 4 Durnf. & East, 124.

(g) Bac. Abr. tit. Execution, A. Com. Dig. tit. Execution, A. 1.

(b) Cro. Elis. 887. Dyer, 185, (b). Append. Chap. XLI. § 8, 16.

(c) Append. Chap. XLV. § 92, &c.

(ee) Append. Chap. XLI. § 90.

(dd) *Id.* § 89, 90, 91.

(ff) *Id.* § 91.

[A] Execution cannot issue until after judgment rendered. *Parker v. Frambes*, 1 Penn. 156. *Geston v. Champion*, *ib.* 157. *Lane v. Peant*, *ib.* 319. *Conner v. London*, 2 Penn. 529. *Little v. Hemming*, *ib.* 552. In Massachusetts, there is, by statute but one form of execution, which includes a *capias ad satisfaciendum*, a *levari facias*, and an *extendi facias*. *Ladd v. Blunt*, 4 Mass. 402. *Lyman v. Lyman*, 11 Mass. 317. *Davis v. Richmond*, 14 Mass. 473.

land: for which purpose the law gave him two several writs, to be sued within the year, one called a *feri facias*, which was only of the goods and chattels, the other a *levari facias*, whereby the sheriff was commanded, that of the lands and chattels of the defendant, he should cause to be levied,

&c.(g) The *capias ad satisfaciendum* lay at common law, in [*994] actions *of trespass *vi et armis* only; but has since been given in other actions, by a variety of statutes.(a) The writ of *elegit* was given by the statute of *Westm.* 2, (13 Edw. I.) c. 18: And by this statute, he who recovereth a debt or damages, may have a writ of execution, for levying them of the lands and chattels; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plough, and one half of his land, until the debt be levied, by a reasonable price or extent. In *replevin*, the *retorno habendo* is the common law writ of execution, for obtaining a return of the goods distrained, on a judgment for the defendant.

After final judgment signed, and even before it is entered of record,(b) the plaintiff may in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out execution by *feri facias*, *capias ad satisfaciendum*, or *elegit*, &c. provided there be no writ of error depending, or agreement to the contrary:(c) and execution may be sued out, in the Common Pleas, by a different attorney from the attorney in the cause, without obtaining an order for changing the attorney.(d) If the plaintiff be apprehensive of a writ of error, he may immediately sue out execution, without waiting to have his costs taxed;(e) which is sometimes done when the debt is large: and so, if the plaintiff, after obtaining a verdict in *ejectment*, sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error will not operate as a *superedeas*.(f) But after a year and a day from the time of signing judgment,[A] the plaintiff cannot regularly take out execution, without re-

(g) 2 Inst. 394, 5; and see 3 Salk. 286.

(a) Hob. 56. *Ante*, 128.

(b) Gilb. C. P. 24. Law of Executions, 43. Bul. Ni. Pri. 228.

(c) 1 Mod. 20. Cas. temp. Hardw. 53. *Ante*, 560.

(d) 2 Bos. & Pul. 357. *Ante*, 94.

(e) 5 East, 146, 7; and see 4 Taunt. 289.

(f) 4 Taunt. 289; and see Barnes, 212, 13. 2 Moore, 581. Ad. Eject. 2 Ed. 10, 11.

[A] An execution does not lose its binding efficacy on the expiration of a year and a day, but only its active quality. *Snipes v. The Sheriff, &c.*, 1 Bay, 295. When a writ of execution has been issued and returned not satisfied, another writ may be issued after a year and a day have elapsed without a *scire facias* to revive the judgment. *Dowman v. Potter*, 1 Mia. 518. If an execution hath once regularly issued on a judgment, other executions may issue thereon at any time, notwithstanding there be more than a year and a day between the return of one and the issuing of another. *Craig v. Johnson*, *Id.* 520. One execution being issued and returned, another may issue more than a year after without a *scire facias*. *Thorp v. Fowler*, 5 Cow. 446. But, in Pennsylvania, it is a fatal objection to an execution, that it is issued more than a year and a day after the judgment without a *scire facias* having been issued to revive the judgment. *Ascarati v. Fitzsimmons*, 3 Wash. C. C. 34. And in Arkansas, *Bracken v. Wood*, 7 Eng. Rep. 615. And in Texas, *Scott v. Allen*, 1 Texas, 508. In Kentucky, after executions have issued upon a judgment within the year and a day, executions may thereafter issue without *scire facias*, though twenty years may have elapsed since the last issue. *Payne v. Payne*, 8 B. Mon. 381. In Pennsylvania, however, since the act of 1845, § 4, executions may be issued on original as well as on revived judgments, after the year and a day have elapsed. *Dailey v. Straus*, 2 Barr, 401.

In Alabama, where an execution has been sued out within a year after rendition of judgment, and returned *nulla bona*, it is not irregular to issue another after a lapse of eight years. *Scull v. Godbolt*, 4 Ala. 326. But it seems where execution issued out within a year and a day after rendition of judgment, another cannot be issued after a lapse of ten years in Alabama, without reviving the judgment by *scire facias*. *VanCleave v. Harworth*, 5 Ala. 188. Where a *feri fa-*

living the judgment by *scire facias*, unless a *feri facias* or *capias ad satisfaciendum*, &c. was previously sued out, returned and filed, or he was hindered from suing it out by a writ of error, (gg) &c. : And if a writ of error be brought, it is generally speaking a *supersedeas* of execution from the time of its allowance, provided bail, when necessary, be put in and perfected in due time. (h) [A] After a writ of error allowed, the plaintiff brought an action on the judgment, wherein bail was justified : afterwards the writ of error was nonprossed, for want of transcribing the record, and the plaintiff, without discontinuing his action on the judgment, took the defendant's goods in execution, which was deemed irregular ; and the court of Common Pleas set aside the execution, and ordered the goods to be restored, with costs ; but held, that the plaintiff would be at liberty to take out execution, after discontinuing his action on the judgment. (i)

Writs of execution are *judicial* writs, issuing out of the court where the record is, upon which they are grounded : (k) and therefore, when a record is removed into the King's Bench, from the Common Pleas, or an inferior court, by writ of error, and the judgment affirmed, (l) or plaintiff in error *non-prossed, (a) or when judgment is affirmed in the [*995] Exchequer Chamber, (b) or House of Lords, (c) to which a trans-

(gg) *Post*, Chap. XLIII.

(h) *Post*, Chap. XLIV.

(i) *Barnes*, 208.

(k) 2 *Wms. Saund.* 5 Ed. 27, 38. (2).

(l) *Cowp.* 843.

(a) 3 *Durnf. & East*, 657.

(b) *Palm.* 186, 7.

(c) *Cowp.* 843.

cias or *ca. sa.* is issued out within a year and a day, and not executed, a new writ of execution may be taken out at any time afterwards, without a *scire facias* ; provided, the first writ be returned and filed, and continuances entered from the time of issuing it. *Bank of Mississippi v. Cutlett*, 5 *How. (Miss.)* 175. In Missouri, if an execution is issued within one year after judgment rendered, and returned unsatisfied, an *alias* may be issued at any time thereafter, without a revival by *scire facias*. *Tendell v. Benton*, 6 *Mis.* 361. In Kentucky, by statute an execution may issue on a replevin bond at any time after it is due ; the time is not limited to a year and a day, as in cases of executions on judgment. *Simmons v. Shain*, 9 *Dana*, 164. In Illinois, an execution may be issued after several years have elapsed from the issuing of previous executions, where the first execution was issued within a year and a day from the rendition of judgment. *Tampsett v. Whitney*, 2 *Scam.* 441. Execution may issue on a judgment in favour of the auditor of public accounts, in Illinois, after a year and a day has expired without reviving the judgment by *scire facias*, the auditor standing in place of the people, to whom *laches* cannot be imputed. *The People v. Peck*, 4 *Scam.* 404.

[A] An execution may issue immediately on judgment being perfected, subject to being superseded by a writ of error, filed in four days thereafter. *Blunt v. Greenwood*, 1 *Cow.* 15. A writ of error cannot operate as a *supersedeas* after the *feri facias* has been executed. *Ib.* But in such case the court may order the money to be brought into court, to abide the event of the suit. *Ib.* Where there is a regular judgment and award of execution, but afterwards the execution issues irregularly, the judgment and award cannot be reversed by writ of error ; but the injured party's remedy is either by *audita querela*, or by motion to the court to set the execution aside. *Johnson v. Harvey*, 4 *Mass.* 483. Where an execution was enforced by an officer after it was dead in law, by direction of the creditor, through mistake, and the debtor afterwards brought an action of trespass against the officer, and recovered a greater sum in damage than the amount of the execution, and the creditor had indemnified the officer against the judgment, it was held, that the creditor was entitled to a judgment in his favour on a *scire facias*, to obtain a new execution. *Stogel v. Cady*, 4 *Day*, 222. The issuing of an execution, after the lapse of two years, without reviving the judgment by *scire facias*, where all the parties to the judgment are alive, is an irregularity merely, and does not render void a sale under it. *Pierce v. Alsop*, 3 *Barb. Ch. R.* 184. An irregularity in an execution in respect to the return day, can be taken advantage of only by the defendant in the judgment. If he waives the irregularity, a third person cannot object to it. *Berry v. Riley*, 2 *Barb. Sup. Ct. R.* 307. In South Carolina, an execution issued more than a year and a day after the judgment has been rendered, is not void but voidable only. *Ingraham v. Belk*, 2 *Strobh.* 207. A purchaser under an execution, not void but voidable only, will be protected in his title, and the objection cannot be made by third persons. *Ib.* An execution is not void for a variance from the judgment on which it issued, but may be amended. *McCollum v. Hubbert*, 13 *Ala.* 282.

cript only is removed, the execution issues out of the court of King's Bench. So, if proceedings are removed out of the county court, or other court not of record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the court above: (d) but in the latter case a *scire facias* seems to be necessary: (e) And, in like manner, we have seen, (f) the execution issues out of the superior court, when the record or transcript of the proceedings is removed from the courts in *Wales*, or the counties palatine, or from an inferior court, by *certiorari*, under the statute 19 Geo. III. c. 70, § 4, or 33 Geo. III. c. 68, § 1. (g)

The party suing out execution for the debt or damages and costs recovered, or the costs only, may, at his election have a *feri facias* against the goods *capias ad satisfaciendum* against the person, or an *elegit* against the goods and moiety of the lands, of the party chargeable: (h) And a *feri facias* and *capias ad satisfaciendum* may issue at the same time against the goods and person of a defendant. (i) [A] So the party, having sued out one writ of execution, may, before it is executed, abandon that writ, and sue out another of a different sort: or he may have several writs of the same sort, running at the same time, in order to take the defendant or his goods, &c. in different counties: And where, in an action against two defendants, the plaintiff sued out two several writs of *testatum feri facias* at the same time into different counties, and the sheriff under each of them took possession of the goods of one of the defendants; it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendants the full benefit of all moneys levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other, the court of Exchequer, under these circumstances, refused to put the plaintiff to his election, which of the writs he would proceed under, and to set aside the other for irregularity. (k) So, if *nulla bona* be returned to a *feri facias*, or *non est inventus* to a *capias ad satisfaciendum*, or *nilil* to an *elegit*, the party may afterwards sue out another writ, of the same or a different species, for the debt, &c.; or if part only be levied [*996] on a *feri facias*, or of the goods upon an *elegit*, *and *nilil* be returned as to the lands, (aa) he may have a new writ of execution for the remainder: Or, if the *capias ad satisfaciendum* be rendered ineffectual by the death or escape of the party chargeable, the other party may have a new writ for the whole. So, he may sue out and execute several *elegits*, for lands in different counties: (bb) And on statutes merchant,

(d) Bro. Abr. tit. *Execution*, 112. Tit. *Faux Judgment*, 6.

(e) *Id.* Bro. *Brev. Jud.* 206, 318, 320.

(f) *Ante*, 401.

(g) And see stat. 5 Geo. IV. c. 106, § 15, for enforcing obedience to rules, orders and decrees of the courts of Great Sessions in *Wales*, against persons residing out of the jurisdiction, by process from the courts at *Westminster*. *Ante*, 401. See also stat. 48 Geo. III. c. xcviii. § 31, for the more easy and speedy recovery of small debts, within the parish of *Ashton under Lyne*, in the county palatine of *Lancaster*, and within the townships of *Staley*, &c., in the county palatine of *Chester*, by the aid of a justice of the peace, where the defendant and his goods are not to be found within the jurisdiction of the court.

(h) Bac. Abr. tit. *Execution*, D.

(i) 2 Dowl. & Ryd. 193.

(k) *Cooper v. Rowe & another*, T. 51 Geo. III. in *Scac.*; and see 1 Ken. 120. 9 Price, 5.

(aa) Hob. 58. 1 Lev. 92. 1 Sid. 184. S. O. 1 Str. 226. 3 Ld. Raym. 1451, S. P.

(bb) 2 Wms. Saund. 5 Ed. 68, b.

[A] Where a plaintiff has obtained a judgment, he may first issue a *feri facias*, and if the whole of the debt is not levied on that execution, he may issue a *ca. sa.*, or bring an action of debt on the judgment for the residue; and if *non est inventus* is returned to such a *ca. sa.* he may proceed against the bail. *Olcot v. Lilly*, 4 Johns. 407.

statutes staple, and recognizances in nature of statutes staple, the body goods and lands being all liable by the several acts of parliament that create these securities, the conusee may take all at once, or at different times; and if he extend the lands first, he may afterwards take the body.(c) But after part of the debt and costs has been levied on a *feri facias*, the plaintiff cannot regularly sue out another *feri facias* into the same, or *testamentum* into a different county, and levy the residue under it, before the return of the first writ.(d) So, when the sheriff has taken goods in execution under a *feri facias*, the plaintiff cannot sue out a *capias ad satisfaciendum*, until the *feri facias* has been returned,(e) though he should have withdrawn the execution under it:(f) And whenever a *capias ad satisfaciendum* is sued out, and the defendant taken under it, the plaintiff cannot afterwards have a *feri facias* or *elegit*, unless the defendant die in execution, or escape, or be rescued. So, if lands be extended on an *elegit*, and delivered to the plaintiff, he cannot afterwards have a *feri facias*, or *capias ad satisfaciendum*:(g) And though he take but an acre of land in execution, yet it is deemed a satisfaction of the debt, be it never so great, because it may in time come out of the profits.(h) A commitment in execution for three months, for not paying penalties recovered by judgment, in an action on the *Goldsmith's* company's act, (12 Geo. II. c. 26, § 9,) cannot be obtained, till a *feri facias* has been ineffectually issued.(i)

There are some cases, however, in which execution cannot be taken out without leave of the court; as where, in actions on a policy of assurance, there is a verdict for the plaintiff against one of several underwriters, and the rest have entered into the *consolidation* rule, and agreed to be bound by it.(k) So, though a writ of error abate by the death of the plaintiff in error, before it is returned and certified, yet execution cannot afterwards be issued on the judgment, without leave of the court:(l) and the court having set aside the execution on this ground, refused leave for the plaintiff to issue a *testatum feri facias*, tested in the preceding term, on the return day of the original *feri facias*, which was after the allowance and service of the writ of error.(l) And it seems, that on a writ of error *coram nobis*, execution taken without leave of the court is irregular.(m) The *plaintiff also may apply to the court by affidavit, for leave to take [*997] out execution after the allowance of a writ of error, where it appears to have been brought for delay.(a) When a verdict is taken *pro forma* at the trial, for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded must be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment, and take out execution for the amount, without first applying to the court for leave.(b) But the arbitrator in such case cannot award a *greater* sum than that for which the verdict was taken;(cc) and if he do, the plaintiff cannot take out an execution for the whole sum awarded;(dd) nor will an *assumpsit* arise by implication, to pay

(c) Hob. 60. 2 Rol. Abr. 75. Bac. Abr. tit. *Execution*, D.

(d) Barnes, 213; and see 2 Chit. Rep. 203, (a).

(e) 2 Chit. Rep. 203.

(f) 6 Taunt. 370. 2 Marsh. 78, S. C.

(g) Cro. Jac. 338, 9. 1 Str. 226. 2 Ld. Raym. 1451.

(h) Bac. Abr. tit. *Execution*, D.

(i) 2 Chit. Rep. 139.

(k) *Ante*, 487, 614, 15, 16.

(l) 7 East, 296.

(m) Say. Rep. 166. Barnes, 201. 2 Blac. Rep. 1067. (a) *Post*, Chap. XLIV.

(b) 1 East, 401. 1 Bos. & Pul. 97, 480. 3 Bos. & Pul. 244; and see 10 Moore, 110. *Ante*, 838; but see 1 Salk. 84. Barnes, 58, *contra*.

(cc) *Ante*, 839.

(dd) *Bonner v. Charlton*, E. 43 Geo. III. K. B.

even to the extent of the verdict;(e) though perhaps the court, on application, would assist the plaintiff in recovering to that extent.(f)

When several actions are brought against different parties for the same debt, as upon a bail bond, promissory note, or bill of exchange, each party is liable to execution for the whole debt, and the costs of the action against himself; but neither of them is liable to the costs of the actions against the other defendants.(g) And in suing out execution in actions upon a bail bond, we have seen, it is usual to apportion the debt and costs in the original action amongst the different defendants, so as to levy a part on each, together with his own costs.(h)

In an action of *debt* on bond for a penalty, the sheriff may be directed to levy the sum secured by the condition, together with the damages and costs recovered by the judgment, and all subsequent costs of the execution, &c.:(i) which direction is usually indorsed on the writ. But if judgment be entered up for the *penalty* of a bond given to secure an annuity, and the defendant taken in execution thereon, when the warrant of attorney, under which such judgment was entered up, only authorized the taking out execution for the *arrears*, the court will set aside the execution *in toto*, and not merely charge the defendant *pro tanto*.(k)

By the statute 43 Geo. III. c. 46,(l) "in every action in which the plaintiff shall be entitled to levy under an execution, against the *goods* of the defendant, such plaintiff may also levy the poundage, fees, and expenses of the execution, over and above the sum recovered by the judgment." A *mandamus* is holden to be an action within the meaning of this act, when the party pleads, and damages and costs are given to the prosecutor:(m) and it seems that, under this act, the expenses of execution include the expenses of levying.(n) But the act does not seem to extend to the crown,(o) or to apply to cases where the levy is made under an

[*998] *execution against the goods of the *plaintiff*, for costs on a judgment of *non pros*.(a) &c.; nor where the defendant is taken in execution, on a *capias ad satisfaciendum*. In a case arising before the passing of the above act, it had been holden, that where the defendant suffered judgment by default, in an action of *debt* on simple contract, the plaintiff was not entitled to levy the expenses of the execution, notwithstanding those expenses, together with the debt and costs of the action, did not exceed the sum confessed upon record.(b) And a plaintiff, who levies the costs and expenses of an execution, in addition to the sum recovered by the judgment, under the above act, must at his peril take care to keep them within a reasonable amount: and, in the Common Pleas, if it appear, on reference to the prothonotaries, that he has levied too much, the court will order the excess to be restored, with costs to be paid by the plaintiff.(c)

A *fiery facias*, we have seen,(d) is a common law execution: and, except in a county palatine, is directed to the sheriff of the county where the action is laid;(ee) commanding him, that of the goods and chattels of the defend-

(e) 5 East, 139. *Ante*, 839.

(f) 5 East, 143, 4.

(g) *Ante*, 541.

(h) *Ante*, 305.

(i) Cas. Pr. C. P. 90. Pr. Reg. 213, S. C.

(k) 16 East, 163.

(l) § 5.

(m) 2 Smith, R. 8.

(n) 2 Bing. 255. 9 Moore, 425, S. C.

(o) West, on *Extents*, 238.

(a) 7 Taunt. 180. 2 Chit. Rep. 353.

(b) 3 Bos. & Pul. 362; and see 2 Black. Rep. 760. Forrest, 33.

(c) 2 Taunt. 174.

(d) *Ante*, 993.

(ee) A writ of *fiery facias* directed in the first instance to the bailiff of the *isle of Ely*, out

ant, in his bailiwick, he cause to be *made*, or *levied*, the sum recovered, and have it before the king, or his justices, at *Westminster*, (or, in the King's Bench by original, *wheresoever*, &c.) on the return day. (f) In a county palatine, it is directed to the chancellor in *Lancashire*, to the chamberlain in *Cheshire*, and to the bishop in *Durham*. In point of form, it should invariably pursue the judgment: therefore it has been holden, that a special execution is not warranted by a general judgment. (g) And where a *fieri facias* is issued out after a *scire facias* on a judgment, the *fieri facias* must set out the award of execution on the *scire facias*, as well as the original judgment; even, as it seems, though the *scire facias* was sued out unnecessarily. (h)

This writ should be *tested* in term time, (i) on a day after the judgment is, or may be supposed to have been given: [A] And as the judgment relates in law to the first day of the term wherein it is signed, it seems that the *fieri facias* may be tested on any day in that term; (k) and it should be made returnable, in term time, on a day certain by *bill*, or by *original*, on a general return day. (l) If it be tested, (m) or returnable, (n) out of term, or, *in an action by *bill*, if it be returnable on a [*999] general return day, (a) it is void, or at least erroneous; and may be quashed or set aside on motion, together with the proceedings that have been had under it. A writ of *fieri facias* need only be sealed, in the King's Bench: (b) but, in the Common Pleas, all executions are required to be signed by the prothonotary; (c) and must be so signed, before they are sealed. (d) In order to prevent the fraudulent issuing of a writ of execution, without a judgment to support it, it is a rule, (e) that "the sealer of the writs of this court shall not seal any writ of *fieri facias*, or *capias ad satisfaciendum*, without having the judgment paper, *postea*, or inquisition produced to him; and that the attorney concerned for the plaintiff, or his agent, shall, upon every writ of *fieri facias*, and *capias ad satisfaciendum*,

of the King's Bench, is erroneous and void; and the bailiff is guilty of a trespass in executing it, 3 East, 128; and see 9 East, 342.

(f) For the forms of writs of *fieri facias* for the plaintiff, in the different courts, in *assumpsit*, see Append. Chap. XLI. § 1, &c. in *debt*, *id.* § 9, &c., in *detinue*, *id.* § 13, in *covenant*, *id.* § 17, in *case*, *id.* § 18, &c., in *replevin*, Chap. XLV. § 89, in *trespass*, Chap. XLII. § 21, &c.; and for the defendant, on a *non pros*, &c., *id.* § 29, &c.

(g) 1 Durnf. & East, 80; and see 6 Durnf. & East, 525. 7 Durnf. & East, 27.

(h) 1 Bing. 133. 7 Moore, 499, S. C.

(i) 2 Salk. 700.

(k) 1 Crompt. 3 Ed. 365.

(l) See stat. 5 Geo. IV. c. 106, § 6, for appointing the return days of writs of execution, upon judgments obtained in the courts of Great Sessions in *Wales*.

(m) 2 Salk. 700.

(n) *Davey v. Hollingsworth & another*, T. 24 Geo. III. K. B.

(a) 1 Wils. 155.

(b) Imp. K. B. 10 Ed. 392; but see R. E. 1659, K. B. *contra*.

(c) R. E. 12 Jac. I. § 3. C. P. Imp. C. P. 7 Ed. 468, 473, 4, *accord*.

(d) R. M. 1654, § 6, C. P.

(e) R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 1 Dowl. & Ry. 471. 2 Chit. Rep. 377.

[A] An execution cannot issue until after record of judgment is filed. *Mawri v. Herriek*, 5 Wend. 109. The issuing an execution is a ministerial act; and in case it be issued contrary to the provisions of the statute, the party issuing it is liable to the party injured. *Briggs v. Wardell*, 10 Mass. 356. The execution must follow the judgment in regard to parties, or it will be quashed. *Commonwealth v. Fisher*, 2 J. J. Marsh. 139. An execution, irregularly issued, is a nullity, but it is otherwise with an erroneous execution or process, and the party may justify under it until it be reversed. *Read v. Markle*, 3 Johns. 523. An irregularity in the issuing of execution within twenty-four hours after judgment, can only be shown by the parties and privies; and it cannot affect the title of an innocent purchaser, without notice. *Allen v. The Portland Stage Co.*, 8 Greenl. 207. Whether this objection can be taken collaterally or only directly upon a motion to set aside the execution, *quære*. *Id.*

indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him, as such attorney or agent may be able to give."(*e*)

If the *feri facias* vary from the judgment, it may be amended thereby, in the body of the writ:[*A*] And when a *feri facias* is sued out into a different county from that in which the venue is laid, and the party suing it afterwards takes out a *feri facias* into the proper county, and gets a return of *nulla bona* in order to warrant the *feri facias* which first issued, the courts will permit the first writ to be amended, by inserting the return of *nulla bona* and the *testatum* clause, on payment of costs.(*f*) So, where a *feri facias* is improperly *tested*,(*g*) or made returnable on a *particular* instead of a *general* return day,(*h*) or on a day out of term,(*i*) or, in the Common Pleas, "before us," instead of "our justices at *Westminster*,"(*k*) it may be amended by the award of execution on the roll: And where to a writ of *venditioni exponas*, for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff returned that he had made of the said goods 20*l.*, but omitted by mistake to return *nulla bona* to the *feri facias*, the court allowed him to amend the return, and set aside an attachment issued against him for not making it.(*l*) But the court of King's Bench refused to allow the plaintiff to amend a *feri facias*, where the defendant had become bankrupt before the goods taken under it were sold;(m) as such amendment would have prejudiced third persons.[*B*]

(*e*) See note (*e*), preceding page.

(*f*) 3 Durnf. & East, 657. 1 H. Blac. 541; and see 3 Durnf. & East, 388. 6 Durnf. & East, 450. *Ante*, 713.

(*g*) Say. Rep. 12.

(*h*) 2 Bos. & Pul. 336.

(*i*) *Davey v. Hollingsworth & another*, T. 24 Geo. III. K. B.

(*k*) 5 Taunt. 605. 1 Marsh. 237, S. C.

(*l*) 1 Marsh. 344.

(*m*) 4 Maulp. & Sel. 329.

[*A*] "Where there is anything on the record, or filed with it as part of the proceedings in the cause, to justify an amendment, it may be made, even after error brought. The record, if brought on error, will be remitted by the court below for the purpose. A *venditioni exponas* may be amended by the præcipe, by inserting the name of one of the defendants, even after the writ is executed by a sale of the land of the defendants, and after ejectment brought by the purchaser on the sheriff's deed. *Sickler v. Overton*, 3 Barr, 325. So the omission of a specified item of property in the *venditioni exponas* may be amended by the levy and the sheriff's deed, even after the lapse of forty years. *De Haas v. Bunn*, 2 Barr, 338. A judgment entered against a defendant by the wrong christian name, may be amended by the bond and warrant of attorney, as between the parties; but such amendment cannot be made so as to affect the rights of third persons. *Zimmerman v. Briggans*, 5 Watts, 186. So a judgment may be amended from a less to a greater sum, by the paper on file assessing the damages. This, as between the parties, may be done after bail given for the stay of execution, *ca. sa.* issued and returned, and after an action brought against the bail, or of creditors or purchasers. As between the parties themselves they do no injustice, and are attended with no danger, as long as they are confined to cases where there is something to amend by." *Crutcher v. The Commonwealth*, 6 Whart. 349. *Smith v. Hood*, 1 Casey, Penn. Rep. 220, per Lewis, Ch. Just.

[*B*] The omission of material words, clearly by a clerical mistake in an execution, may be amended after sale of land under it. *Toomer v. Purkey*, 1 Rep. Con. Ct. 328. Or a clerical misprision, by which the execution varies by one cent damages from the judgment, is no ground for quashing the execution. *Sanders v. Kentucky Ins. Co.*, 4 Bibb, 471. Neither is the clerk's failure to indorse on the execution issued on the replevin bond, that it was payable in bank notes, when the first execution was actually so indorsed. *Id.* An execution cannot be levied after the return day; but if levied before, the sale and return may be made after the return day. *Bennard v. Stevens*, 8 Aik. 429. Where an execution was enforced by an officer after it was dead in law, by direction of the creditor through mistake, and the debtor afterwards brought an action of trespass against the officer and recovered a greater sum in damages than the amount of the execution, and the creditor had indemnified the officer against the judgment, it was held that the creditor was entitled to a judgment in

The writ of *feri facias* being sued out, is delivered to the sheriff, or other officers to whom it is directed, his under-sheriff or deputy; and if directed to the sheriff, he (or more commonly his under-sheriff) makes out a *warrant* thereon, which is delivered to his officer, for the execution of *the writ. In a county palatine, the officer to whom it [*1000] is directed, makes out his writ or *mandate* to the sheriff, who grants a warrant thereon for its execution. And where a *feri facias* having been sued out, the defendant pays the plaintiff's attorney the debt and costs, without the delivery of the writ to the sheriff, it is no contempt of the court, to attach the same money in the hands of the plaintiff's attorney for a debt due from the plaintiff to the defendant.(a)

At common law, the *feri facias* had relation to its *teste*, and bound the defendant's good from that time;[A] so that if the defendant had after-

(a) 4 Taunt. 472.

his favour on a *scire facias* to obtain a new execution. *Stoyel v. Cady*, 4 Day, 222. If an execution is indorsed satisfied, by any mistake or accident, the creditor's remedy is by motion or *scire facias* for an *alias* execution, but the court, in such case, will not render any new judgment. *Langdon v. Langdon*, 1 Root, 453. A mistake of the name of the town in which the county jail is situate, is merely a clerical error in an execution, and does not invalidate it. *Lewis v. Avey*, 8 Verm. 289. The sheriff is obliged to execute a writ, regular on its face, though the amount differs from that in the judgment. *Parmelee v. Hitchcock*, 12 Wend. 90. *Ringes v. Ward*, 2 B. Mon. 127. A judgment was recovered at the June term of a county court, 1839, an execution was issued on the 13th of June, 1839, reciting the judgment truly, but by mistake of the clerk, dated the 13th of June, 1809. The execution was delivered seasonably to the officer to execute, but he neglected to do so. Held, that the execution was not void, and that the officer was liable for not executing it. *Bank of Whitehall v. Bates*, 13 Verm. 395. A *feri facias* sent to a sheriff in New York, and received by him previous to the signing and filing of the record, is not irregularly issued, if he is directed to indorse it as received of a subsequent day, and on that day the record be actually signed and filed, and afterwards levy is made. *Walters v. Sykes*, 22 Wend. 566. Though it is irregular to issue a second *feri facias* where the first has not been returned, yet if it be regular upon its face, and issued in conformity to the judgment of a court, in a case of which it had jurisdiction, it is not void, and will justify the sheriff in acting under it. *The State v. Page*, 1 Speers, 408. It is no objection to an execution, that it was not made out by the clerk nor his deputy, if it is signed and adopted by the clerk. *M'Mahan v. Cokelough*, 2 Ala. 68. Where a writ against two defendants was served upon one only and he only appeared, and the record stated that the parties came by their attorneys, &c., and that the plaintiffs recovered of the defendants, it was held that they only were parties who were parties to the issue; that the word defendants in the judgment instead of defendant, was a clerical mistake, and that in case an execution should be taken out against the party not served upon, it would be superseded or quashed. *Graham v. Roberts*, 7 Ala. 719. An execution issued on an informal judgment may be sustained by an amendment of the judgment. *Graham v. Lynn*, 4 B. Monr. 17. Where a defendant in a *feri facias* has submitted to it, a stranger to the record cannot avail himself of any irregularity in the writ in a collateral proceeding. *Swiggart v. Huber*, 4 Scam. 364.

[A] Where an execution is issued, it creates a lien on the personal property of the defendant from the *teste*, so that he cannot dispose of it. Where an *alias feri facias* is issued, this lien has relation to the *teste* of the first *feri facias*. *Gilkey v. Dickerson*, 2 Hawks, 341. *Arnold v. Bella*, 1 Hayw. 396. *Irwin v. Micon*, 1 Jones, Penn. 419. An execution is a lien upon personal property of the judgment debtor from its delivery to the sheriff, and is superior to the title of one to whom the property is assigned in payment of a preëxisting debt subsequent to such delivery, but prior to a levy upon the property. *Ray v. Birdseye*, 5 Denio, 619. *Stuarts v. Reynolds*, 4 Harring. 112. *Smith v. Reynolds*, 4 Harring. 112. *Stamps v. Irwin*, 2 Hawks, 232. In South Carolina, executions bind the property throughout the state from the time they are entered in the sheriff's office. The party may, however, lose his priority by delay. *Woodward v. Hill*, 3 M'Cord, 241. *Johnson v. M'Clane*, 7 Blackf. 501. An execution from the time of its delivery to the sheriff, binds personal property, and a subsequent sale by the defendant, though without notice, and prior to a levy, is void. *Nowell v. Sibley*, 1 South. 381.

An execution tested after the plaintiff's death is irregular; but it may be amended by altering the *teste* to some day in term previous to his death. *Center v. Billingshurst*, 1 Cow.

wards sold the goods, though *bond fide* and for a valuable consideration, they were still liable to be taken in execution, into whose hands soever they came.(b) This relation being productive of great mischief to purchasers, was taken away by the statute 29 Car. II. c. 8, § 16, which enacts, that "no writ of *feri facias*, or other writ of execution, shall bind the property of the goods of the party, against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) indorse upon the back thereof, the day of the month or year whereon he or they received the same." But neither before the statute nor since, is the property of goods *altered*, but continues in the defendant, till execution executed. The meaning of these words, that "no writ of execution shall bind the property, but from the delivery of the writ to the sheriff, &c." is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution.(c)

This statute, being made in favour of purchasers, does not alter the law as between the parties:[A] therefore, if the execution be tested in the de-

(b) Glib. *Exec.* 13, 14. 8 Co. 171. Cro. *Eliz.* 174, 440. Cro. Car. 149. 2 Vent. 218. 7 Durnf. & East, 21, 2; but see 1 Lev. 174.

(c) 2 Eq. Cas. Abr. 381; and see 1 Ld. Raym. 252. 4 East, 539, 40.

33. But it may be issued after his death, if tested before it. A variance between the judgment and execution, being amendable, cannot be taken advantage of on a trial for the recovery of land sold by virtue of the execution. *Jackson v. Walker*, 4 Wend. 462. *Jackson v. Anderson*. *Ib.* 474. A slight variance between the execution and the judgment as to the amount rendered before a justice of the peace, will not affect the right of a purchaser of property sold by virtue of such execution. *Jackson v. Page*, 4 Wend. 585.

[A] It is not regular to issue an execution on a judgment after the death of the plaintiff in the name of his executor without previously suggesting the death of the plaintiff and substituting the executor on the record. Where it was done, however, and the money levied, the Supreme Court, in Pennsylvania, on writ of error remitted the record with directions to suggest the death and substitute the name of the executor upon the record *nunc pro tunc*. *Darlington v. Speakman*, 9 Watts & Serg. 182. Under the South Carolina act of 1827, a *feri facias* may be renewed at any time within three years after the expiration of the four years in which it had its active energy, without *scire facias*; and the right to such renewal is not affected by death of the defendant. *Altier*, in case of a defendant's death after verdict and before judgment. *Fishbone v. Verdin*, 1 Speers, 348. An execution issued after the death of the plaintiff will be quashed. *Harwood v. Murphy*, 1 Green, 193. An execution taken in the name of plaintiff, who is dead, and without a *sci. fa.* to substitute his representatives, is voidable, not void, and the party may justify under it. *Day v. Sharp*, 4 Whart. 339. Where there is a judgment against two joint defendants which remains unsatisfied until one of them die, his personal property is discharged from execution; but the plaintiff may have execution of the land and tenements of such deceased party, if any he had, which were bound by the judgment at the time it was obtained. *Stiles v. Brock*, 1 Penn. State Rep. 215. In Delaware, after the death of the defendant and the lapse of a term, no execution can issue without a previous *scire facias*. *Cooper v. May*, 1 Harring. 18.

A *venditioni exponas* to sell lands tested after the defendant in the execution had died without any *scire facias* against the heirs, is null and void. *Samuel v. Zackery*, 4 Iredell, 377. An execution tested on the first day of the term, before the defendant's death, may actually issue after his death; but in such case, to be good, the judgment must be actually signed previously to defendant's death. *Fox v. Lamar*, 2 Brevard, 417. An execution cannot issue against the effects of a deceased person, before a revival of the judgment against his legal representatives. *Wilson v. Kirkland*, Walker, 155. *Hubart v. Williams*, Walker, 175. Where a judgment debtor dies after judgment, and before *feri facias* is placed in the sheriff's hands, the *feri facias* is void, and the sheriff is not liable to a rule under the Alabama statute for not returning it. *Holloway v. Johnson*, 7 Ala. 660. An execution issued and tested of a term subsequent to the death of the defendant in the execution upon a judgment rendered against him in his

fendant's life-time, it may be taken out, (d) and executed, (e) after his death. And the sheriff deriving his authority from the writ, it has been holden, that if the plaintiff die after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money: (f) Or if the plaintiff have made no executor, or administration be not committed, the money must be brought into court, and there deposited, until, &c. (g)

*The king is not bound by this statute: (a) and therefore, an [*1001] extent at his suit still binds from the *teste*, or *fiat* of the baron on which it issues. (b) And as between different plaintiffs, if two writs of execution be delivered to the sheriff, on the same or different days, he ought to execute that first which was first delivered, (c) [A] except it be fraudulent, and then he ought to execute the other; (dd) and the court on motion will not assist the plaintiff in the second execution. (ee) But if the sheriff levy goods in execution, by virtue of the writ last delivered, and make sale of them, whether the last writ was delivered upon the same or a subsequent day, the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff. (ff) If a second *feri facias* be delivered to the sheriff, after he has the defendant's goods in possession under a prior writ, the goods are bound by the second execution, subject

(d) 1 Ld. Raym. 695. Com. Rep. 117. Bumb. 271. 12 Mod. 5. 2 Ld. Raym. 850. 7 Mod. 95, S. C.; and see 3 P. Wms. 399; and the case of *Finch v. Earl of Winchelsea*, *id.* in *notis*. Willes, 131. 7 Durnf. & East, 20. 1 Bos. & Pul. 571. *Aliter*, if the execution be tested after the defendant's death. 6 Durnf. & East, 368.

(e) Gilb. Exec. 15, 16. Law of Exec. 46. Cro. Eliz. 181. Comb. 23. O. Bridg. 468, 9. 1 Mod. 188. Pr. Reg. 215. 7 Durnf. & East, 20.

(f) Cro. Car. 459. 1 Sid. 29. 2 Ld. Raym. 1073. 1 Salk. 323, S. C.

(g) Noy, 73. 2 Ld. Raym. 1073.

(a) 3 Atk. 739. 1 Ves. 196.

(b) Bumb. 39. Gilb. Rep. 222. 2 Str. 754. S. C. 2 Blac. Rep. 1251.

(c) 1 Durnf. & East, 720; and see 4 East, 539, 40. 7 Taunt. 56. 2 Marsh. 375. S. C. 1 Dowl. & Ryl. 307.

(dd) 1 Wils. 44; and see Peake's Cas. Ni. Pri. 3 Ed. 96. 4 East, 523.

(ee) 1 Durnf. & East, 729; and see 4 East, 539, 40. 7 Taunt. 56. 2 Marsh. 375, S. C.

(ff) 1 Ld. Raym. 252. 1 Salk. 320. Carth. 419, S. C.; and see the case of *Rybol v. Peckham*, 1 Durnf. & East, 731, *in notis*. 4 East, 523.

lifetime is void. *Gwin v. Latimer*, 4 Yerg. 22. Where an execution issues after the death of him against whom it runs, although it is an irregularity, it is not a nullity, nor can its validity be called in question collaterally. *Butler v. Haynes*, 3 N. Hamp. 21. If an execution is tested in the defendant's life-time, it may be taken out and executed after his death. *Dem v. Hillman*, 2 Halst. 180. Under the North Carolina act of 1828, a justice's execution binds property in the hands of an administrator, though the defendant in execution died after the *teste* and before the levy of the writ. Such property may be sold without a *scire facias*. *McCarson v. Richardson*, 1 Dev. & Bat. 561. But it is a general rule that where a sole defendant dies after judgment and before execution, an execution issued without revival of the judgment by *scire facias*, is void. *The State v. Michaels*, 8 Blackf. 436. Where an execution is issued after the death of the party defendant, and before the administrator has been made a party, the execution will be quashed on motion, and a sale thereon set aside. *Bentley v. Cummings*, 4 Eng. 487.

[A] Where two executions against the same defendant, but in favour of different plaintiffs, were both tested returnable and delivered to the sheriff at the same time, and by him simultaneously levied on the defendant's personal property, which was sold for less than would pay both executions, it was held that the proceeds must be equally divided between the two executions until the smaller is satisfied, and the residue be applied to the larger one. *Campbell v. Eager*, 1 Cow. 215. But where money is made on a *feri facias*, the sheriff cannot set up any claim on the surplus proceeds by reason of a debt due him by the defendant, nor for the expenses incurred in taking care of goods when the sale was deferred at the instance of the defendant, and on his promise to pay the expense. *Fück's Appeal*, 10 Barr, 461.

to the first, from the day of the delivery of the last writ to the sheriff; and that, even without a warrant on the second writ, or further seizure. (gg) Two writs of *fiery facias*, at the suit of different plaintiffs, were issued against the same defendant, and the goods taken under them were not more than sufficient to satisfy the first execution; the officer, under the second writ, continued in possession until the goods were sold by the sheriff, after which the defendant obtained a rule for setting aside the first execution, and pending that rule, there were conferences between all the parties: The rule, however, was made absolute, and the sheriff ordered to pay to the defendant the proceeds of the levy. The sheriff, having so paid the money, without having applied to the court for relief, and without having given any notice to the plaintiff in the second execution, was held liable to him for the amount, in an action for a false return of *nulla bona*. (h)

By this writ, the sheriff has authority to seize and sell every thing that is a chattel belonging to the defendant, (i) [A] except his necessary wearing

(gg) 7 Taunt. 56. 2 Marsh. 375, S. C.; and see 3 Moore, 83. 1 Bing. 71.

(h) 3 Barn. & Ald. 95; and see 5 Barn. & Cres. 660. 8 Dowl. & Ry. 442, S. C.

(i) Gilb. Exec. 19. 3 Co. 12.

[A] Under the system of jurisprudence established in those states in which the common law prevails, a sheriff may seize under an execution against a creditor, individually, all his interest in partnership property, subject to the prior rights and liens of the other partners and of the creditors of the partnership; and the creditor may, after the seizure and before the sale, institute proceedings against the other partners to ascertain the amount of the interest seized, or he may cause a sale to be made, and leave it to the purchaser to ascertain it. *Broadnace v. Thomason*, 1 La. Ann. R. 382. The goods of a deceased person, in the hands of his executor or administrator, are liable to be taken on execution unless their value have been expended in the administration; and this, notwithstanding the executor or administrator have charged himself with the appraised value of the goods, and settled his account in the probate office. *Weeks v. Gibbs*, 9 Mass. 74. And any person having obtained judgment and execution against the goods and estate of a deceased person, may cause the execution to be levied on such goods or estate notwithstanding the same may be represented insolvent. *Clark v. May*, 11 Mass. 233. But an execution which has issued in the life-time of a debtor, cannot, after his decease, be levied on his goods which were not attached on *mens process*; nor on goods which were attached, if a commission of insolvency have issued. *Jewett v. Smith*, 12 Mass. 309. *Grosvenor v. Gold*, 9 Mass. 209. A slave in the possession of another than his owner, merely as bailee, without claim of title, is liable to execution for the debt of the bailor. *Thomas v. Thomas*, 2 A. K. Marsh. 430. A suit brought by the bailor to recover possession does not alter the case. *Id.*

The interest of a lessee of goods or chattels may be taken and sold on execution, and the purchaser acquires a right to use them during the term of the lease. *Van Antwerp v. Newman*, 2 Cow. 543. Where goods are so taken, they revert to the lessor after the expiration of the lease, and if they are not returned to him uninjured, he has an action against the purchaser. *Id.* Where goods are attached and sold on execution, all actual expenses necessarily incurred, such as expenses for moving, storing, and taking account of them, are a charge on the goods; but the officer is entitled to receive nothing for extra trouble, his compensation being provided for by the fee bill. *Caldwell v. Eaton*, 5 Mass. 399. *Shattuck v. Woods*, 1 Pick. 171. *Warren v. Leland*, 9 Mass. 265. The court may direct money taken under an execution, which money is in the hands of the sheriff, or brought into court to be paid over in satisfaction of another execution in the hands of the same sheriff, against the plaintiff in the first execution. *Steele v. Browne*, 2 Virg. Cas. 246. And this, although it may not appear that sufficient effects cannot otherwise be found to satisfy the judgment. *Id.* Shares of the stock of incorporated companies are liable to be taken on different executions by different officers; and if the proceeds of the sale be more than sufficient to satisfy the executions in the hands of the officer selling, he will be bound to pay the surplus to the officer who holds the other executions. *Denney v. Hamilton*, 16 Mass. 402. Money, whether in specie or in bank notes, may be taken on execution if found in possession of the defendant, or capable of being identified as his property. *Crane v. Freese*, 1 Harr. 305. *Rogers v. Bullin*, R. M. Charit. 176. *Dolby v. Mullins*, 3 Humph. 437. *Steele v. Brown*, 2 Virg. Cas. 246. *Means v. Vance*, 1 Bailey, 39. *M'Gee v. Cherry*, 6 Geo. 550. *Turner v. Tendall*, 1 Cranch, 117. *Brooks v. Thompson*, 1 Root, 216. *Prentiss v. Bliss*, 4 Verm. 513.

apparel: It has even been holden, that if the defendant have two gowns, the sheriff may sell one of them: (k) And he may sell *leases*, or terms for years, and *fructus industriales*, as corn growing, which goes to the executor, (l)[A] or fixtures which may be removed by the tenant: (m)[B] But where the growing crops of a tenant having been seized under a *fieri facias*, a writ of *habere facias possessionem* was subsequently delivered to the sheriff, in an *ejectment*, at the suit of the landlord, founded on a demise *made long before the issuing of the *fieri facias*, the court held, [*1002] that the sheriff was not bound to sell the growing crops under the *fieri facias*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise in *ejectment*. (a) And furnaces, or apples upon trees, which belong to the freehold, and go to the heir, cannot be sold by the sheriff on this writ. (b) So, the sheriff has no right, under a *fieri facias*, to seize fixtures, where the house in which they are, is the freehold of the person against whom the execution issues. (c) So, where A. mortgaged land with a windmill thereon, (built chiefly of wood,) the deed containing also a bargain and sale of the mill, the court of Common Pleas held, that it could not be taken in execution by a creditor of A. though A. remained in possession. (d) And where certain machinery, together with a mill, had been demised for a term to a tenant, and he without permission of his landlord, severed the ma-

(k) Comb. 356.

(l) Gilb. Exec. 19. 1 Salk. 368; and see 1 Younge & J. 398.

(m) 1 Salk. 368. 3 Atk. 13; and see M'Clel. 217. 3 Barn. & Cres. 368.

(a) 5 Barn. & Ald. 88; and see 9 Price, 287. 3 Bing. 11.

(b) Gilb. Exec. 19; and see 1 Younge & J. 398.

(c) 5 Barn. & Ald. 625. 1 Dowl. & Ry. 247, S. C.

(d) 4 Moore, 281. 1 Brod. & Bing. 506, S. C.

[A] Rye growing in a field was levied on by the sheriff, under a *fieri facias*, but not sold; and a collector of taxes, by virtue of a warrant against the defendant, afterward distrained upon and sold the same field of rye. Held, that after the levy the rye was in custody of the law, so that the collector had no right afterwards to sell it; and that the purchaser under him could not maintain trover against the purchaser under the sheriff, who at harvest-time cut and carried away the rye. *Partwell v. Bissell*, 17 Johns. 128. The growing crop may be levied upon and sold under a *fieri facias*. *Parham v. Thompson*, 2 J. J. Marsh. 159. Wheat growing, is a chattel, and if raised upon the land of another pursuant to an agreement between him and the defendant, may be levied on and sold under an execution against the latter. *Whipple v. Foot*, 2 Johns. 418. Corn, and any other product of the soil raised annually by labour and cultivation, is personal estate, and may be taken in execution while standing in the field, if ripe and fit to be gathered. *Penhallow v. Dwight*, 10 Mass. 54. Growing corn, in Kentucky, was liable to be sold in virtue of a *fieri facias*, previous to the act of 1834. *Craddock v. Riddleburger*, 2 Dana. 205. And the purchaser could enter and remove it. *Thompson v. Craigmyle*, 4 B. Monr. 391. But it has been held that a growing crop of corn on rented land, sold by the tenant by parol in good faith, is not subject to an execution afterwards issued against him. *Noethen v. The State*, 1 Smith, 71. In North Carolina, an officer may levy an execution upon a standing crop, provided it is matured. The act of 1844, c. 35, prohibiting officers from levying executions on growing crops, embraces only crops which are not matured. *Shannon v. Jones*, 12 Ired. 206. It has also been held in New York, that growing grass cannot be taken as a chattel on execution. *Bank of Lansingburgh v. Crary*, 1 Barb. 542. And although the defendant in the execution turns out the grass to the sheriff, a levy thereon will be a nullity. *Ib.* But there may be a legal severance of such trees or grass from the land, without an actual severance; as where the owner of the fee of the land sells and conveys the trees or grass by valid conveyance, in writing, and where he conveys the lands reserving the trees and grass. *Ib.* A mortgage of such trees or grass by the owner of the land, will not work a severance until the mortgage becomes absolute. *Ib.* Chattels, subject to a mortgage, may be sold on execution against the mortgagor, and the purchaser will take them subject to the mortgage. *Ib.*

[B] See *Doty v. Gorham*, 5 Pick. 487.

chinery from the mill, and it was afterwards seized and sold by the sheriff, under a *fiery facias*; the court held, that no property passed to the vendee, and that the landlord was entitled to bring *trover* for the machinery, even during the continuance of the term.(e)

Also, by the statute 56 Geo. III. c. 50, § 1, "no sheriff or other officer in *England* or *Wales* shall, by virtue of any process of any court of law, carry off, or sell or dispose of for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or turnips, or any manure, compost, ashes, or sea-weed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice, before he shall have proceeded to sale." And "no sheriff or other officer shall, by virtue of any process whatsoever, sell or dispose of any clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown, and be growing under any crop of standing corn.(f) Provided that this act shall not extend to any straw, turnips, or other articles, which the tenant may remove from the farm, consistently with some contract in writing."(g) This statute, although passed for the public benefit, in promoting good husbandry, does not bind the crown: There-
[*1003] fore, sales of growing crops, &c., seized under *prerogative process, are not within it; and the sheriff must sell them unconditionally: nor can they be sold as being subject to tithe.(a)

Money found in the defendant's possession, may, it seems, be taken in execution;(b) but the court will not order money in the sheriff's hands, being the surplus of money levied under a former execution against the defendant's goods, at the suit of the same plaintiff,(c) or damages recovered by the defendant against the sheriff in another action,(d) or money levied under an execution at the suit of the defendant against a third person,(e) to be paid over to the plaintiff, in satisfaction of his demand. And the sheriff cannot take bank notes,(ff) &c.; nor goods pawned, or gaged for debt; nor goods demised or letten for years:(gg) nor goods distrained,(h) or taken and in custody of the sheriff upon a former execution;(i) nor any thing which cannot be sold, as deeds, writings,(k)[A] &c. But goods pawned

(e) 5 Barn. & Ald. 826. 3 Stark. Nl. Pri. 130, S. O.

(f) § 7.

(g) § 8.

(a) 6 Price, 94.

(b) Doug. 231; but see 4 East, 510. 9 East, 48. 7 Moore, 127, 3 Brod. & Bing. 294. S. C.

(c) 4 East, 510.

(d) 2 New Rep. C. P. 376.

(e) 9 East, 48. 7 Moore, 127. 3 Brod. & Bing. 294. S. O.; but see Doug. 231, *contra*.

(ff) Cas. temp. Hardw. 53. 9 East, 48.

(gg) 1 Car. & P. 347.

(h) Bac. Abr. tit. *Execution*, 352; and see Willes, 181. 5 Moore, 79. 2 Brod. & Bing. 362, S. O.

(i) 2 Show. 173. 3 Mod. 236; and see 5 Moore, 79. 2 Brod. & Bing. 362. S. O. 9 Price, 287. *Post*, 1010.

(k) Cas. temp. Hardw. 53.

[A] A note for the payment of money, cannot without the defendant's assent, be taken and sold on an execution at common law. *Johnson v. Crawford*, 6 Blackf. 377. *Goodman*

may be taken on an execution against the pawner, upon satisfaction of the pledge.(l) And though it be said, that in the case of a lease of land and of a stock of cattle for a year, they cannot be taken in execution during the term;(m) that is, because the lessor himself could not have disposed of his tenant during the year, and of course the lessor's creditor cannot: But subject to the right of the pawnee or lessee, the goods may it seems be taken in execution:(n) and the sheriff is not liable to an action, for selling the entire property, unless he be apprized that the defendant has only a special interest therein.(o)

A mere equitable interest in a term for years cannot be taken in execution by the sheriff, under a writ of *feri facias*, at the suit of a judgment creditor:(p) and therefore, when the defendant has only an equity of redemption in a leasehold estate, an execution will not affect it, as the legal estate is in the mortgagee.(q)[A] The plaintiff's only remedy in that case,

(l) Bro. Abr. tit. *Pledges*, pl. 28.

(m) *Id. ibid.* and *id.* tit. *Execution*, pl. 107.

(n) 8 East, 476, 479; and see 15 East, 607.

(o) 1 Car. & P. 347.

(p) 8 East, 467. 2 New Rep. C. P. 461, S. P.; and see 3 Bro. Chan. Cas. 480. 1 Ves. jun. 431.

(q) 3 Atk. 200, 739; and see Forrester, 162, 3. 4 Moore, 281. 1 Brod. & Bing. 506, S. C.

v. Duffield, Wright, 455. *Field v. Lawson*, 5 Pike, 376. Nor can any other chose in action. *Ingalls v. Lord*, 1 Cow. 240. *M'Clelland v. Hubbard*, 2 Blackf. 361. *Rhoads v. Megonsagal*, 2 Barr. 39. Money in the hands of a third person, is not bound by the lien of an execution against the owner. *McDonald v. Pickett*, 2 Bailey, 617. Money taken on execution, in Virginia, does not become goods and chattels of the plaintiff until it has been paid over to him; and while it remains in the hands of the officer, he cannot apply it to the satisfaction of another execution against the former plaintiff. *Turner v. Fendall*, 1 Cranch, 117. By the command in the writ, the officer is in strictness to bring the money into court, there to be paid to the plaintiff. *Id.* Bank shares or shares in a public library, cannot be seized and sold on execution in New York. *Denton v. Livingston*, 9 Johns. 96; or Connecticut. *Stamford Bank v. Ferris*, 17 Conn. 259. An apparatus for printing, consisting of a printing press, cases, types, &c., may be "tools" exempted from execution under the Connecticut statute; but in order to be thus exempted, they must be necessary for the upholding of life; and whether they are of such description is a question of fact for the jury. *Patten v. Smith*, 4 Conn. 450. The interest of the mortgagee in mortgaged premises after the expiration of the law day, and before foreclosure, cannot be taken in execution. *Huntington v. Smith*, 4 Conn. 235. So too, money in sheriff's hands belonging to the defendant, though subject to levy, is not subject to the lien of a *feri facias* against him. If, therefore, it is assigned before levy, the assignee will be entitled to it in preference to the execution creditor. *Dupong v. Watkins*, 2 Rich. 328. *Southwestern Railroad Bank v. Watkins*, 2 Rich. 328. *Reid v. Ramsey*, 2 Rich. 4.

[A] An equitable interest of the defendant in land, cannot be sold by an execution issuing from a court of common law. *Den v. Hog*, 1 N. Jersey, 174. Nor otherwise than by a sale at auction in the manner prescribed by the statute. *Warren v. Childs*, 11 Mass. 222. *Thornhill v. Gilmer*, 4 Sm. & Marsh. 153. The interest of a mortgagee, whether equitable or legal, cannot be taken in execution. *Rickert v. Maderia*, 1 Rawle, 325. Lands mortgaged cannot be sold on execution against the mortgagee, before a foreclosure of the equity of redemption though the debt be due, and the estate of the mortgagee has become absolute at law. *Jackson v. Willard*, 4 Johns. 41. An equity of redemption may be sold on execution, in Ohio; *Ely v. M'Guire*, 2 Ham. 223; *Phelps v. Butler*, *Id.* 224; in Mississippi; *Hunter v. Hunter*, Walker, 194; in Indiana; *Watkins v. Gregory*, 6 Blackf. 113; in Kentucky. *Dougherty v. Linthicum*, 8 Dana, 194; and in Alabama; *Sand v. Hopkins*, 7 Ala. 115. But it is otherwise in some of the states, except through the intervention of the court of chancery: thus, an equitable title to land which is not complete and perfect, and especially an imperfect equity of a complicated character, is not the subject of sale under execution. The creditor must resort to a court of chancery in order to reach such equity of his debtor. *Hopkins v. Carey*, 23 Miss. (1 Cushman.) 54. The equity of redemption of a mortgagor is not subject to seizure and sale on execution. *Baldwin v. Jenkins*, 23 Miss. (1 Cushman.) 206. The equity of redemption of a mortgagor, is not the subject of seizure and sale under an execution at law; and if the mortgagee or those claiming under him, cause an execution issued upon a judgment founded on the mortgage debt to be levied upon the land, a purchaser of the land, at a sheriff's sale, cannot upon that ground, in a case unmixed with fraud, oppose an appli-

is by filing a bill in equity, to redeem the estate, by paying off the principal and interest due on the mortgage.(q) But before he is entitled to redeem, he must first take out a writ of execution against the goods of the defendant;(r) though it does not seem to be necessary to have it returned.(s)

In a late case, however, where A. having entered into an agree-
[*1004] ment for a *lease, had been let into possession, and had paid the stipulated rent, it was holden, that a tenancy from year to year was created, which the sheriff might sell under a *feri facias* against A.(aa)

In assigning a term for years, which has been taken in execution, it is not necessary for the sheriff to state in the assignment, the particular interest which the defendant has, for he may not be able to come at the precise knowledge of it: But it is sufficient for him to state, that the defendant is possessed of the premises, for a term of years *yet to come and unexpired*, and to assign all his interest therein generally:(b) and it is more prudent in the sheriff to state the interest in this way, for if he attempt to state it particularly and fail, the vendee will not have a good title.(c) It is said, that if a sheriff, on a *feri facias*, sell a lease or a term of a house, he cannot legally put the party out of possession, and the vendee in; but the vendee must bring his ejectment.(d) This, however, must be understood of a forcible expulsion; for it has been determined, that under a *feri facias*, the sheriff may justify expelling the defendant *peaceably*,(e) or, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. If the defendant, subsequent to the delivery of the writ to the sheriff, make an assignment of a leasehold estate, the judgment creditor

(q) See note (q), preceding page.

(r) 3 Atk. 200; and see 1 Vern. 399. 1 P. Wms. 445. 6 Ves. 72. 1 Madd. Chan. 205, 522, 3.

(s) Ld. Redesd. Pl. 3 Ed. 102. 1 Madd. Chan. 205, (r).

(aa) 1 Man. & Ryl. 137.

(b) 4 Co. 74. Cro. Eliz. 584. S. C. 3 Durnf. & East, 292. 8 East, 475.

(c) *Id. ibid.* 3 Durnf. & East, 294.

(d) 2 Show. 85.

(e) 3 Durnf. & East, 292.

action for a foreclosure of the mortgage; though he may substitute the rights of the mortgagee to the extent of the amount of his bid at the sheriff's sale. *Ib.*

If after an attachment of an equity of redemption, a second mortgage is made and duly recorded, and afterwards a second attachment is made and the executions in both suits are placed in the hands of an officer, and the equity sold on the first, the officer is not bound to search the records for an intermediate conveyance, but may apply the balance to satisfy the second execution, if no notice of the second mortgage is given him. *Littlefield v. Kimball*, 5 Shep. 313. In giving a construction to the language used by an officer in his return of the sale of an equity of redemption, and his deed thereof, the whole description of the land should be taken together; and effect should be given to every clause and word, if possible, in order to ascertain the intended meaning. *Ib.* The proper mode of securing the interest of a mortgagor in land, is by attachment and sale of the equity of redemption. *Kelly v. Burnham*, 9 N. H. 20. The purchaser of an equity of redemption sold on execution, can aver no seizin or title against any other person than the execution debtor, or his immediate tenants or assigns. *Foster v. Mellen*, 10 Mass. 421. On the sale on execution of an equity of redemption, the purchaser is estopped from contesting the validity of the mortgage, and thus, in case it is proved fraudulent, holding the estate in absolute fee. *Russell v. Dudley*, 3 Met. 147. A lease for a term of years, is the subject of levy and sale upon a *feri facias*, without inquisition and condemnation. *Dalyell v. Lynch*, 4 Watts & Serg. 255. Equitable estates are primarily liable to sale under a *feri facias* in the same manner that legal estates are. *M'Meehan v. Marman*, 8 Gill & Johns, 57. In Kentucky, since statute of 1821, a sheriff is bound to levy upon the interest of a mortgagor. *Bell v. The Commonwealth*, 1 J. J. Marsh. 550. The sale and conveyance of an equity of redemption under execution, invest the purchaser with all the right, title, and interest of the mortgagor, who cannot deny the purchaser's right of possession or resist his recovery. The rights of the mortgagor's tenant or executory vendee, are the same, not greater. *Dougherty v. Linthicum*, 8 Dana, 194.

need not bring a suit in equity to come at the estate, by setting aside the assignment; but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment. *(f)* And where an outgoing tenant had agreed to assign the remainder of his term to the incoming tenant, it was holden, that the sheriff, before an actual assignment made, might, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it. *(g)* Where a lease by deed was taken in execution, and an assignment made in the name and under the seal of office of the sheriff, by A. B. acting as under sheriff; the court held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as under-sheriff, and that he was authorized by deed, to execute deeds in the name of the sheriff. *(h)*

The sheriff, upon this writ, may take any goods which have been fraudulently sold, or conveyed away by the defendant; and a principal badge of fraud is the defendant's continuing in possession: *(i)* For if a man sell goods, and still continue in possession, as visible owner of them, such sale is fraudulent and void as against creditors. *(k)* In cases of this nature, the notoriety *of the change of possession is the question on [*1005] which the validity or invalidity of the transaction depends: *(a)* Therefore, if an assignment be made of household furniture, and the assignor continue in possession, it is not protected against an execution at the suit of one of his creditors, unless the assignment were notorious. *(bb)* So, if a creditor by *feri facias* seize the goods of his debtor, and suffer them to remain long in the debtor's hands, and another creditor obtain a subsequent judgment and execution, it has been determined often, that this is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable. *(cc)* So, where it was proved, in an action for a false return, that the warrant upon a *feri facias* was directed to three persons as special bailiffs; that the plaintiff's attorney was present at the time of executing it, and ordered one of the persons to use the defendant kindly, and not to take any of his household goods, for that his landlord would soon be in the country, and pay the debt; and thereupon another of the persons rode round the farm and grounds, and said "*I seize all this corn and cattle,*" and took some account thereof, for the use of the plaintiff; afterwards the landlord sued out a *feri facias*, and the sheriff's bailiffs not being in possession of the goods under the former writ, nor having left any body for them, he got his execution executed; and there was no proof that he promised to pay the plaintiff: it was left to the jury, upon this evidence, whether the first execution was intended to be, or was really executed; and the jury thought it was not, and gave a verdict for the sheriff, which was afterwards confirmed by the court, on a motion for a new trial. *(d)* So,

(f) 3 Atk. 739.

(g) 1 Marsh. 10.

(h) 5 Barn. & Ald. 243.

(i) Gilb. Exec. 15; and see *Twyne's case*, 3 Co. 81. Godb. 161. 2 Durnf. & East, 587. 1 Esp. Rep. 205, 357, 8. 8 Durnf. & East, 82, 521. 5 Barn. & Cres. 660. 8 Dowl. & Ryl. 442, S. C.; but see 2 Bos. & Pul. 59. 3 Esp. Rep. 52. S. C. 3 Taunt. 256. 4 Moore, 281. 1 Brod. & Bing. 506, S. C.

(k) Prec. in Chan. 286, 7.

(a) Gow. 34, 5, *per Dallas*, Ch. J.

(bb) *Id.* 33.

(cc) Prec. in Chan. 286, 7. 1 Ves. 245, 456; and see 3 Taunt. 400.

(d) 1 Wils. 44.

where a sheriff's officer executed a writ of *fieri facias*, by going to the house, and informing the debtor he came to levy on his goods, and laying his hands on a table, and saying, "*I take this table*;" upon which he locked up his warrant in the table drawer, took the key and went away, without leaving any person in possession, and after the *fieri facias* was returnable, but not continued, the landlord distrained the goods for rent; the court held, that the sheriff could not maintain *trespass* against him.^(e)[A] So, if the party at whose suit a sequestration out of Chancery is issued, take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at a distance of eighteen months, a writ of *fieri facias* is directed against the goods of the party defendant in the suit in Chancery, for not executing such writ, and selling the goods: the plaintiff in the sequestration having at all events lost his priority by such laches: and therefore the sheriff who had seized goods under the *fieri facias*, having, on notice of such supposed obstacles, returned *nulla bona*, was holden liable to the plaintiff, in an action for a false return.^(f)

(e) 1 Maule & Sel. 711.

(f) 4 East, 323; and see 1 H. Blac. 543. Peake's Cas. Ni. Pri. 95. 2 Campb. 48. 2 Maule & Sel. 175. 5 Barn. & Cres. 660. 8 Dowl. & Ryl. 442. S. C. 8 Price, 95. 11 Price, 445. 10 Moore, 210. 2 Bing. 479, S. C.

[A] To make a levy on personal property valid, against a *bond fide* purchaser, without knowledge of the levy, the sheriff must have the property within view. *Van Wyck v. Pine*, 2 Hill, 666. *Cowthorn v. M'Graw*, 9 Ala. 519. To constitute a levy, the goods must be in the view of the officer, and subject to his disposition and control. *Ray v. Harcourt*, 19 Wend. 495. *Porter v. Barker*, 8 Texas, 23. In New Jersey, a sheriff after having levied on goods and chattels, is presumed in law to have the possession or custody of them, and he must take care of them at his peril. *Cumberland Bank v. Hann*, 4 Harr. 166. He may leave them in the actual possession of the defendant until the day of sale, and in such case the law will consider the defendant as his agent or bailiff; but it will be at the risk of the sheriff as between him and the plaintiff. *Ib.* Goods so left by the sheriff, acting in good faith, would not be liable to seizure on a subsequent execution so as to avoid the former levy. *Ib.* The sheriff may so leave the goods, by the direction or consent of the plaintiff, and at his risk, without thereby losing the legal custody of them or the plaintiff's priority, if done in good faith. *Ib.* And so, however long the goods may be so left with the defendant. *Ib.* So if the plaintiff, when he gives the execution to the sheriff, direct him not to proceed to sell without further orders. *Ib.* But if the defendant is permitted with the knowledge and consent, express or implied, of the plaintiff, not only to use but to exercise an unlimited control and dominion over all the property levied on, selling, consuming, or disposing of it as his own, it is evidence of a fraudulent or colorable use of the execution so as to let in a younger execution prosecuted in good faith. *Ib.* An execution under which an officer takes actual possession of the personal property levied on, has precedence over one previously levied on the same property, but under which no actual possession has been taken and retained by the officer levying it. *Barham v. Massey*, 5 Iredell, 192. It is not necessary that there should be an actual manual seizure and removal of the property, to constitute a levy; it is enough that the sheriff, having the execution in his hand within reach of the property, should, with the assent of the defendant in the execution, indorse the levy on the execution. And permitting the property to remain in possession of the defendant in the execution, with his consent, is not an abandonment of the levy. *Moss v. Mone*, 3 Hill, S. C. 276. A sheriff who has made a levy upon certain negroes under an execution, may proceed to sell after the execution has run out, even if he then be out of office. *Gibbs v. Mitchell*, 2 Bay, 120. *Atter*, in case of land. *Sims v. Randall*, 2 Bay, 524. To constitute a valid levy of an execution on real estate, the officer should either go upon or to the premises and make an actual levy, or should see the defendant in the execution or his agent, and obtain his consent that the execution be levied upon the estate sought to be subjected, or should see and apprise the defendant or his agent of the particular estate upon which he designs levying, and should thereupon make an official and specific entry upon the execution, or upon a paper thereto attached, of the estate and levy. *M'Burnie v. Overstreet*, 8 B. Mon. 300. See post page 1012, note [A].

But if the defendant sell his goods *bonâ fide*, and for a *valuable consideration, before the delivery of the writ to the sheriff, [*1006] they cannot be taken in execution: and though he sell them fraudulently, yet if they be afterwards sold to another *bonâ fide*, they are not liable to be taken in the hands of the second vendee.(a) And if A. indebted to B. and C., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out; the preference so given by A. to C. is not unlawful nor fraudulent, within the meaning of the statute 13 Eliz. c. 5.(b) So, where an insolvent debtor, being sued by the plaintiff, executed an assignment of all his effects to trustees, pending the suit and before execution, for the benefit of all his creditors, under which possession was immediately taken; the court of King's Bench held, that the assignment was not fraudulent within the above statute, although made with intent to delay the plaintiff of his execution.(c) So, where the plaintiff having purchased a public house, for which he could not himself obtain a licence, put B. an insolvent person into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to B., and also purchased all the liquors and provisions that were consumed in the house; a majority of the judges of the court of Common Pleas held, that the sheriff was not entitled to take, under an execution against B., the plaintiff's goods in the house, committed to B.'s custody; for though B. was the ostensible owner of the goods, yet that was not deemed sufficient to justify the execution: If it were, there would have been no occasion for the statute 21 Jac. I. c. 19, § 11: and it has never yet been holden, (unless where, as in *Twyne's* case,(d) the original owner has sold goods and retained the possession, and except in cases of bankruptcy on the above statute,) that a person may not give the possession of his goods to another, without subjecting them to an execution for his debt.(e) So, where a creditor having taken the goods of a defendant in execution, upon a judgment confessed on a warrant of attorney, bought them by public auction, and took a bill of sale from the sheriff for a valuable consideration, after which he let the goods to the former owner, for a rent which was actually paid; the court of Common Pleas held, that the creditor had a title, which could not be impeached as fraudulent by other creditors, having executions against the same defendant.(f) And although A. cohabit with B., and assume his name, and pass for his wife, and permit him to appear to be the owner of the furniture of the house in which they live, the *fur- [*1007] niture, being her property, is not liable to be taken under an execution-against B.(aa)

In an action against one of two *partners*, the sheriff must seize all their joint property, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety;

(a) Godb. 161.

(b) 5 Durnf. & East, 235.

(c) 3 Maule & Sel. 371.

(d) 3 Co. 81.

(e) 3 Taunt. 256; and see 2 Bos. & Pul. 59. 3 Esp. Rep. 52. S. C. Ry. & Mo. 312.

(f) 4 Taunt. 823; and see 1 Maule & Sel. 251. 4 Campb. 383. 1 Stark. Ni. Pri. 367. 1 Moore, 189. Gow, 35, n. 8 Taunt. 676. 3 Moore, 11. S. C. 8 Taunt. 838. 4 Barn. & Cres. 652. 7 Dowl. & Ry. 106. S. C. Ry. & Mo. 312.

(aa) 2 Stark. Ni. Pri. 396.

but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.(b) The goods being once seized, and in custody of the law, they cannot be seized again by the same or another sheriff; and if they were seized under a second execution, and sold thereon, the bargain would be void.(c) And the sheriff cannot sell more than an undivided moiety, belonging to the defendant; for the property of the other moiety is not affected by the judgment, nor by the execution:(dd) consequently, the interest or share of the other partner or partners remains, so that a return of *nulla bona* to an execution against them would be false, and the sheriff liable to an action for making it.(ee) If the sheriff, under an execution against one of several partners, sell the whole of the property, he would it seems be liable to an action of *trover*, or for money had and received, at the suit of the rest. And where the defendant was partner with another person, against whom a commission of bankrupt had issued, but before the bankruptcy, the plaintiff had taken out execution, and levied on the partnership effects; the bankrupt's assignees obtained a rule of the court of King's Bench to show cause, why the sheriff should not pay them a moiety of the money arising from the sale of the goods taken in execution, upon an affidavit of the bankrupt, that he was entitled to an equal share of the partnership effects; and although the plaintiff, in his affidavit on showing cause, denied that the bankrupt had such share, and stated that he had embezzled the joint stock to a considerable amount, the court directed that it should be referred to the master, to take an account of the share of the partnership effects to which the bankrupt was entitled, and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.(f) But in such case, the court of Common Pleas would not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account could be taken of the several claims upon the partnership property:(g) And a *feri facias* having issued against the effects of the defendant, who was jointly concerned in a manufactory with other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, that court re-
 [*1008] fused to refer it to the prothonotary, to inquire what was the defendant's interest in the effects seized.(a) In an action against the sheriff, for not selling goods, the joint property of A. and B., under an execution against the goods of A., it seems that *half* the value of the whole goods is the proper measure of damages.(bb) It should also be remembered, as connected with this subject, that where three partners (two of whom resided abroad, and one in *England*,) were sued for a partnership debt, and the partner resident in *England* appeared to the action, but refused to appear for the partners who resided abroad, the sheriff was holden to be justified under a *distringas* issuing out of the Common Pleas against the two partners, in taking partnership effects, though paid for by the partner

(b) 1 Salk. 392; and see Comb. 217. Com. Rep. 277. 1 Ves. 239. Cowp. 449. 1 East, 367. 4 Ves. jun. 396. In what is stated above, it is supposed that the partners have *equal* shares of the property; but the doctrine will extend also to the case of partners whose shares are *unequal*.

(c) 1 Show. 169.

(ee) 1 Show. 169.

(f) Doug. 650.

(a) 3 Bos. & Pul. 289.

(dd) 2 Ld. Raym. 871.

(g) 3 Bos. & Pul. 288.

(bb) 2 Stark. Nl. Pri. 218. *Ante*, 886.

resident in *England* alone, to whom the partnership was largely indebted; and the court of Common Pleas would not relieve him from such distress.(c)

On a *feri facias*, the sheriff is bound at his peril to take only the goods of the defendant:[A] and therefore, if he take the goods of a third person, though the plaintiff assure him they are the defendant's, he is a trespasser; for he is obliged at his peril to take notice whose the goods are: And the vendee of a growing crop of grass, may maintain *trespass* against the sheriff, whose bailiff had seized and sold it under a *feri facias* against the vendor, where the person claiming under the sale from the bailiff entered and carried it away by his authority.(d) If the sheriff doubt whether the goods shown him are the defendant's, he may summon a jury *de bene esse*, to satisfy himself.(e) This may be given in evidence, to show that the sheriff has not acted maliciously;(ff) and will mitigate damages in an action of *trespass* against him for taking the goods of a third person:(gg) And as it is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury, summoned by the sheriff to inquire in whom the property of goods seized by him under a *feri facias* is vested.(h) But this proceeding of the sheriff is not conclusive in any case; for inquests of office are always traversable; and therefore an inquisition made by the sheriff's jury, to ascertain to whom the property of goods taken under a *feri facias* belonged, though found in favour of A., is not admissible evidence in an action of *trover* for the goods, brought by A. against the sheriff:(i) nor is such an inquisition admissible evidence for the sheriff, in an action on the case against him, for a false return of *nulla bona*.(k)[1]

(c) 3 Bos. & Pul. 254. *Ante*, 112.

(d) 9 Price, 287.

(e) Dalt. Sher. 146. Gilb. Exec. 21. Bac. Abr. tit. *Execution*, 352. 4 Durnf. & East, 633, 648. 7 Durnf. & East, 177. 3 Maule & Sel. 175. (ff) 3 Maule & Sel. 175.

(gg) Dalt. Sher. 146. Gilb. Exec. 21. Bac. Abr. tit. *Execution*, 352. 4 Durnf. & East, 633, 648. 7 Durnf. & East, 177. 3 Maule & Sel. 175.

(h) 6 Durnf. & East, 88.

(i) 2 H. Blac. 437.

(k) 3 Maule & Sel. 175.

[1] Having considered, in a preceding chapter, such of the provisions of the *Interpleader* act, in England, 1 & 2 W. IV. 58, § 1, &c., as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein, it may here be proper to notice those which are calculated for the relief of *sheriffs*, and other officers, in execution of process against goods and chattels.

Previously to this statute, if the property of goods had been disputed, which frequently happened, on a commission of bankrupt, &c., the courts, on the suggestion of a reasonable doubt, would have protected the sheriff, by enlarging the time for making his return, till the right were tried between the contending parties, or one of them had given him a sufficient indemnity: The rule for this purpose was a rule to show cause. *Ledbury v. Smith*, 1 Chit. R. 294. And the court of King's Bench, upon the application of the sheriff, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ were not bound by an *extent* afterwards issued, at the suit of the crown, for malt duties, for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown in a more eligible manner than in that court. *Wells v. Pickman*, 7 Durnf. & E. 174. *Thurston v. Thurston*, 1 Taunt. 120, *accord*. So, where it appeared by *affidavit* that writs of *extent* and *feri facias* had been issued on the same day, the court of King's Bench, for protecting the sheriff, refused to allow a *venditioni exponas* to be issued, on the return of the *feri facias*, to compel

[A] Partnership goods may be taken on an execution against one of the partners; and in an action of trespass against the officer by the members of the partnership, evidence is not admissible to show that the partnership property is not more than sufficient to pay their debts. *Moore v. Sample*, 3 Ala. 319.

As the sheriff cannot take the goods of a third person, so if the defendant become *bankrupt*, before the delivery of the writ to the sheriff, or, as it

him to sell the goods under it. *Anon.* 1 Chit. Rep. 643, a; and see *Anon.* 2 Chit. Rep. 390. *Swain v. Moreland*, Gow, 39. 1 Brod. & B. 370. S. C. *Rez v. Cooke*, 1 M'Clel. & Y. 196. So, where a bankrupt brought one action, and his assignees another, against the sheriff, the court allowed the latter to pay the money levied into court, and stayed the proceedings until the trial of an issue between the bankrupt and his assignees. *Jones v. Perry*, T. 21 Geo. III. K. B. And in general, when an action was brought against the sheriff, by the assignees of a bankrupt, for taking goods in execution after a bankruptcy, the courts would assist the sheriff, by staying the proceedings until he was indemnified, on proper and equitable terms. *M'George v. Birch*, 4 Taunt. 585. *Colley v. Hardy*, 5 Man. & R. 123; and in one case: *Probinia v. Roberts*, 1 Chit. R. 577; and see *id.* 643, a, the terms imposed by the court of King's Bench were, the sheriff's paying over the money levied to the assignees, with the costs of the action up to that time, being allowed his poundage, and the expenses incurred in the execution. But the costs of applying to the court, for enlarging the time for making his return, were not in general allowed him. *Rez v. Cooke*, 1 M'Clel. & Y. 198, 9.

At length, by the above statute, 1 & 2 W. IV. c. 58, § 6, reciting that whereas difficulties sometimes arose in the execution of process against goods and chattels, issued by or under the authority of the courts therein mentioned, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons, not being the parties against whom such process issued, whereby sheriffs and other officers were exposed to the hazard and expense of actions, and it was reasonable to afford relief and protection in such cases, to such sheriffs and other officers; it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process, as the party making such claim; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities thereinbefore contained, and make such rules, and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

This statute was intended to afford relief and protection to sheriffs and other officers, acting in the execution of process against goods and chattels; and in arranging the decisions thereon, it may be proper to consider, 1st, in what cases the courts will or will not relieve the sheriff; 2dly, the proceedings thereon, when the adverse parties do or do not appear; and 3dly, the costs of such proceedings. The statute extends to all cases where any claim is made to goods or chattels taken, or intended to be taken, in execution, under any process issued by or under the authority of any of his majesty's courts of law at Westminster, or the court of Common Pleas of the county palatine of Lancaster, or the court of Pleas of the county palatine of Durham. And the courts will relieve the sheriff, under the above statute, in the case of a conflicting claim on property seized by him, though that claim be only of a *lien* on the property. *Ford v. Baynton*, 1 Dowl. Rep. 357. 4 Leg. Obs. 125, S. C. *per Taunton, J.* The circumstance of the goods seized being in the possession of a stranger, and not of the defendant, against whom the execution issued, does not prevent the sheriff from applying to the court, under the above act. *Allen v. Gibbon*, 2 Dowl. Rep. 292. So, if an execution creditor abandon his process against goods seized under a *fiat facias*, in favour of a claimant, the sheriff has still a right of coming to the court, even after the goods are sold. *Baynton v. Harvey*, 3 Dowl. Rep. 344. And it is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the court under the interpleader act. *Crosby v. Ebers*, 1 Har. & W. 216. Nor is he bound to accept an indemnity from the execution creditor. *Levy v. Champneys*, 2 Dowl. Rep. 454. 8 Leg. Obs. 286, S. C. *per Parke, J.* And he need not wait till an action is brought against him, before he applies to the court for relief. *Green v. Brown*, 3 Dowl. Rep. 337. *Smith v. Bowell*, 9 Leg. Obs. 348, S. C. *per Patteson, J.* But the court will not give relief to the sheriff, unless an actual claim appears to have been made. *Bentley v. Hook*, 2 Dowl. Rep. 339. 2 Crompt. & M. 426. 4 Tyr. Rep. 223, S. C.; and see *Parker v. Linnett*, 2 Dowl. Rep. 562, *per Patteson, J.* And in order to entitle the sheriff to relief, it must not only appear that the claim has been made, but also that there has been something done under it, on the part of the alleged claimants, which shows that they intend to enforce their claims against the property seized. *Isaac v. Spiesbury*, 10 Bing. 3. 3 Moore & S. 341. 2 Dowl. Rep. 211. 6 Leg. Obs. 458, S. C. It is also said, that before the sheriff applies to the court for relief, he is bound to inquire into the nature of the claims set up by the adverse parties. *Bishop v. Hinzman*, 2 Dowl. Rep. 166.

The interpleader act does not apply to claims in equity. *Sturges v. Claude*, 1 Dowl. Rep. 505, *per Patteson, J.*; and see *Holmes v. Mentze*, 5 Nev. & M. 563. 4 Ad. & E. 127. 4 Dowl.

should seem before, it is actually executed,⁽¹⁾ the sheriff cannot legally take *or dispose of them, after notice of the act of bankruptcy, and of a commission sued out, or docket struck: For,

(1) 1 Lev. 173, 4.

Rep. 300. 11 Leg. Obs. 133, S. C. And where the sheriff had levied under a *feri facias*, and, while in possession, he received notice that other writs of execution had been issued against the defendant's goods, and that the first execution creditor was entitled to the whole proceeds of the levy, the court held, that the sheriff was not entitled to relief under the above statute. *Salmon v. James*, 1 Dowl. Rep. 369. *Anon.* 4 Leg. Obs. 141, S. C. *per Taunton, J.*; and see *Day v. Waldoock*, 1 Dowl. Rep. 523: 5 Leg. Obs. 427, 8, S. C. *per Parke, J.* So, where the sheriff had seized goods in execution, which were under a distress for rent due to the landlord, the court refused to grant him relief, though he had applied for indemnity to the execution creditor, which had been refused. *Haythorn v. Bush*, 2 Dowl. R. 641. 2 Crompt. & M. 689, S. C. But where the sheriff, having seized goods under a *feri facias*, received notice before sale, of the landlord's claim for rent in arrear, and afterwards of a *fiat* of bankruptcy, the court held, that the assignees were entitled to the goods, the landlord not having made a distress for his rent. *Gethin v. Wilks*, 2 Dowl. Rep. 189. 6 Leg. Obs. 237, S. C. *per Taunton, J.* If a claim be made by a person as partner of the defendant, on property seized by the sheriff, the court will not grant relief to the latter, under the interpleader act, but will compel the plaintiff to indemnify him, if he deny the partnership. *Holmes v. Mentze*, 4 Dowl. Rep. 300. 5 Nev. & M. 563. 4 Ad. & E. 127. 1 Har. & W. 606. 11 Leg. Obs. 133, S. C.

A sheriff is not entitled to relief, under the above act, where he has paid over the proceeds of the execution to the judgment creditor. *Anderson v. Calloway*, 1 Crompt. & M. 182. 1 Dowl. Rep. 636, S. C. *Chalon v. Anderson*, 3 Tyr. Rep. 237; and see *Devereux v. John*, 1 Dowl. Rep. 548. 5 Leg. Obs. 431, S. C. *per Parke, J.*, though he had no notice of any claim until after he had paid over the money. *Scott v. Lewis*, 1 Gale, 204. 4 Dowl. Rep. 259. 2 Crompt. & M. & R. 289, S. C. Or, though he may be willing to bring a similar amount into court. *Inland (or Ireland) v. Bushell*, 5 Dowl. Rep. 147. 2 Har. & W. 118. 12 Leg. Obs. 245, S. C. Nor is he so entitled, where he has delivered up part of the goods to the claimant. *Braine v. Hunt*, 2 Dowl. Rep. 391. 4 Tyr. Rep. 243. 2 Crompt. & M. 418, S. C. And where it appears that the under-sheriff is the plaintiff in the action, in which the writ of execution has been issued and executed, the court will not interfere to relieve the sheriff under the act, although the sheriff himself swears, in the usual way, that he does not conclude either with the execution creditor, or the claimant whom he seeks to bring before the court, for the adjustment of their respective claims on the property seized. *Oulter v. Bower*, 4 Dowl. Rep. 405. 1 Har. & W. 653. 11 Leg. Obs. 273, 4, S. C. *per Patteson, J.* So, where the sheriff, or his under-sheriff, is placed in circumstances which give him an interest on either side, the court will not relieve him. *Dudden (or Duddin) v. Long*, 1 Bing. N. R. 299. 1 Scott, 281. 3 Dowl. Rep. 139, S. C. And where a sheriff applied for relief, and it appeared that he had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby. *Brackenbury v. Laurie*, 3 Dowl. Rep. 180.

The application by the sheriff for relief under the sixth section of the act, must be made to the court out of which the execution issued; or, if the process issued out of different courts, directed to the same sheriff, the latter must apply for relief to the respective courts out of which the process issued. *Bragg v. Hopkins*, 2 Dowl. Rep. 151. 6 Leg. Obs. 13, S. C. *per Patteson, J.* And it cannot be made, as under the first section, to a judge at chambers. *Shaw v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5, S. C. *Brackenbury v. Laurie*, 3 Dowl. Rep. 180, *per Alderson, B.* *Smith v. Wheeler*, 1 Gale, 15. 3 Dowl. Rep. 431. 9 Leg. Obs. 318, S. C. *Poweler v. Lock*, 4 Nev. & M. 852, 3, *per Ld. Denman, Ch. J.* *Beames v. Cross*, 4 Dowl. Rep. 122. *Haily v. Disney*, 1 Hodges, 189. But after the rule has been granted by the court, cause may, it seems, be shown at chambers. *Poweler v. Lock*, 4 Nev. & M. 852, 3, *per Ld. Denman, Ch. J.* *Beames v. Cross*, 4 Dowl. Rep. 122. *Hailey (or Haines) v. Disney*, 1 Hodges, 189. 2 Scott, 183, S. C. *per Gaselee, J.*; and see *Matthews v. Sims (or Sill)*, 5 Dowl. Rep. 234. 13 Leg. Obs. 189, S. C.; but see *Shaw v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5, S. C. *Brackenbury v. Laurie*, 3 Dowl. Rep. 180, *per Alderson, B.* *Smith v. Wheeler*, 1 Gale, 15. 3 Dowl. Rep. 431. 9 Leg. Obs. 318, S. C. *contra*. It is also a rule, that if a sheriff wish to obtain relief, he must come to the court promptly, or in a reasonable time after he has notice of the claim. *Devereux v. John*, 1 Dowl. Rep. 548. *Cooks v. Allen*, 1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11. 6 Leg. Obs. 221, S. C. *Dixon v. Ensell*, 2 Dowl. Rep. 621; and see *Braine v. Hunt*, 4 Tyr. Rep. 243. *Almore v. Adeane*, 3 Dowl. Rep. 498. 10 Leg. Obs. 12, 13, S. C. And if a sheriff receive notice on the 2d January, of a claim of goods seized by him under a *feri facias*, he will not be entitled to relief under the interpleader act, unless he come to the court in Hilary term. *Ridgway v.*

per Holt, Ch. J., "if a writ of execution be delivered to the sheriff against A., who becomes bankrupt before it is executed, the execution is super-

Fisher, 3 Dowl. Rep. 567. 1 Har. & W. 191. 10 Leg. Obs. 136, S. C. *per Williams*, J. But a late application will, under circumstances, be allowed. *Dixon v. Ensell*, 2 Dowl. 621; and see *Barker v. Phipson*, 3 Dowl. Rep. 590. 1 Har. & W. 191. 10 Leg. Obs. 136, 7, S. C. And it has been holden that a sheriff is early enough in his application, if he come to the court within eleven days after notice of an intended claim. *Skipper v. Lane*, 2 Dowl. Rep. 784. 4 Moore & S. 283, S. C.; and see *Dixon v. Ensell*, 2 Dowl. Rep. 621. So, if a sheriff, who has seized goods under a *fiat facias*, receive notice of an intended *fiat* of bankruptcy against the defendant, he will be entitled to relief under the interpleader act, if he come to the court on the second day of the term, after the assignees are appointed. *Barker v. Phipson*, 3 Dowl. Rep. 590. 1 Har. & W. 191. 10 Leg. Obs. 136, 7, S. C. But the court refused to give a sheriff relief under the interpleader act, where a *fiat facias* had been delivered to him two months before notice of a *fiat* having issued against the defendant, and no reason was assigned for the delay in the execution. *Lashmar v. Claringbold*, 2 Har. & W. 87.

The *affidavit* in support of the application, should state the seizure of the goods by the sheriff under the execution, and that he had received notice of the claim from the party or parties by whom it was made. *Northcote v. Beauchamp*, 1 Moore & S. 158; and where there is delay, or any circumstance to be accounted for, the sheriff must make a special *affidavit*, stating the facts; and no supplemental *affidavit* will be allowed, when cause is shown against the rule. *Cooke v. Allen*, 1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11 S. C. It does not seem to be necessary for the sheriff in his *affidavit* to deny collusion, in order to obtain relief under the above act. *Donniger v. Hinzman* (or *Hinkman*), 2 Dowl. Rep. 424. 7 Leg. Obs. 252, S. C. *per Littledale*, J. *Dobbins v. Green*, 2 Dowl. Rep. 509. 8 Leg. Obs. 397, S. C. *per Patteson*, J. *Boond v. Woodall*, 1 Tyr. & G. 11. 2 Crompt. M. & R. 601. *Bond v. Woodhall*, 4 Dowl. Rep. 351. 11 Leg. Obs. 374, S. C.; but see *Anderson v. Calloway*, 1 Crompt. & M. 182. 1 Dowl. Rep. 636, S. C. *Cooke v. Allen*, 1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11. 6 Leg. Obs. 221, S. C. *semb. contra*. Nor to state that an application has been made to the execution creditor, or to the claimant, for an indemnity. *Wills v. Popjoy*, 10 Leg. Obs. 12, *per Williams*, J.; but see *Levy v. Champneys*, 2 Dowl. Rep. 454. 8 Leg. Obs. 286, S. C. *per Parke*, J. *Ante*, 576, 7. Where the sheriff obtains a rule for relief, the claimants may appear without taking office copies of the *affidavits* on which the rule was obtained. *Mason v. Redshaw*, 2 Dowl. Rep. 595. And *affidavits*, on showing cause, are in time, if sworn at any time before cause is shown. *Braine v. Hunt*, 2 Dowl. Rep. 391. A claimant called upon by a rule under the interpleader act, to come in and state his claim, must give the particulars upon his *affidavit*, to enable the court to decide, even whether he is to be made a party to an issue. *Powell* (or *Poweler*) *v. Lock*, 1 Har. & W. 281. 3 Ad. & E. 315. 4 Nev. & M. 852, S. C. And when the sheriff applies to the court for relief under the above act, no one has a right to be heard against the rule, unless he is called upon thereby, though he is in fact a claimant, and if he be called on in one character, he cannot appear in another. *Clarke v. Lord*, 2 Dowl. Rep. 55, Excheq. But where a rule *nisi* had been obtained, under the interpleader act, and the defendant afterwards became a bankrupt, his assignees were admitted as parties to the rule. *Kirk v. Clark*, 4 Dowl. Rep. 363. 11 Leg. Obs. 436, S. C.

In the exercise of the powers and authorities given by the act, if the parties appear, the court will either discharge the rule, in which case the sheriff is entitled to a reasonable time to return the writ, before an attachment can issue; *Rea v. Sheriff of Hertfordshire*, 5 Dowl. Rep. 144; 2 Har. & W. 122; 12 Leg. Obs. 244, 5, S. C.; or they will order the question of property to be tried in an action, or on one or more feigned issue or issues, and direct which of the parties shall be plaintiff or defendant on such trial; *Badcock v. Beauchamp*, 3 Leg. Obs. 66; 8 Bing. 86, S. C.; cited. *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85, S. C. *Northcote v. Beauchamp*, 1 Moore & S. 158. 8 Bing. 86, S. C. *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310, S. C. *Slowman v. Back*, 3 Barn. & Ad. 103. And for the form of the rule, see *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85, S. C. Append. to Tidd *Sup.* 1833, p. 322, &c. Or with the consent of the plaintiff and party making the claim, their counsel or attorneys, the court will dispose of the merits of their claims, and determine the same in a summary manner. *Ford v. Baynton*, 1 Dowl. Rep. 357. *Curlew v. Pocock*, 5 Dowl. Rep. 381. On an application by the sheriff for relief, the court, if there be any doubt, will not try the merits of the respective claims upon *affidavits*; *Bramidge v. Adhead*, 2 Dowl. Rep. 59; but direct the same to be tried in an action against the sheriff, or by a feigned issue; *Allen v. Gibbon*, 2 Dowl. Rep. 292; in which the claimant should, it seems, be the plaintiff, and the execution creditor the defendant. *Bramidge v. Adhead*, 2 Dowl. Rep. 59. *Bentley v. Hook*, 4 Tyr. Rep. 229. And the court will, in such case, order the proceedings against the sheriff to be stayed, until the trial of the action or feigned issue: and in the mean time, give such directions respecting the sale of the goods, and application of the proceeds or value thereof, as shall appear to be just, according to the circumstances of the case. And where, in an issue under the interpleader act, the declaration states that "divers goods

seded; consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff:”(a) And therefore, where goods are

(a) 1 Ld. Raym. 252; and see 2 Eq. Cas. Abr. 381. 2 Ken. 542. *Ante*, 1000.

and chattels” were seized under a *feri facias*, and avers that “the said goods and chattels” were the property of the plaintiff, unless the plaintiff prove that the whole of the goods belong to him, the defendant will be entitled to a verdict; but it seems that if part of the goods belong to the plaintiff, the judge will ask the jury to find specially. *Morewood v. Wilkes*, 6 Car. & P. 144.

When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief, and the adverse party does not appear to support his claim, the court will bar his claim as against the sheriff. *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187, S. C. *Perkins (or Parkins) v. Benton (or Burton)*, 3 Tyr. Rep. 51. 2 Dowl. Rep. 108. 6 Leg. Obs. 478, S. C. *Towgood v. Morgan*, 3 Tyr. Rep. 52, (a); and see *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567, S. C. So, where the execution creditor does not appear to support his execution, his claim may be barred, as against a third person claiming the goods. *Ford v. Dillon (or Dilly)*, 2 Nev. & M. 662. 5 Barn. & Ad. 885, S. C. But where an execution creditor does not appear, on being served with a sheriff’s rule, the court cannot bar his claim, as between him and another execution creditor. *Donniger v. Hinzman*, 2 Dowl. Rep. 424. 7 Leg. Obs. 252, S. C. *per Littledale, J.* And if an execution creditor abandon his process against certain goods seized under a *feri facias*, in favour of the claimant, the sheriff has still a right to show, in an action against him, that the goods were the property of the defendant. *Baynton v. Harvey*, 3 Dowl. Rep. 344.

The costs of proceedings, under the interpleader act, are declared thereby to be in the discretion of the court; and in what manner this discretion has been exercised, will appear by the following decisions.

As the sheriff, previously to the above act, was not allowed his costs of applying to the court for enlarging the time to make his return; *Rez v. Cooke*, 1 M’Clel. & Y. 198, 9; and see Tidd Prac. 9 Ed. 1017, 18; *Ante*, 574, 5; so neither is he entitled by that act to his costs of the application for relief. *Badcock v. Beauchamp*, 3 Leg. Obs. 66. 8 Bing. 86, S. C. cited. *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85, S. C. *Northcote (or Northcott) v. Beauchamp*, 1 Moore & S. 158. 8 Bing. 86, S. C. *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310, S. C. *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187, S. C. *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567, S. C. *Oram v. Sheldon*, 3 Dowl. Rep. 640. 1 Hodges, 92, S. C. *Armistage v. Foster*, 1 Har. & W. 208. *West v. Rotherham*, 2 Bing. N. R. 527. 2 Scott, 802. 1 Hodges, 461, S. C. *Berwick v. Thomas*, 5 Dowl. Rep. 458. And the court will not, under the interpleader act, allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case; no authority for that purpose being given by the act. *Clarke v. Chetwode*, 4 Dowl. Rep. 635. 11 Leg. Obs. 404, 5, S. C. *per Patteson, J.* But where a claimant abandons his claim after an application under the interpleader act, and after an issue directed by the court, the sheriff is entitled to his costs from the time of directing the issue, and of the application for those costs. *Scales v. Sargeson*, 4 Dowl. Rep. 231. 11 Leg. Obs. 118, 19, S. C.; and see *Same v. Same*, 3 Dowl. Rep. 707. 10 Leg. Obs. 285, S. C. So, where an execution creditor appeared under the interpleader act, and consented, with the claimant, that the sheriff should sell the goods, and that their produce should abide the event of an issue to be tried, but subsequently abandoned his claim, the court compelled him to pay the sheriff the costs of selling the goods. *Dabbs v. Humphrey, (or Humphries)*, 1 Hodges, 4. 1 Scott, 325. 1 Bing. N. R. 412. 3 Dowl. Rep. 377. 9 Leg. Obs. 302, S. C.; and see *Underden v. Burgess*, 4 Dowl. Rep. 104. 10 Leg. Obs. 495, S. C. *Armistage v. Foster*, 1 Har. & W. 208. Where there had been great delay, however, on the part of the sheriff, in applying to the court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claim, the court ordered each party to pay his own costs. *Dixon v. Ensell*, 2 Dowl. Rep. 621.

An execution creditor, served with a sheriff’s rule under the interpleader act, is not bound to appear, when there are no goods liable to his execution: and therefore, where such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance; *Glazier v. Cooke*, 5 Nev. & M. 680. So, where the rule called upon assignees of a bankrupt, who had made a claim under a *fiat* in bankruptcy which was afterwards superseded, the court refused to make the sheriff pay the costs of the assignees’ appearance. *Clarke v. Lord*, 2 Dowl. Rep. 55. But where the landlord of premises on which the goods were taken, has a claim for rent, and gives notice in proper time, the sheriff ought to pay him; otherwise the court will make the sheriff pay the landlord’s costs of appearing; *Id. ib.* So, where the court had ordered the sheriff to pay the rent, upon the landlord’s giving security, and also to pay his costs, it was holden that the

seized under a *fiery facias*, the same day that the defendant commits an act of bankruptcy, evidence should be given to prove at what time of the day

sheriff was liable to pay the expense of the security; *Sams v. Same*, *id.* 227. 7 Leg. Obs. 525, S. C.

Where an issue is directed to be tried between an execution creditor and a claimant brought before the court by the sheriff under the interpleader act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs, down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff out of court: *Wills v. Hopkins*, 3 Dowl. Rep. 346. 9 Leg. Obs. 429, S. C. So where, in consequence of a claim made to goods seized by a sheriff in execution, the court ordered the claimant to proceed to trial, upon paying a sum of money into court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim, the court held that he was liable to pay those costs, as well as the costs of that rule, though no previous application had been made to him; *Scales v. Sargeson*, 3 Dowl. Rep. 707. 10 Leg. Obs. 285, S. C.; and see *Same v. Same*, 4 Dowl. Rep. 231. 11 Leg. Obs. 118, 19, S. C. The affidavit in support of an application to the court for costs, when the claimant relinquishes his claim, must be entitled in the names of the parties in the original cause; *Elliot v. Sparrow*, 1 Har. & W. 379. And the rule for paying a sum of money in the hands of the execution creditor, which is the produce of an execution, and which has been paid into court by the sheriff under the interpleader act, the claimant having abandoned his claim, is not absolute, but only a rule nisi in the first instance; *Stanley (or Staley) v. Perry*, 4 Dowl. Rep. 599. 1 Har. & W. 669. 11 Leg. Obs. 230, 325, S. C., *per Patteson, J.*; and see *Shuttleworth v. Clark*, 1 Har. & W. 662. 4 Dowl. Rep. 561. 11 Leg. Obs. 373, 4, S. C., *per Coleridge, J.*

Where an issue is tried by the direction of the court, the unsuccessful party is liable for the costs: But the other party applies to the court by motion, without having made application to the opposite party, to do what the rule requires of him, is not entitled to the costs of the rule, if the latter, on showing cause, confine himself to the question of costs; *Bowen v. Bramidge*, 2 Dowl. Rep. 213. *Armitage v. Foster*, 1 Har. & W. 308; and see *Matthews v. Sims*, (or *Sill*), 5 Dowl. Rep. 234. 13 Leg. Obs. 189, S. C. And where a sheriff is relieved under the interpleader act, and an issue is directed to try the rights of adverse claimants, the court may adjudicate after the trial, on the costs of appearing to the sheriff's rule, and of the issue; *Seaward v. Williams*, 1 Dowl. Rep. 528. 5 Leg. Obs. 427, S. C., *per Parke, J.*; and see *Lery v. Champneys*, 4 Ad. & E. 365.

When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief, and the adverse party does not appear to support his claim, the court will make him pay the execution creditor his costs of appearing on the sheriff's rule; *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187, S. C. *Perkins (or Parkins) v. Benton (or Burton)*, 3 Tyr. Rep. 51. 2 Dowl. Rep. 108. 6 Leg. Obs. 478, S. C. And where a *fiery facias* having issued, goods were seized under it, and an adverse claim being set up, the sheriff applied to the court for relief, and the execution creditor did not appear to support his *fiery facias*, the court granted the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff; *Bryant v. Ikey*, 1 Dowl. Rep. 428. 4 Leg. Obs. 284, S. C. *per Patteson, J.* *Tomlinson v. Done*, 1 Har. & W. 123, *per Patteson, J.* *Ford v. Dilly (or Dillon)*, 5 Barn. & Ad. 885. 2 Nev. & M. 662, S. C. *Berwick v. Thomas*, 5 Dowl. Rep. 458; and see *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567, S. C. Where a claim to goods seized by a sheriff was made by the defendant, on behalf of another, which did not appear to be well founded, and neither party appeared to support the claim, the court of Exchequer made the defendant pay the costs of the sheriff's application under the interpleader act; *Lewis v. Eicke*, 2 Dowl. Rep. 337. 2 Crompt. & M. 321. 4 Tyr. Rep. 157, S. C.; and see *Philby v. Ikey*, 2 Dowl. Rep. 222. 7 Leg. Obs. 508, S. C. *Twigg v. Morgan*, 3 Tyr. Rep. 52, (a.) But in a subsequent case; *Oram v. Sheldon*, 3 Dowl. Rep. 640. 1 Hodges, 92, S. C. *Thompson v. Sheddon*, 1 Scott, 697, S. C.; and see *West v. Rotherham*, 2 Bing. N. R. 527. 2 Scott, 802. 1 Hodges, 461, S. C. *Berwick v. Thomas*, 5 Dowl. Rep. 458. 13 Leg. Obs. 302, S. C. *per Ld. Abinger, Ch. B.*, the court of Common Pleas would not allow the sheriff applying to be relieved under the act his costs, where the claimant did not appear; nor will the execution creditor be allowed his costs, except in the event of extremely improper conduct in the parties. *Id. ib.* And where the sheriff applies to the court for relief under the interpleader act, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party shall pay his own costs; *Moreland v. Chitty*, 1 Dowl. Rep. 520. 5 Leg. Obs. 428, S. C. In a late case, *Eveleigh v. Salisbury*, 3 Bing. N. R. 298. 5 Dowl. Rep. 369, S. C., (which is the first case of the kind in any of the courts; 3 Bing. N. R. 299, (a.)) where upon a rule of interpleader obtained on behalf of the sheriff, neither the execution creditor nor the claimant appeared, after service of the rule, the court ordered so much of the goods to be sold, as would satisfy the sheriff's poundage and expenses, and the rest to be abandoned. The sheriff's right to poundage de-

the goods were seized, and the act of bankruptcy was committed.^(b) And if a sheriff take in execution the goods of a defendant, who afterwards becomes bankrupt, and sell at one time, after the bankruptcy, sufficient goods to satisfy both that execution, and also another which was delivered to him after an act of bankruptcy, the assignees may recover against him in *trover*, for such of the goods as were sold after he had raised money enough to satisfy the first execution.^(c) But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, &c., he is excused;^(d) and if he sell them after such notice, though he may be sued in *trover*,^(e) yet he is not liable to an action of *trespass*.^(f) Also, by the statute 6 Geo. IV. c. 16,^(g) "all executions against the goods and chattels of any bankrupt, *bond fide* executed or levied more than *two* calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: Provided the person or persons, at whose suit such execution shall have issued, had not, at the time of executing or levying the same, notice of any prior act of bankruptcy by him committed: Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within *two* calendar months next after it shall have been superseded, no such execution shall be valid, unless executed or levied more than *two* calendar months before the issuing of the first commission." But, by a subsequent clause of the same statute,^(h) "no creditor having a security for his debt, or having made any attachment in *London* or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of, or lien upon any part of the property of such bankrupt, before the bankruptcy: Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors; but shall

(b) 4 Campb. 197.

(c) 8 Taunt. 527.

(d) 1 Ken. 395. 1 Bur. 20. 1 Blac. Rep. 65, S. C.; and see 2 Ken. 542.

(e) 1 Durnf. & East, 475.

(f) § 108.

(d) 1 Blac. Rep. 205. 2 Blac. Rep. 829. S. P.

(e) 1 Ken. 395. 1 Bur. 20. 1 Blac. Rep. 65, S. C.; and see 2 Ken. 542.

(f) 1 Durnf. & East, 475.

(g) § 81; and see stat. 49 Geo. III. c. 121, § 2.

pend upon the event of the suit: and if that be determined in favour of the execution creditor, the sheriff will of course be entitled to his poundage; but otherwise not; *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 319, S. C.

To give effect to the provisions of the interpleader act, it is thereby enacted, that "all rules, orders, matters, and decisions, to be made and done in pursuance of that act, except only the *affidavits* to be filed, may, together with the declaration in the cause, (if any,) be entered of record, with a note in the margin, expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order, so entered, shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within *fifteen* days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same, by *fieri facias*, or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *fieri facias*; and such writ and writs may bear *teste*, on the day of issuing the same, whether in term or vacation; and the sheriff, or other officer, executing any such writ, shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court." The court, however, has no power by this statute, to order rules made under it to be entered up, otherwise than as pointed out in the seventh section, *viz.* according to their true date. *Lambirth v. Barrington*, 4 Dowl. Rep. 128. 2 Bing. N. R. 146. 2 Scott, 263. 1 Hodges, 205, S. C.

be paid rateable with such creditors." This latter clause, however, [*1010] only *applies to creditors having security for their debts, at the time of the bankruptcy: And therefore, where A. having a debt from B. secured to him by warrant of attorney, entered up judgment by *non sum informatus*, issued a *fiery facias*, and took from the sheriff a bill of sale of the goods seized; and B. having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to A., who brought an action of *trover* for them; the court held that he was not a creditor having security for his debt, within the above statute, and that he was entitled to recover.(a)

An execution against the goods of a bankrupt, taken out after his certificate is signed, but before it is allowed, is valid:(b) And where a defendant was taken in execution under similar circumstances, and paid the debt and costs to the sheriff, the court on application refused to relieve him.(c) But if a *fiery facias*, issued against a bankrupt before his certificate obtained, be not executed till after, the court will order the goods to be restored, even though he has not pleaded his certificate;(d) and if any thing be alleged to invalidate the effect of the certificate, the court will direct a trial on a plea of bankruptcy.(d) The sheriff having levied upon goods in possession of a defendant, who was a bankrupt, paid over the proceeds to the assignees, on their claiming them; and the defendant afterwards again becoming a bankrupt, and obtaining his certificate, but not paying 15s. in the pound, (and therefore not being protected by 5 Geo. II. c. 30, § 9,) a second execution issued for the same debt; and the court held, that the latter execution was regular, though the first was not returned.(e)

On a *fiery facias* against a husband, it seems, that the sheriff cannot take in execution goods fairly vested in trustees, under a settlement before marriage, for the benefit of the wife:(f)[A] Therefore, where a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her trade separately: it was holden, that if the husband did not intermeddle therewith, and there was no fraud, such effects, though fluctuating, were not liable to be taken in execution for his debts:(g) And a settlement after marriage would, it seems, have the same effect, if made in consequence of

(a) 6 Barn. & Cres. 479.

(b) 1 Durnf. & East, 361; and see 1 Blac. Rep. 400.

(c) *Neatly & Eagleton*, E. 25 Geo. III. K. B.; and see 1 Moore & P. 261. 4 Bing. 493, S. C.

(d) 1 Bos. & Pul. 427; but see 1 Moore & P. 261. 4 Bing. 493, S. C. *Ante*, 212.

(e) 2 Ohit. Rep. 114; but see stat. 6 Geo. IV. c. 16, § 127.

(f) Cowp. 432; and see Co. Lit. 351, a. n. 1; but see 2 Vern. 239.

(g) 3 Durnf. & East, 618; and see *id.* 620, n. 8 East, 477, 479. 5 Barn. & Cres. 336. 8 Dowl. & Ryl. 95. 2 Car. & P. 62, S. C.

[A] Negroes were conveyed by a husband during coverture, in trust for his wife. The husband died indebted to A., and the widow married B. A. sued B. and his wife, who had possession of the negroes, and recovered against them, as *executor de son tort*, and issued his execution *de bonis testatoris, vel si non, de bonis propriis*. The sheriff seized these negroes, which were in the possession of B. and wife, on the execution, and sold them, and B. and his wife sued the purchaser for their value. *Held*, that the title of the plaintiffs to the negroes, was divested by the sheriff's levy and sale under the execution, and transferred to the defendant. *Forgartie v. Hubbell*, Riley, 24. After a sale under execution against husband and wife, of personal property in their possession, previously conveyed in trust for the use of the wife, and "not subject to the debts of her present, or any future husband," the husband and wife cannot maintain *trover* against the purchaser, for the property sold; for, though their possession might have been a sufficient title to sustain the action against a wrong-doer, such title is also the subject of levy and sale. It seems that the trustee may, perhaps, have a right of action in such case. *Forgartie v. Hubbell*, 3 Hill, S. C. 30.

a prior agreement ;(*h*) or for a good and valuable consideration, and without fraud.(*i*) It is no objection to the settlement in these cases, that there is no inventory of the goods :(*k*) and the possession of the husband, if consistent with the deed,(*l*) will not subject them to an execution for his debts, provided *it be satisfactorily proved, that they were [*1011] really and *bond fide* conveyed to a third person as a trustee for his wife, and possession taken by such third person.(*a*) But when the settlement is fraudulent,(*b*) or the husband is suffered to carry on the trade intended for his wife,(*c*) and his possession is not consistent with the deed,(*d*) the goods are not protected : And it is settled, that a term vested in the wife before marriage ; and which the husband is entitled to in her right, may be taken in execution for the husband's debt.(*e*) On a *feri facias* against the wife, who married pending the action, it would be irregular to take the goods of the husband :(*f*) And although A. cohabits with B., and assumes his name, and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture we have seen,(*g*) being her property, is not liable to be taken under an execution against B. It has been determined, that a tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods ; inasmuch as the married woman was legally incapable of acquiring it by any contract ; and therefore, if the sheriff take such goods in execution, at the suit of the husband's creditor, *trover* lies by the tradesman :(*h*) but if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine it, given to the sheriff's officer, and not to the other contracting party, would not have been sufficient to determine the contract.(*hh*)

On a *feri facias* against an *executor*, for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution.(*ii*) But if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.(*kk*)

The sheriff, on a *feri facias*, may enter the house of the *defendant*, when the *outer* door is open, in order to take the goods of the defendant.(*ll*) So, on a *feri facias* against the goods of an intestate, in the hands of his administratrix and her husband, the sheriff may enter the house of the husband, to search for the goods of the intestate, though none be found therein ; because that is the most natural place of custody for them.(*m*) So, if the defendant has goods in the house of a *stranger*, the sheriff may enter it on a *feri facias*, for taking them in execution. But there is this difference between his entering the house of the defendant, and a stranger ; that in the former case his justification does not depend on his finding, or

*not finding the defendant's goods therein ;(*aa*) but in the latter [*1012]

(*h*) 2 Eq. Cas. Abr. 148.

(*i*) 8 Durnf. & East, 521 ; and see 6 East, 257.

(*k*) 3 Durnf. & East, 618 ; but see Cowp. 437. 6 East, 257.

(*l*) Cowp. 439. 3 Durnf. & East, 620, *in notis*.

(*a*) 2 Esp. Rep. 574.

(*b*) 6 East, 257. (*c*) 3 Durnf. & East, 618.

(*d*) 8 Durnf. & East, 82.

(*e*) 4 Durnf. & East, 638, 9.

(*f*) 3 Maule & Sel. 559.

(*g*) *Ante*, 1006, 7.

(*hh*) 15 East, 607.

(*ii*) 4 Durnf. & East, 621 ; but see *id.* 625, (*a*), *semb contra*.

(*kk*) 1 Bos. & Pal. 293. 2 Esp. Rep. 657, S. C.

(*ll*) 5 Co. 92, a.

(*m*) 5 Taunt. 765. 1 Marsh. 333, S. C.

(*aa*) 5 Taunt. 769, 70, *per Gibbs*, Ch. J. *Id.* 765. 1 Marsh. 333, S. C.

case, he is not justified, unless it should turn out that the defendant has goods in the house, which are liable to be taken in execution.(b) There seems to be no settled rule, as to the length of time the sheriff should continue in the house of the defendant, or a stranger, upon a *feri facias*; but as his object in entering is to take the goods, he ought not to stay there, without the consent of the tenant, longer than is necessary or reasonable for that purpose.

In executing a writ of *feri facias*, or other process at the suit of a common person, the sheriff cannot regularly break open the outer door of a dwelling house.(c)[A] This privilege which the law allows to a man's habitation, arises from the great regard it has to every man's safety and quiet; and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect: and hence it is, that every man's house is called his castle.(d) It is even said, that he cannot open a latch;(e) And where the door was a little opened, to see who was there, and the bailiffs rushed in with drawn swords, they were punished by the court for their misbehaviour.(f) This privilege of a man's house, however, extends only to the owner, and shall not protect the goods of any person conveyed thither to prevent a lawful execution: Therefore, if a *feri facias* be directed to the sheriff to levy the goods of A., and it happen that A.'s goods are in the house of B.; if after request made by the sheriff to B. to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house.(g) So, if the sheriff's bailiffs enter the house, the door being open, and the owner lock them in, the sheriff may justify breaking open the door, for setting them at liberty; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient.(h) It has been adjudged, that the sheriff, on a *feri facias*, may break open the door of a barn, standing at a distance from the dwelling house, without requesting the owner to open the door, in the same manner as he may enter a close,(i) &c.: And when the officers are once in the house, they may break open any *inner* doors, or trunks, for executing the writ;(k) and, according to a late case,(l) they need not demand entrance at the inner doors, before they are broken open. [*1018] It also seems, that as goods may be *distraigned, so they may be taken in execution, through the windows of a house, if open(aa.)

A seizure of part of the goods in a house, by virtue of a *feri facias*, in the name of the whole, is a good seizure of all:(bb)[B] And the sheriff, by

(b) *Id. ibid.*; and see *Palm. 52. 2 Lutw. 1434. 6 Taunt. 246. 1 Marsh. 565, S. C.*

(c) 18 Ed. IV. 4, pl. 19. 5 Co. 93. *Gilb. Exec. 17, 18. Loft, 374. Cowp. 1. 14 East, 1, 163.*

(d) *Bac. Abr. tit. Sheriff, N. 3.*

(e) *Dalt. 350.*

(f) *Hob. 62; and see id. 263, 4.*

(g) 5 Co. 93, a. 1 *Sid. 186.*

(h) *Cro. Jac. 555. 2 Rol. Rep. 137. Palm. 52, S. C.*

(i) 1 *Sid. 186. 1 Keb. 698. S. C. Bac. Abr. tit. Sheriff, N. 3; but see 9 Vin. Abr. 128, pl. 6.*

(k) 2 *Show. 87. Comb. 17. Fost. Cr. Law, 319. Loft, 374. Cowp. 1. Astley & Pindar.*

M. 1 *Geo. III. Id. 7.*

(l) 4 *Taunt. 619. 3 Bos. & Pul. 223, sens. contra.*

(aa) 1 *Rol. Abr. 671.*

(bb) 1 *Ld. Raym. 725.*

[A] The outer door of a house being latched, the sheriff entered and levied on the goods within. *Held*, he was a trespasser, though the owner was not in at the time. *Curtis v. Hubbard*, 4 Hill, 437. S. C. 1 Hill, 336. An officer is not justified in opening an outer door to seize goods under execution. *Boggs v. Vandyke*, 3 Harring. 288.

[B] The sheriff, before the return-day of an execution, must make an actual levy on the goods, by taking an inventory of them; and though an inventory may not be requisite in

the seizure, has such a property in the goods, that he may maintain *trespass* or *trover* against the defendant, or a third person for taking them away. (c) On a *feri facias*, it is the duty of the sheriff to sell the goods, if the debt and costs are not paid him : (d) If he wilfully delay to sell for an unreasonable time, with a view to injure the defendant, he is liable to an action. (e) And as the sheriff cannot retain the goods to his own use, on satisfying the debt of his proper money, (f) so neither can he deliver them to the plaintiff, in satisfaction of his debt. (g) But they may be sold to the plaintiff, though not actually delivered to him without a sale ; (h) and the sheriff may sell them after the return of the writ, and even after he is out of office, without a *venditioni exponas*. (i) The sheriff having taken goods in execution under a *feri facias*, is not it seems justified in selling them by auction to the highest bidder, greatly under their value ; but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers. (k)

Before the removal of the goods, the sheriff should take care, if the defendant be tenant of the premises on which the goods are taken, that the landlord be satisfied what, if any thing, is due to him, not exceeding a year's rent ; and also that the arrears of king's taxes, for one year, be paid to the collector. For, by the statute 8 Ann. c. 14, § 1, "no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels, by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent ; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is

(c) Gilb. Exec. 15. 2 Wms. Saund. 5 Ed. 47. 2 Ld. Raym. 1075 ; but see 1 Maule & Sel. 711. 1 Barn. & Cres. 514. 2 Dowl. & Ryl. 755, S. C.

(d) 1 Vent. 7.

(e) 3 Stark. Ni. Pri. 163.

(g) Cro. Eliz. 504. 2 Vent. 95.

(i) Cro. Jac. 73. 1 Salk. 323. 1 Ves. 196. 1 Barn. & Ald. 230 ; but see Yelv. 44. 1 Lutw. 589.

(f) Noy. 107. 1 Lutw. 589.

(h) Comb. 452. 1 Ld. Raym. 346.

(k) 3 Campb. 521 ; but see 1 Stark. Ni. Pri. 43. 3 Stark. Ni. Pri. 163.

all cases, yet, to make a good and valid levy, the sheriff must have the goods within his view, and under his power. *Haggerty v. Wilkes*, 16 Johns. 287. Merely seizing a few articles outside of a store or warehouse, and proclaiming a levy on the goods locked up in the store, and not within view, is not a levy ; but the sheriff ought to break open the store, actually seize the goods, and take an inventory of them. *Ib.* A sheriff, in order to levy an execution, may break open a store or other building not annexed to a dwelling-house, or forming any part of the curtilage, as well as the inner doors of the dwelling-house. *Ib.* Demand, on execution, at a debtor's house, he being absent, is sufficient. And no notice to him to appoint appraisers is requisite, if he be absent in parts unknown, nor to his attorney in the suit, unless specially authorized for that purpose. A defect in the description of the premises levied on, that can be supplied with certainty from other parts, does not vitiate. *Galusha v. Sinclear*, 3 Verm. 394. An officer need not remove goods taken on execution in New Jersey, but at his own responsibility, may make the defendant his store-keeper. *Oliver v. Applegate*, 2 South. 479. To make an effectual levy, an inventory need not be made in the first instance, nor the sheriff remove the goods, or put one in possession ; a reasonable time is allowed. *Wool v. Vanarsdale*, 3 Rawle, 401. See note [A], *ante*, p. 1005.

sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff, or other officer, is thereby empowered [*1014] and required to levy, and pay to *the plaintiff, as well the money so paid for rent as the execution money: Provided always, that nothing in this act contained shall extend, or be construed to extend, to let, hinder or prejudice her majesty, her heirs, or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures, that are or shall be due, payable or answerable to her said majesty, her heirs or successors, but that it shall and may be lawful for her majesty, her heirs and successors, to levy, recover and seize such debts, fines, penalties and forfeitures, in the same manner as if this act had never been made."(a)

This statute extends to all manner of executions for the subject, upon judgments for the *defendant*, as well as the *plaintiff*.(b) And before the removal of goods under sequestration out of the court of Chancery, the landlord is entitled to a year's rent, by the equity of the statute; for his legal remedy by distress cannot be enforced against sequestrators, any more than against receivers.(c) But the king not being bound by this statute, the landlord of premises on which goods have been seized under an extent, in *chief* or in *aid*,(d) is not entitled to call on the sheriff to pay him a year's rent, due before the *teste* of the writ. And where goods seized under an extent had been kept a long time by the officers on the premises, pending a reference of the prosecutor's claim, during which a subsequent arrear of rent accrued due to the landlord, the court refused to interfere in his behalf, by ordering the effects to be sold, and the rent in arrear paid to him out of the produce.(e) So, where certain goods upon a farm were seized by virtue of a writ of *pone per vadios* against the occupier, issued out of the court of Pleas at *Durham*, and where afterwards, upon his default, forfeited to the bishop, who, by writ to the sheriff, ordered them to be assigned to the party at whose suit the *pone* issued, in satisfaction of his damages; the court held, that the sheriff was not bound to pay the landlord half a year's rent then due, before he removed the goods.(f) In cases to which the statute applies, the landlord is entitled to be paid his whole rent, without deduction of poundage:(g) and he may claim forehand rent, or rent stipulated by the lease to be paid in advance.(h) He is also entitled to be paid the rent that became due on the day the goods were taken in execution:(i) which rent may be claimed, although the goods had been before distrained upon and replevied.(j) But he can only claim the rent due at the time of taking the goods; and not that which accrues after the taking, and during the continuance of the sheriff in possession:(k) And after he has had one year's rent paid him, he is not entitled to another, upon a second execution:(l) Nor is the ground landlord within the act, where there is an execution against the under-lessee.(m)

[*1015] *The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit:(aa) And where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made

(a) § 8.

(b) 2 Wils. 140.

(c) 1 Swanst. 457.

(d) 2 Price, 17; and see Bunb. 5, 269. West on Extents, 113. 4 Price, 313.

(e) 6 Price, 19.

(f) 6 Barn. & Cres. 487.

(g) 1 Str. 643.

(h) 7 Price, 690.

(i) *Ladbroke v. Wilmot*, T. 21 Geo. III. K. B.

(k) 1 Maule & Sel. 245; and see 1 Price, 274.

(l) 2 Str. 1024.

(m) *Id.* 787.

(aa) 7 Durnf. & East, 269; and see Bunb. 194, *accord*; but see *id.* 5, *semb. contra.*

a distress for rent, at the instance of the landlord, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received. (a) So where, in an agreement for the sale and assignment of certain premises, there was a stipulation that "in the mean time, and until the assignment was made, the intended purchaser should pay and allow to the seller, at the rate of 100*l. per annum*, from the time of taking possession of the premises until the completion of the purchase;" the intended purchaser having taken possession, and one half-yearly payment having become due before the completion of the purchase; the court held, that it was due as rent, and that the sheriff levying on the goods of the occupier, under a *fieri facias*, was bound by the statute to pay it over to the seller, as landlord. (b) A commission of bankrupt is not considered as an execution within this statute; and as the landlord on the one hand may distrain for a year's rent, even after an assignment and sale by the assignees, before the goods are removed off the premises; so, on the other hand, if he suffer the goods to be removed without distraining, he must in general come in for his rent *pro rata* with the other creditors. (c) But, by the statute 6 Geo. IV. c. 16, § 74, "no distress for rent made and levied after an act of bankruptcy, upon the goods or effects of any bankrupt, (whether before or after the issuing of a commission,) shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord, or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission, for the overplus of the rent due, and for which the distress shall not be available." And there is a similar provision in the last general insolvent act, (d) with regard to distresses for rent made and levied after the arrest, or other commencement of the imprisonment, of any person who shall petition the court for his discharge from such imprisonment, according to that act.

It is in general necessary for the landlord to give notice to the sheriff, of the rent in arrear; and it is usually given, before the removal of the goods from the premises. (e) But where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods, by virtue of a writ of *fieri facias*, without retaining a year's rent, he will be liable to an action, although no specific notice has been given to him by the landlord. (f) And he is bound to retain a year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the court, upon motion, ordered the rent to be paid [*1016] to the landlord, even where the notice was given after the removal of the goods from the premises. (aa) If the sheriff remove the goods after notice, without satisfying the landlord, he is liable to a special action on the case for damages, on the statute; (bb) or, instead of bringing an action, the landlord may move the court out of which the execution issued, that he may be paid what is due to him, out of the money levied, if sufficient for

(a) See note (a), preceding page.

(b) 6 Barn. & Cres. 524.

(c) 1 Atk. 103, 4. 15 East, 230.

(d) 7 Geo. IV. c. 57, § 31.

(e) 1 Str. 97. 3 Taunt. 400. And as to the form of the notice, see 4 Moore, 473. 2 Brod. & Bing. 67, S. C.; and for the manner of stating it in the declaration, see 7 Price, 566.

(f) 3 Barn. & Ald. 645.

(aa) 3 Barn. & Ald. 440.

(bb) M'Clel. 217. 13 Price, 455, S. C.

the purpose, or otherwise so much as it will satisfy. (c) The action on the statute may be brought by an executor or administrator; (dd) or by a trustee of an outstanding satisfied term to attend the inheritance. (ee) And such an action may it seems be maintained, if the sheriff remove any part of the tenant's goods, without retaining a year's rent, though other part be left on the premises. (ee) But if, upon the goods of a tenant being taken in execution, an agent of the landlord take from the sheriff's officer an undertaking for a year's rent, and then consent to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff, for not paying him a year's rent, on making the levy, although the rent be not paid according to the undertaking, and although the undertaking be void, under the statute of frauds, for not stating any consideration. (ff) And an action for money had and received cannot be maintained by a landlord, to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution. (g) In an action against the sheriff, for removing goods without paying a year's rent, the declaration need not state all the particulars of the demise; (h) but if it do, and they are not proved as stated, the plaintiff will be nonsuited. (h) And where the declaration alleged that the *feri facias*, under which the goods were taken, issued out of the King's Bench, and the writ produced in evidence appeared to have issued out of the Common Pleas, the court held that this was a fatal variance. (i) In support of such an action, an existing tenancy must be proved: (k) but it is sufficient for the plaintiff to prove the occupation by the tenant; (l) and it lies on the defendant to show that the rent has been paid. (l)

The benefit of the statute 8 Ann. c. 14, § 1, was extended, for the recovery of arrears of king's taxes, by the statute 43 Geo. III. c. 99, § 87, which enacts, that "no goods or chattels whatever, belonging to any person or persons, at the time any of the duties to be assessed under the regulations of that act became in arrear, shall be liable to be taken, by virtue of any execution, or other process, warrant or authority, or by [*1017] *virtue of any assignment, on any account or pretence whatever, except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued out or made, or to whom such assignment shall be made, shall, before the sale or removal of such goods or chattels, pay or cause to be paid to the collector or collectors of the said duties so due, all arrears of the said duties, which shall be due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made; provided the duties shall not be claimed for more than one year; and in case the said duties shall be claimed for more than one year, then the said party, at whose instance such seizure shall have been made, paying the said collector or collectors the aforesaid duties due for one whole year, may proceed in his seizure, as he might have done if no duties had been so claimed; but in case of refusal to pay the said duties, the said collector or collectors are thereby

(c) Cas. temp. Hardw. 255. 2 Wils. 140. 1 Crompt. 3 Ed. 375. Willes, 377. Barnes, 199, 211.

(dd) 1 Str. 212.

(ee) 4 Moore, 473. 2 Brod. & Bing. 67, S. C.

(ff) 3 Campb. 24.

(g) Id. 260.

(h) Doug. 665.

(i) 4 Barn. & Cres. 657. 7 Dowl. & Ry. 123. Ry. & Mo. 268, S. C.

(k) 5 Barn. & Ald. 88.

(l) 7 Price, 690; and see 8 Moore, 451. 1 Bing. 401. S. C. Ry. & Mo. 310. 2 Car. & P. 100, S. C.

authorized and required to distrain such goods and chattels, notwithstanding such seizure or assignment, and proceed to the sale thereof according to that act, in order to obtain payment of the whole of the said duties so assessed, together with the reasonable costs and charges attending such distress and sale; and every such collector so doing, shall be indemnified by virtue of this act."

On the return day of the *feri facias*, the sheriff may be called upon by rule, to return the writ: and if he do not return it, or offer a reasonable excuse, the courts will grant an attachment against him.(a) And where the sheriff seizes goods under a *feri facias*, and keeps possession at the defendant's desire, to enable him to pay the debt and costs without sale; the defendant, after such payment, may, in the Common Pleas, rule the sheriff to return the writ.(b) But that court will not, on the motion of the defendant, compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *feri facias*, on the ground that his officer has wasted the goods.(c) And, after an action brought against the sheriff of *Chester*, for not levying under a writ of *feri facias* issued out of the court of Great Session, the court of King's Bench refused to grant a rule for the sheriff to give the plaintiff inspection of the writ, in order to frame his declaration, although the writ was in the sheriff's possession.(d)

If the property of the goods be disputed, which frequently happens on a commission of bankrupt, &c., the court, on the suggestion of a reasonable doubt, will protect the sheriff, by enlarging the time for making his return, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity:(e) The rule for this purpose is *a rule to show cause.(aa) And the court of King's Bench, upon [*1018] the application of the sheriff, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ were not bound by an *extent*, afterwards issued at the suit of the crown for malt duties; for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown, in a more eligible manner than in this court.(bb) So, where it appeared by affidavit, that writs of extent and *feri facias* had been issued on the same day, the court of King's Bench, for protecting the sheriff, refused to allow a *venditioni exponas* to be issued, on the return of the *feri facias*, to compel him to sell the goods under it.(cc) So, where a bankrupt brought one action, and his assignees another, against the sheriff, the court allowed the latter to pay the money levied into court, and stayed the proceedings, until the trial of an issue between the bankrupt and his assignees.(dd) And in general, when an

(a) 1 H. Blac. 453. 1 Marsh. 344.

(b) 7 Taunt. 5. 2 Marsh. 330, S. C.

(c) 6 Taunt. 576. 2 Marsh. 293, S. C.

(d) 1 Chit. Rep. 476. 9 Moore, 781, S. C. cited. But a rule was afterwards granted in the same case, by the court of Great Sessions, for the plaintiff to inspect the writ.

(e) *Simple v. Lord Newhaven*, M. 24 Geo. III. K. B.; and see 8 Mod. 315. 1 Blac. Rep. 205, 6. 2 Blac. Rep. 1064, 1181. 3 Campb. 340, 523. 1 Stark. Ni. Pri. 45. 1 Chit. Rep. 294, 643. 9 Price, 54. 1 Bing. 71. 7 Barn. & Cres. 379. And for the form of a condition of a bond to indemnify the sheriff, for selling goods on a *feri facias*, see Append. Chap. XLI. § 41.

(aa) 1 Chit. Rep. 294. Vide *ante*, p. 1008.

(bb) 7 Durnf. & East, 174. 1 Taunt. 120, *accord*.

(cc) 1 Chit. Rep. 643, (a); and see 2 Chit. Rep. 390. Gow, 39. 1 Brod. & Bing. 370. S. C. 1 M'Clel. & Y. 196.

(dd) *Jones v. Perry*, T. 21 Geo. III. K. B.

action is brought against the sheriff, by assignees of a bankrupt, for taking goods in execution after a bankruptcy, the courts will assist the sheriff, by staying the proceedings until he is indemnified, on proper and equitable terms: (e) and the terms imposed by the court of King's Bench in a late case (f) were, the sheriff's paying over the money levied to the assignees, with the costs of the action up to that time, being allowed his poundage, and expenses incurred in the execution. But the costs of applying to the court, for enlarging the time for making his return, are not allowed him. (g)

The returns commonly made by the sheriff to a *fiery facias*, are first, *fiery feci*, or that the sheriff has caused to be made of the defendant's goods, the whole or a part of the debt, &c., which he has ready to be paid to the plaintiff; (h) secondly, that he has taken goods of the defendant, to a certain amount, which remain in his hands unsold for want of buyers; (i) thirdly, *nulla bona*, (k) which is either general, that the defendant has no goods in his bailiwick, whereof he can cause to be made the sum directed to be levied, or any part thereof: or special, with this addition, that the defendant is a benefited clerk, having no lay fee within his bailiwick; (l) or, being an executor or administrator, that he has wasted the goods of the testator or intestate: (m) fourthly, that the sheriff has made his mandate to the bailiff of a liberty, who has given him no answer, or returned *nulla bona*, (n) &c.

*If *fiery feci* be returned, the plaintiff may proceed against the [*1019] sheriff for the money, by rule of court, or action of *debt* founded on his return; or by action of *assumpsit* for money had and received: and the latter action is maintainable, without making any previous demand of payment: (a) Or, though no return be made, an action of *debt*, *account*, or *assumpsit*, will still lie against the sheriff, or his executors, for the money levied: (b) And in such an action, the defendant cannot plead the statute of limitations; for though, till the writ be returned, it is not a matter of record, yet it is founded upon a record, and has a strong relation to it. (c) But where the sheriff by mistake returned to a *fiery facias*, that he had money in his hands, ready to be paid over to the plaintiffs, whereas it had been paid over, through the misconduct of his officer, to the solicitor of a commission of bankrupt issued against the defendant, (the original debtor,) under which commission one of the plaintiffs was appointed assignee, who knew of and did not object to such payment; the court of Common Pleas held, that this amounted to an assent on the part of such plaintiff, to ratify the payment, and consequently that the sheriff was not liable to pay over to the plaintiffs the sum which he stated in his return to have received for them. (d) So, where the plaintiff had appointed a special bailiff and agent, to manage the sale of goods under a *fiery facias*, it was holden that the sheriff was discharged; although, on being ruled to return the writ, he returned that he had sold, and that he

(e) 4 Taunt. 585. 7 Taunt. 294. 1 Moore, 43. S. C. 1 Ohit. Rep. 577. *Id.* 643, (a). 2 Chit. Rep. 204. 4 Moore, 339. 7 Barn. & Cres. 379; but see 1 East, 338. 3 Bos. & Pul. 288. 8 Moore, 466. *Ante*, 1007, 8.

(f) 1 Chit. Rep. 577; and see *id.* 643, (a).

(g) 1 M'Clint. & Y. 198, 9.

(h) Append. Chap. XLI. § 42, 44.

(i) *Id.* § 48, 9.

(k) *Id.* § 50, 52.

(l) *Id.* § 51.

(m) *Theas. Brw.* 116, 17. Append. Chap. XLI. § 53.

(n) Append. Chap. XLI. § 43, 47.

(a) 3 Campb. 347.

(b) Cro. Car. 539. 2 Show. 79, 281. Gilb. Exec. 25.

(c) 2 Show. 79.

(d) 4 Moore, 505. 2 Brod. & Bing. 77, S. C.; and see 6 Barn. & Cres. 739.

had made deductions, which he had no right to make in point of law.(e) And in an action brought against the sheriff for money levied under a *fieri facias*, without any previous demand, the court of King's Bench stayed the proceedings, upon payment of the sum levied, without costs.(f) The sheriff's return to a writ of *fieri facias*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it, in an action for money had and received.(g)

When the sheriff has taken the defendant's goods upon a *fieri facias*, to the amount of the sum directed to be levied, the defendant is discharged, and may plead it in bar to an action of *debt*, or *scire facias* upon the judgment.(h) But where two persons are jointly and severally bound, and execution is had against one of them, and his goods are seized, but not sold, this cannot be pleaded in an action of *debt* against the other obligor; because it is no actual satisfaction.(i)

If part of the money only be levied, the plaintiff may have a *fieri facias*,(k) *capias ad satisfaciendum*,(l) or *elegit*,(m) for the residue: Or he may bring an action on the judgment for the residue; wherein the *defendant may be arrested, if he was not arrested in the [*1020] original action.(aa) But the first writ must be returned, before a second execution can be taken out;(bb) for that must be grounded on the first writ, and recite that all the money was not levied thereon: though if upon the first, all the money had been levied, the writ need not have been returned, for no further process was necessary;(c) and if nothing be levied on the first writ, it need not be recited in the second.(d)

If the sheriff return that he has taken goods, which remain in his hands unsold for want of buyers, the plaintiff may sue out a writ of *venditioni exponas*, reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the moneys arising therefrom in court, at the return of it;(ee) or, if goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *fieri facias* for the residue, in the same writ.(ff) And it is said, that if a sheriff seize goods to the value, and return it, he is bound to find buyers.(gg) If he willfully delay to sell for an unreasonable time, with a view to injure the defendant, he is liable to an action.(hh) But where it appeared by affidavit, that writs of *extent* and *fieri facias* had been issued on the same day, the court of King's Bench, we have seen,(ii) refused to allow a *venditioni exponas* to be issued, on the return of the *fieri facias*, to compel the sheriff to sell the goods under it. And the court of Common Pleas refused to grant an attachment against the sheriff, because he had returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands,

(e) *Pallister v. Pallister*, H. 56 Geo. III. K. B. 1 Chit. Rep. 614, *in notis*.

(f) 3 Barn. & Ald. 696.

(g) 1 Maule & Sel. 599.

(h) 2 Ld. Raym. 1072. 1 Salk. 322. S. C. Bac. Abr. tit. *Execution*, D.

(i) *Id. ibid.* 2 Show. 394.

(k) Append. Chap. XLI. § 54, 5; 57.

(l) *Id.* § 92, 3.

(m) *Id.* § 123, 4; 128.

(aa) 1 New Rep. C. P. 133. 2 Smith, R. 39, S. C.

(bb) Barnes, 212. 2 Chit. Rep. 203. *Ante*, 996.

(c) 1 Salk. 318. Gilb. Exec. 28.

(d) 1 Ken. 120. 9 Price, 5.

(ee) Append. Chap. XLI. § 57. Cowp. 406.

(ff) *Theas. Brev.* 305. Append. Chap. XLI. § 59. And see further, as to the writ of *venditioni exponas*, 2 Wms. Saund. 5 Ed. 47, g. (2).

(gg) *Per Holt*, Ch. J. 6 Mod. 293. 2 Ld. Raym. 1075, S. C.

(hh) Stark. Nl. Pri. 163. *Ante*, 1013.

(ii) *Ante*, 1018; and see 2 Chit. Rep. 390.

for want of purchasers.(k) A sheriff having returned a levy under a writ of *feri facias*, cannot return to a *venditioni exponas*, that he has sold the goods, but detains the money for another plaintiff, under a prior writ of execution; and the court of Exchequer quashed such return on motion, and would not give the sheriff leave to amend it.(l) But where, on a writ of *venditioni exponas* for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff returned that he had made a certain sum of the said goods, but omitted by mistake to return *nulla bona* to the *feri facias*, the court of Common Pleas allowed the sheriff to amend the return, and set aside an attachment issued against him for not making it.(m) And where the sheriff returned to a *feri facias*, issued on a judgment against C., that he had levied, and the goods remained in his hands for want of buyers, and afterwards a *venditioni exponas* issued, under which the sheriff sold part of the goods; the court held, that in an action against the sheriff for not selling the residue, nor paying the [*1021] money, *he might, notwithstanding his return, be admitted to prove that C. became bankrupt before the judgment, and that the plaintiff knew of his insolvency at the time of the action.(a)

When the old sheriff returns that he has taken goods, which remain in his hands for want of buyers, the usual way of proceeding, in the King's Bench, is by writ of *distringas* to the new sheriff, commanding him to distrain the old one, till he sell the goods,(b) &c. Of this writ there are two sorts; the first, which is the more ancient, commands the sheriff to whom it is directed; to distrain the late sheriff, so that he expose the goods to sale,(cc) and cause the moneys arising therefrom to be delivered to the present sheriff, in order that such sheriff may have those moneys in court, at the return:(d) The other writ, which is the most usual,(e) is to distrain the late sheriff, to sell the goods, and have the money in court himself.(f) And when there has been collusion between the defendant and the sheriff, the court will not prevent the plaintiff from proceeding at the same time by action for a false return, and by *distringas* against the late sheriff to make a return to a *venditioni exponas*.(g) But where the sheriffs of London, having taken the defendant's goods in execution under a writ of *feri facias*, were ruled on the 8th of February, 1811, to return the writ; and returned on the 11th, that they had the goods in hand for want of buyers: after which the plaintiff, without issuing a writ of *venditioni exponas*, lay by till a commission of bankruptcy issued against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered up the goods to the assignees of the bankrupt on the 16th of March, and had gone out of office in September following; and then, in January 1812, issued a writ of *distringas* to the present sheriffs, to distrain the late sheriffs, for not selling the goods, the court of King's Bench, under these circumstances, set aside the last mentioned writ, leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him.(h) So where the sheriff, in Michaelmas term, returned to a writ of *feri facias*,

(k) 1 Ros. & Pul. 359; and see 4 Moore, 339.

(l) 9 Price, 317.

(a) 6 Maule & Sel. 42.

(cc) Gilb. Exec. 21.

(d) 34 Hen. VI. 36.

(f) Rast. 164. *Thos. Brev.* 90. *Off. Brev.* 46.

1074, 5. 1 Salk. 323. S. C. 2 Wms. Saund. 5 Ed. 47, q. (2).

(g) 2 Chitt. Rep. 392.

(m) 1 Marsh. 344. *Ante*, 899.

(b) Append. Chap. XLI. § 61, 2.

(e) 6 Mod. 299.

Append. Chap. XLI. § 61, 2. 2 Ld. Raym.

(h) 15 East, 78.

"goods in hand for want of buyers, value unknown," and no further steps were taken by the plaintiff till *Trinity* term following, and in the mean time the goods were seized under an *extent* by the crown; the court would not compel the sheriff to make good the loss to the plaintiff, but quashed a writ of *distringas* which had been issued for that purpose, although the plaintiff had given all the indulgence, with the advice and concurrence of the sheriff's officer.(i) On an *alias distringas* against the late sheriff, for *not selling goods on a *venditioni exponas*, the court [*1022] ordered the issues to be increased to the amount of the debt, and costs subsequently incurred.(a)

The return of *nulla bona* is proper, when the defendant has no goods or chattels in the bailiwick of the sheriff, whereof he can cause to be made the debt and costs, or damages recovered; but when the defendant has goods, though the sheriff is prevented from taking them by the allowance of a writ of error, he should not return *nulla bona*, but the fact of a writ of error, having been sued out and allowed, as an excuse for not taking them.(b) If the sheriff return, on a *fieri facias*, that the defendant has no goods in his bailiwick, the plaintiff, if it be true, may have another writ of *fieri facias* into the same county, or a *testatum fieri facias* into a different county, suggesting that the defendant has goods there;(c) which latter writ may be awarded into *Wales*, or a county *palatine*:(dd) Or the plaintiff, in that case, may sue out a *capias ad satisfaciendum*,(ee) or *elegit*. By the statute 5 Geo. IV. c. 106, § 14, the prothonotaries, in the courts of Great Session in *Wales* may issue *testatum* executions against defendants, in any county within the jurisdiction. And a *testatum fieri facias* may be either for the whole, or, on the return of a partial levy, for the residue.(f) In any of these writs, there may be a clause of *non omittas*;(g) commanding the sheriff that he do not omit, on account of any liberty in his county, but that he enter the same, &c.: which clause may be inserted in the first process.(h) If the return be not true, the plaintiff may maintain an action against the sheriff, for a false return; in which action, the sheriff cannot go into circumstantial evidence to impeach the judgment, on the ground of a collateral fraud:(i) And when the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him, or the plaintiff; but they remain in the defendant, and are liable to a subsequent execution for his debt.(k) But an action on the case does not lie against a sheriff, who has not been ruled to return the writ for neglecting to have the money in court, according to the exigency of a *fieri facias*.(l)

The plaintiff cannot regularly sue out a *fieri facias* into a different county from that where the action is laid, without a *testatum*;(m) nor a *testatum*, without a previous *fieri facias*.(n) But the award of a *testatum* on the

(i) 3 Barn. & Ald. 204. 1 Chit. Rep. 613, S. C.

(a) 4 Barn. & Ald. 652.

(b) 3 Moore, 83. Gow, 66, S. O.

(c) Append. Chap. XLI. § 60, 61.

(dd) Cro. Jac. 484; and see 1 Lev. 256, 291. T. Raym. 206. 2 Wms. Saund. 5 Ed. 193, 194, (2). R. H. 19 Jac. I. K. B. Append. Chap. XLI. § 66, 7, 8.

(ee) Append. Chap. XLI. § 28.

(f) *Id.* § 69, 70, 71.

(g) *Id.* § 40.

(h) *Ante*, 147.

(i) 2 Stark. Nl. Pri. 218.

(k) 2 Vern. 239.

(l) 1 Stark. Nl. Pri. 388.

(m) 2 Blac. Rep. 694. *Palter & Ellison*, H. 25 Geo. III. K. B. 3 Durnf. & East, 657.

(n) 3 Durnf. & East, 388.

roll, is sufficient to warrant a *feri facias* into a different county: (o) [*1023] *or if a *feri facias* be sued out into one county, when it should have been a *testatum*, without any original *feri facias*, and the plaintiff afterwards sue out an original *feri facias*, the court will permit the party to amend the former writ, by making it a *testatum*, on payment of costs; (a) and they will not set aside a *testatum*, sued out without an original *feri facias* to warrant it, if the plaintiff afterwards sue out such original *feri facias*, and get it returned and filed, so as to be able to produce it on showing cause; (b) though a writ of error has been previously brought. (c) So, where the record was produced in court, on which an original *capias ad satisfaciendum* was entered, with the sheriff's return thereto, the court of King's Bench permitted the plaintiff to sue out and seal an original *capias ad satisfaciendum*, to warrant a *testatum* into a different county: (d) And in that court, it is said that the *feri facias*, on which the *testatum* is founded, is returned of course by the attorneys themselves, as originals are. (e) In all continued writs, the *alias* or *testatum* must be tested the day the former was returnable; (ff) and if a *feri facias* issue to the sheriff, returnable on a return day, and he at that day return *nulla bona*, a *testatum* may issue on the day following, and execution thereon will be good; for though, on mesne process, there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court. (gg)

If the sheriff return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, there goes a *feri* or *levari facias* to the bishop of the diocese wherein the benefice is, commanding him to make or levy the sum recovered, of the *ecclesiastical* goods and chattels of the defendant. (h) This writ is similar to a common *feri facias*; and under it, the bishop, who is in nature of a temporal officer or ecclesiastical sheriff, may seize and sell the profits of the benefice: (i) But he must return *feri* or *levari feci*, and not *sequestrari feci*, upon this writ. (j) He may also, like the sheriff, be called on by rule to return the writ: (k) and if he make a false return, will be liable to an action. (l) Upon this writ, the bishop or his officer makes out a *sequestration*, (m) directed to the churchwardens, or, upon proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice; [*1024] which *sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon, if that be the usual mode of publi-

(o) Barnes, 196, 7; and see Prac. Reg. 210, 212. Append. Chap. XLI. § 27, 65. It is not sufficient, however, to verify the fact of an original *feri facias*, having been awarded, by affidavit; but the plaintiff ought to have the roll in court. Per Cur. M. 42 Geo. III. K. B.

(a) 3 Durnf. & East, 657. 1 H. Blac. 541. Ante, 999.

(b) 2 Salk. 589, 90. Barnes, 200, 201, 208, 9; 211. 3 Durnf. & East, 388, 657; but see 7 East, 296. Ante, 996.

(c) 5 Durnf. & East, 272.

(d) 6 Durnf. & East, 450. Append. Chap. XLI. § 104.

(e) 2 Salk. 590.

(gg) T. Jon. 200.

(ff) Id. 699. Ante, 152.

(h) Gilb. Exec. 26. Bac. Abr. tit. Execution, 360. Append. Chap. XLI. § 69, &c. For the history of this writ, and what may be taken under it, see 3 Bos. & Pul. 326, per Alcanley, Ch. J. Or, instead of a *feri* or *levari facias de bonis ecclesiasticis*, a *sequestrari facias* may be issued; for which see Append. Chap. XLI. § 75.

(i) 1 Mod. 260. 2 Mod. 257, 8. 1 Freem. 230, S. C.

(k) 1 Str. 87.

(l) 1 Sid. 276. Gilb. Exec. 26, and see 1 Salk. 320. 1 Ld. Raym. 265, S. C.

(m) Burn's Eccles. Law, tit. Sequestration, 3 V. 317. Append. Chap. XLI. § 78.

cation in the diocese where the benefice sequestered is situate: (a) for where a sequestration was made out, and not published while the writ was in force, but was stayed in the register's hands, by desire of the plaintiff's attorney, the court held that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect, and must have been first satisfied, notwithstanding it was then returnable. (b) The writ of *fieri* or *levari facias de bonis ecclesiasticis* is a continuing execution; and if the sequestration issue before the writ is returnable, it is sufficient, though it be not published till afterwards; (c) and the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ. (b) Yet, if it be actually returned, the authority of the bishop is at an end: Therefore, where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of the vicarage, accruing as well before the return day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the return day, the court of Common Pleas would not order the writ and return to be taken off the file; but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was actually returned: (d) The proper way would have been, to have ruled the bishop from time to time, to know what he had levied. (e) When a bishop grants a sequestration against the effects of a clergyman within his diocese, he stands in the same situation as a sheriff; and the court has the same power over him as over that officer: Therefore, where four writs of sequestration had issued against the effects of a clergyman at the same time, by the same attorney, at the suit of different persons, and they had been entered so as to postpone the execution of the plaintiff, who was entitled to priority, the court ordered the bishop to return what he had levied, and give precedence to the writ issued at the suit of the plaintiff. (f) When a beneficed clergyman or curate has been discharged, under the insolvent act, 1 Geo. IV. c. 119, his assignees are authorized by that statute, (g) to apply for and obtain a sequestration of the profits of his benefice, for the payment of his debts; and the order for his discharge shall be a sufficient warrant for granting such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been upon any writ of *levari facias*, founded upon any judgment against such clergyman.

*In an action against an *executor* or *administrator*, if the sheriff return *nulla bona* to the *fieri facias*, the plaintiff must proceed by *scire fieri*, inquiry, (aa) or action of *debt* upon the judgment, suggesting a *devastavit*: but if a *devastavit* be returned by the sheriff, the plaintiff may have execution immediately against the defendant, by *fieri facias de bonis propriis*, (bb) or *capias ad satisfaciendum*. (cc)

(a) 6 Barn. & Cres. 630.

(b) Burn's *Eccles. Law*, tit. *Sequestration*, 3 V. 317. *Legassie v. Bishop of Exeter*, K. 22 Geo. III. 1 Crompt. 3 Ed. 351, 2. 2 H. Blac. 582; but see Wood's *Inst.* 608, 9. 1 Crompt. 3 Ed. 337, 8, *sensu contra*.

(c) 2 H. Blac. 582.

(f) 1 Dowl. & Ry. 486.

(g) § 38, and see stat. 7 Geo. IV. c. 57, § 28.

(aa) Lil. Ent. 664. Append. Chap. XLIII. § 87.

(bb) *Thea. Brev.* 46, 7, 122, 125. Append. Chap. XLI. § 79, 80.

(cc) Append. Chap. XLI. § 94.

(c) 6 Barn. & Cres. 630.

(e) *Id.* 583.

If the sheriff return, that he has made his mandate to the bailiff of a liberty, who has given him no answer, the bailiff may be called upon by rule, to return the mandate; (d) and if he do not return it, will be liable to an attachment: Or if he return *nulla bona*, &c. the plaintiff may proceed thereon, in like manner as if the sheriff had returned it: And if the bailiff make an *insufficient* return, he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. VIII. c. 24 § 9.(e)

After a *feri facias*, if the plaintiff be not satisfied, he may have a *capias ad satisfaciendum*, against the person of the defendant, or an *elegit*, against his goods and a moiety of his lands: or he may sue out either of these writs in the first instance.

It has been said, that where judgment is given against one who is in view of the court, or in *Westminster* hall, it may be executed immediately, and the party taken or sent for into court and committed.(ff) This however is a case that can scarcely occur in *civil* actions; wherein the judgment is not given in court, but signed, on taxing costs, in the King's Bench or prothonotary's office. The usual mode, therefore, of executing a judgment against the person of the defendant, is by writ of *capias ad satisfaciendum*: And when he is at large, it commands the sheriff, or other officer to whom it is directed, to take the defendant, and him safely keep, so that he may have his body in court, on the return day, to *satisfy* the plaintiff.(gg)[A] When the defendant is already in custody, there is no

(d) 2 Durnf. & East, 5.

(e) Gilb. C. P. 30. Durnf. & East, 12. *Ante*, 309.

(ff) 3 Salk. 160.

(gg) Append. Chap. XLI. § 81, &c.

[A] A debt is satisfied by taking in execution the body of the defendant, unless the statute provides otherwise. *Cooper v. Bigelow*, 1 Cow. 56. The arrest of one of several joint debtors on a *ca. sa.*, and his subsequent discharge by the creditor, discharges and extinguishes the judgment as to all the debtors; so that neither can be after taken or held on executions. *Ransom v. Keyes*, 9 Cow. 128. If a defendant be discharged for want of being duly charged in execution, he can never be taken on a *ca. sa.* issued on the same judgment. *Martin v. Edwards*, 1 Caines, 515. If a defendant be committed on an execution, and discharged for want of security for the prison fees, no new execution can issue on the judgment until it is revived by *scire facias*. *Scott v. Maspin*, Hardin, 122. Where a judgment debtor has once been taken in execution, and is afterwards discharged by the creditor's consent, he cannot be again taken on the same execution, or on any other issued on the same judgment, unless the discharge were procured by the fraud of the debtor. *Little v. Newburyport Bank*, 14 Mass. 443. But where a debtor, who has been taken on execution, is liberated by the creditor, on an agreement that he will return on certain conditions, and the debtor afterwards surrenders himself pursuant to the agreement, he may be again imprisoned on the same execution. *Id.* Discharge of an execution debtor from imprisonment, amounts to a discharge of the debt, so that the joint debtors are thereby discharged. *Bailey v. Kimball*, 1 Chip. 151. Where the body of a debtor is committed upon execution, all liens created by the attachment are lost; and if the creditor, in pursuance of the statute, subsequently release the body of the debtor and take execution against his goods and estate, it only gives him a new and independent remedy, and does not revive any lien created by the original attachment. *Willard v. Lull*, 20 Vt., (5 Washb.) 373. And lodging a *ca. sa.* with the sheriff, whose prisoner the defendant is, under the practice in South Carolina, is a sufficient charging in execution. *Robertson v. Shannon*, 2 Strobb. 419. It is no objection to a *feri facias* that the defendant is in custody in the action, if he has not been charged in execution. It is the plaintiff's right to choose in execution between the body and the goods; and the defendant, although in custody in the action, cannot, by neglect to give bail, take away this choice, at least for a reasonable time. *Id.* By the common law, and under the statutes of Virginia, as they existed prior to the Revised Code of 1819, a judgment creditor,

occasion for this writ; but if the plaintiff would proceed against his body, he must charge him in execution, as directed in a former chapter.(h)

The process of *capias* after judgment is not given by the express words of any statute, but arises by consequence of law; it being a rule, that whenever a *capias* is allowed on *mesne* process before judgment, it may be had upon the judgment itself.(i) This process therefore lies after judgment in every instance where the defendant was subject to a *capias* before;(k) and it may be taken out against the defendant sued by a wrong name, if he has omitted to take advantage of the misnomer:(l) but it lies not against *peers*, or *members* of the House of Commons, except upon a *statute merchant* or *statute staple*;(a) or recognizance in nature [*1026] of a *statute staple*;(a) nor against *ambassadors*, and other public ministers, or their domestic servants;(b) nor the servants in ordinary of the *king*, or *queen regent*;(c) nor against members of *corporations aggregate*, or *hundredors*, for any thing done in their corporate capacity, or under the statute 7 & 8 Geo. IV. c. 81.(d) Neither does it lie against an *heir*, on a *special judgment*, for the debt of his ancestor, to be levied of the lands descended;(e) nor against *executors* or *administrators*, unless a *devastavit* be returned.(f) And, by the statute 57 Geo. III. c. 99, § 47, "no penalty or costs incurred by any *spiritual* person, by reason of any non-residence on his benefice, shall be levied by execution, against the body of any such person, whilst he shall hold the same, or any other benefice, out of the profits of which the same can be levied by sequestration, within the term of *three years*; and in case the body of any such spiritual person shall be taken in execution for the same, the court in which the same was recovered, or any judge thereof, may and shall, upon application made for that purpose, discharge the party from such execution, in case it shall be made appear, to the satisfaction of such court or judge, that such penalty and costs can be levied as aforesaid."

This process lies for a *defendant* to recover his costs, on a judgment of *nonpros*, *nonsuit*;(g) or *verdict*;(hh) as well as for the *plaintiff*. And an *infant* seems to be liable to this process.(ii) It may also be taken out against

(h) Chap. XV. p. 363, &c.

(i) 3 Salk. 286.

(k) 3 Co. 12.

(a) 2 Leon. 173, 4. 1 Cromp. 3 Ed. 338.

(c) *Id.* 190.

(e) 2 Wms. Saund. 5 Ed. 7, (4.) *Ante*, 938.

(f) Append. Chap. XLI. § 90.

(g) 2 Str. 1217, and see *id.* 708. 1 Bos. & Pul. 480.

(l) 2 Str. 1218. *Ante*, 449, 50.

(b) *Ante*, 449, 50.

(d) *Id.* 122, &c., 193.

(f) 3 Blac. Com. 414.

(hh) *Id.* § 91.

by committing the body of his debtor to prison on execution, released his lien on the lands of the debtor, and could not afterwards levy on them, unless the debtor died in custody or escaped. *Snead v. McCord*, 12 How. U. S. 407. In Georgia, when a defendant is arrested and imprisoned under a *ca. sa.*, the fact of giving bond to appear and take the benefit of the Insolvent Debtor's Act, does not in law discharge his property from execution under a *feri facias*. *Higgs v. Huson*, 8 Geo. 317. Where a debtor has been arrested on a *ca. sa.* and given bond for his appearance at court, under the Insolvent Debtor's Act, of North Carolina, and is afterwards surrendered by his sureties, he is then in custody on execution, and the sheriff cannot discharge him from prison without an order of court. *Wright v. Roberts*, 6 Iredell, 119. The taking of his body on a *ca. sa.* is not a satisfaction of the debt, in case the debtor escapes or is discharged by the sheriff; and the debtor, in such case, is not released from his liability. *Saunders v. M'Cloot*, 1 Strobb. 22. In Vermont, when a creditor discharges the body of a debtor committed on execution, under the third section of the act of 1803, he is entitled, as matter of right, and without notice to the debtor, to an *alias* execution against his property. *Martin v. Kilbourne*, 11 Verm. 93.

bail, in the King's Bench, without any previous *feri facias*, or return of *nulla bona*; (*kk*) but in the Common Pleas or Exchequer, &c., the bail are not subject to a *capias*; (*ll*) nor does it lie on a common law recognizance, (*m*) or recognizance taken in the King's Bench, on bringing a writ of error; (*n*) nor for damages, against tenant in dower, (*n*) &c. After interlocutory judgment against a *feme* upon a contract, she married; and the court held, that the plaintiff might proceed to judgment and execution against her, without joining the husband by *scire facias*: and a *capias ad satisfaciendum* against her, following the judgment, was at all events regular, though the plaintiff had notice of the marriage before. (*o*) In an action against *husband and wife*, they may both be taken in execution: and when the wife is taken in execution, she shall not be discharged; unless it appear that she has no separate property, out of which the demand can be satisfied, (*p*) or that there is fraud and collusion between the plaintiff and her husband, to keep her in prison. (*q*) It should also be re-
 [*1027] membered, that **volunteers, soldiers and seamen*, are not liable to be taken in execution, unless an affidavit be made, that the original debt, in the case of *soldiers*, amounted to 20*l.*, at least, over and above all costs of suit, (*a*) or, in the case of *seamen*, that the debt or damage and costs are of that amount; and that the debt was contracted when the defendant did not belong to any ship in his majesty's service: (*b*) And when a *capias ad satisfaciendum* lies, it cannot, we have seen, be executed upon parties coming to, attending upon, or returning from courts of justice; (*c*) nor at the time, (*d*) or place, (*e*) when and where they are privileged from arrest.

In point of form, the *capias ad satisfaciendum* must pursue the judgment: (*f*) therefore, on a judgment against several defendants, it must include them all. (*g*) If part of the demand has been already levied under a *feri facias*, the *capias ad satisfaciendum* is only for the residue: (*h*) And it may be sued out against executors or administrators, after a *devastavit* returned. (*i*) This writ should be directed to the sheriff of the county where the action is laid, or to the proper officer for executing it in a county palatine; and it need only be sealed in the King's Bench, (*k*) but, in the Common Pleas, it must be signed, as well as sealed; (*l*) and it must be tested and returnable in term time, in like manner as the *feri facias*. (*mm*) It was formerly necessary that there should be *fifteen* days at least between the *teste* and return of the *feri facias* and *capias ad satisfaciendum*, by *original*: but as that occasioned great delay, it was enacted by the statute 13 Car. II. stat. 2, c. 2, § 6, that "in all actions of *debt*, and other *personal*

(*kk*) 2 Str. 822, 1139.

(*ll*) 2 Taunt. 113, 14. 2 Marsh. 186. *Id.* 187, (*a*). Post, Chap. XLIII.

(*m*) Gilb. Exec. 69. Bing. Exec. 106, 7.

(*n*) Gilb. Exec. 6 Bing. Exec. 107.

(*o*) 4 East, 521.

(*p*) *Chalk v. Deacon & Wife*, T. 2 Geo. IV. C. P. 6 Moore, 128, and see 5 Barn. & Ald. 759. *Ante*, 194.

(*q*) 2 Str. 1167, 1237. 1 Wils. 149. K. B. Barnes, 203. 3 Wils. 124. 2 Blac. Rep. 720, 8. C. O. P. *Ante*, 194.

(*a*) *Ante*, 199.

(*b*) *Id.* 198, 9.

(*c*) *Id.* 195, &c.

(*d*) *Id.* 218.

(*e*) *Id.* 219, 19.

(*f*) *Philpot v. Muller & another*, T. 23 Geo. II. K. B.

(*g*) 6 Durnf. & East. 526, 7.

(*h*) Append. Chap. XLI. § 92, 3.

(*i*) *Id.* § 94.

(*k*) Imp. K. B. 10 Ed. 382, but see R. E. 1659. K. B. *contra*.

(*l*) Imp. C. P. 7 Ed. 468.

(*mm*) *Ante*, 998, 9.

actions, and also in all actions of *ejectment*, depending by *original writ* in the courts of King's Bench and Common Pleas, after any judgment obtained therein, there need not be *fifteen* days between the *teste* and return of any writ of *feri facias* or *capias ad satisfaciendum*; nor shall the want thereof be assigned for error." This statute, however, does not extend to any writ of *capias ad satisfaciendum*, whereon a writ of *exigent* after judgment is to be awarded: nor to any *capias ad satisfaciendum* against the defendant, in order to make his bail liable. The *capias ad satisfaciendum* should regularly be returnable on a *general* return day, or day *certain*, in like manner as the former proceedings;(n) and for the purpose of charging the bail, there ought be *eight* days between the *teste* and return by *bill*,(o) and *fifteen* by *original*:(p) but a *capias ad satisfaciendum* returnable out of term, is not void as against the bail, though *it [*1028] may be set aside by the principal on motion, for irregularity;(aa) and there may be an intervening term, between the *teste* and return of this writ.(bb) The *capias ad satisfaciendum* may be amended by the judgment, in the names of the parties,(c) if mistaken, or in the amount of the sum recovered,(d) &c.; or by the award of execution on the roll, when the writ is made returnable on a *general* instead of a *particular* return day,(e) or in the Common Pleas, "before us at *Westminster*," instead of "before our justices."(f) &c.

The common returns to a writ of *capias ad satisfaciendum* are, that the sheriff has taken the defendant, whose body he has ready;(g) or that the defendant is sick in prison, or so ill, that the sheriff cannot remove him without great peril and danger of his life;(h) or that the defendant is not found in his bailiwick :(i) Or the sheriff may return that he has made his mandate to the bailiff of a liberty, who has given him no answer, or has returned *cepi corpus*, or *non est inventus*;(k) or that the defendant has become bankrupt, and obtained his certificate, wherefore he forbore to take him.(l) On the return of *non est inventus*, the plaintiff may sue out another *capias* into the same, or a *testatum*(m) into a different county; or he may have a *non omittas capias ad satisfaciendum* into either:(nn) And as the defendant can only be once taken, it seems there may be several writs running against him at the same time, in different counties;(oo) Or, instead of suing out another *capias* or *testatum*, the plaintiff may, if the action was commenced by original writ, proceed at once to *outlaw* the defendant, by suing out an *exegi facias*,(pp) and process of outlawry.(q)

The defendant being taken upon a *capias ad satisfaciendum*, either satisfies the plaintiff's demand, or remains in custody. And the plaintiff

(n) But where an attorney, having sued by attachment of privilege, was not nonsuited, and afterwards taken upon a *ca. sa.* returnable on a general return, the court of Common Pleas held it to be well enough. 3 Wils. 58.

(o) 2 Salk. 602.

(aa) 2 Bur. 1188.

(c) Barnes, 10, 11. 4 Taunt. 322.

(d) 2 Durnf. & East, 737. 5 Durnf. & East, 577. 6 Durnf. & East, 450. 8 Durnf. & East, 416, (a). 1 Chit. Rep. 349. *Ante*, 713.

(e) 2 Blac. Rep. 836; and see 2 Bos. & Pul. 336.

(f) 3 Wils. 58; and see 1 Marsh. 237. *Ante*, 999.

(g) Append. Chap. XLI. § 97.

(h) Imp. Sher. 2 Ed. 444, 5. Append. Chap. XLI. § 100.

(i) Append. Chap. XLI. § 98.

(k) *Id.* § 99.

(nn) *Id.* § 102.

(pp) Append. Chap. XLI. § 109.

(p) 13 Car. II. stat. 2, c. 2, § 6.

(bb) 2 Salk. 700. 2 Ld. Raym. 775, S. C.

(m) *Id.* § 103, &c.; but see 4 Taunt. 631.

(oo) *Ante*, 995.

(q) *Ante*, 131, 2.

is bound to accept from a defendant in custody under a *capias ad satisfaciendum*, the amount of the debt and costs, when tendered, in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody : (r) And an action on the case will lie against the plaintiff, for having maliciously refused so to do; and the refusal to sign the discharge is sufficient *prima facie* evidence of malice, in the absence of circumstances to rebut the presumption. (r) But in order to discharge a defendant out of custody, who is in execution for costs, it must appear

that such costs were paid on his account: Therefore, where a [*1029] *plaintiff was in execution for costs recovered by a magistrate, in an action for false imprisonment, an affidavit, stating that they had been paid to the latter by the treasury, was deemed insufficient. (a) The sheriff hath it seems no power to receive money of the defendant, upon a *capias ad satisfaciendum*; for his business is only to execute the writ; and if in such case the defendant pay the sheriff, and he afterwards become insolvent, and do not pay the plaintiff, such payment shall not excuse the defendant: (b) And accordingly, upon the execution of a writ of *capias ad satisfaciendum*, issuing out of the King's Bench, which requires the sheriff to take and keep the body, so that he may have it on the return day of the writ at *Westminster*, to satisfy the plaintiffs of their damages, costs and charges, if the sheriff, before the return day, receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape; (c) and his return, under the common rule, of *cepi corpus*, and that he detained the prisoner until he satisfied him, (the sheriff,) the levy money indorsed on the writ, which he had ready, as commanded, &c., is of no avail. (c) If the plaintiff appoint a special bailiff, or give particular directions to the officer with regard to the receipt of money on an execution, he thereby discharges the sheriff; and if the sheriff afterwards return that he has paid over the money to the plaintiff, he is not liable to an action for a false return. (d)

If the defendant, being taken in execution, do not satisfy the plaintiff, he either remains in custody of the sheriff, who may carry him immediately to the county gaol, (e) or is removed by *habeas corpus* to the King's Bench or Fleet prison. In either case, the execution is considered, *quoad* him, as a satisfaction of the debt: (f) Therefore a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt; (g) nor set off the sum recovered, in an action brought by the debtor, for a cross demand; (h) nor stay the proceedings in a second action, until the costs of a prior one, for which the plaintiff is in execution, are paid: (i) and if the plaintiff, having the defendant in

(r) 4 Barn. & Cres. 26. 6 Dowl. & Ry. 129, S. C.

(a) 6 Moore, 65. 3 Brod. & Bing. 3, S. C.

(b) 12 Mod. 250, *per Holt*, Ch. J.; and see 1 Lutw. 587. 12 Mod. 385. *Freem.* 482. *Barnes*, 214. *Bac. Abr. tit. Execution*, D.

(c) 14 East, 468.

(d) *Porter v. Viner*, M. 56 Geo. III. K. B. 1 Chit. Rep. 613, (a). *Ante*, 1019.

(e) 4 Durnf. & East, 555. *Ante*, 230, 31.

(f) Hob. 59.

(g) 8 Durnf. & East, 123; and see 1 Str. 653. 3 Wils. 271, *accord.* But the courts have no power to discharge the defendant out of execution, on the ground of a commission of bankrupt having since been sued out against him by the plaintiff. 1 Bos. & Pul. 302.

(h) 5 Maule & Sel. 103. 2 Chit. Rep. 303, S. C.; but see 1 Taunt. 426. 1 Maule & Sel. 696, *semb. contra.* 6 Taunt. 176.

(i) 8 Dowl. & Ry. 42. *Ante*, 538.

execution, consent to his discharge, though it be on terms which are not afterwards complied with, (k) or upon giving a fresh security, which afterwards becomes ineffectual, (l) the plaintiff cannot resort to the judgment again, and take or charge the defendant's person in *execu- [*1080] tion; even though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. (a) But a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons, liable to the same debt or damages: (b) And where a defendant, having been taken under an attachment for non-payment of money pursuant to an award, was discharged by the sheriff, on his consenting to return into custody, the court, on his refusal to do so, granted an *alias* attachment against him. (cc) So, where a defendant was taken in execution under a *capias ad satisfaciendum*, on a judgment obtained by the plaintiffs, and a commission of bankruptcy was afterwards issued against him, whilst he remained in custody at their suit, and the plaintiffs being compelled, in order to prove their debt under the statute 49 Geo. III. c. 121, to discharge the defendant from the execution, and the commission having been afterwards superseded, the plaintiff took the defendant in execution again on a *capias ad satisfaciendum* founded on the original judgment; the court held, that if there were no fraud in suing out the commission, the defendant would have been entitled to his discharge on motion; but that if the commission had been preconcerted, or fraudulently superseded, he would not be so entitled; and the plaintiff's affidavits imputing strong circumstances of fraud to the defendant, the court refused to discharge him out of custody, but left him to his remedy by *audita querela*. (d) If the plaintiff consent to discharge one of several defendants, taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake him, or take any of the other defendants. (e) And where the plaintiff obtained a verdict in *trespass* against two defendants, both of whom were arrested on a joint *capias ad satisfaciendum*, and one was discharged, on giving a promissory note to the plaintiff, the court of Common Pleas held, that this operated to discharge the other. (f) But if one of two defendants, taken on a joint writ, be discharged under an insolvent debtor's act, that will not operate as a discharge of the other; the discharge of the former not being with the actual consent of the plaintiff. (g)

It was formerly doubted whether, if a person were taken in execution, and set at liberty by privilege of either house of parliament, the party at whose suit such execution was pursued, was for ever after barred and disabled from suing forth a new writ of execution: For the avoiding of any further doubt in which case, it is enacted by the statute 2 Jac. I. c. 13, § 2,

(k) 4 Bur. 2482. 6 Durnf. & East, 526, 7. 7 Durnf. & East, 420.

(l) 1 Durnf. & East, 557.

(a) 2 East, 243. Barnes, 205. But see the statute 41 Geo. III. c. 64, by which any creditor, at whose suit a debtor was charged in execution, might have consented to his discharge, without losing the benefit of the judgment upon which the execution issued; except that the person of the debtor was not to be again liable to an arrest for the same debt, nor the bail to be proceeded against. This statute, however, being made to continue in force only for three years, is now expired.

(b) Hob. 59; and see 5 Taunt. 614. 1 Marsh. 250, S. C.

(cc) *Good v. Wilks*, T. 57 Geo. III. K. B.

(d) 9 Moore, 114. 2 Bing. 41, S. C.

(e) 6 Durnf. & East, 525.

(f) 5 East, 147.

(f) 2 Moore, 235.

that "the party at whose suit such writ of execution was pursued, [*1031] his *executors or administrators, after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution, in such manner and form as by the law of this realm he or they might have done, if no such former execution had been taken forth or served."

If a person taken on a *capias ad satisfaciendum* died in execution, it was formerly holden that the plaintiff had no further remedy; because he had determined his choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law. (a) But now, by the statute 21 Jac. I. c. 24, reciting, that forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions, it is declared, explained and enacted, that "the party or parties at whose suit, or to whom any person shall stand charged in execution, for any debt or damages recovered, his or their executors or administrators, may, after the death of the person so charged and dying in execution, lawfully sue forth and have new execution, against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they or any of them might have had, by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution."

"Provided, that this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be and die in execution, to have or take any new execution, against any lands, tenements or hereditaments, of such party so dying in execution, which shall at any time after the said judgment or judgments, be by him sold *bond fide*, for the payment of any of his creditors, and the money which shall be paid for the lands so sold, either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof." (b)

If a party taken on a *capias ad satisfaciendum* escape, or be rescued, though the sheriff is thereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may sue out a new execution; and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent: (c) Or, if the defendant escape from the King's Bench or Fleet Prison, the plaintiff, on application to a judge, may have an escape warrant, in order to retake him; which shall be in force throughout *England*. (d) The new sheriff, however, is not answerable for the escape of a debtor taken in execution, in the time of his predecessor, and not delivered over to him by indenture. 1 Moody & M. 34, *Ante*, 307.

[*1032] *If the writ of execution be *irregular*, the defendant may move the court to set it aside, (aa) and discharge him out of custody, if

(a) Hob. 52. 6 Durnf. & East, 526.

(b) And see the statute 47 Geo. III. sess. 2, c. 74, "for more effectually securing the payment of the debts of traders." *Ante*, 937.

(c) 2 Bac. 240, 244, 355.

(d) Stat. 1 Ann. stat. 2, c. 6, § 1. *Ante*, 233, 4.

(aa) 1 Bing. 171, 190.

taken on a *capias ad satisfaciendum*, &c. or that the sheriff repay the money levied thereon:(*bb*) or that the goods or money levied on a *feri facias*, &c. may be restored to the defendant. But where the plaintiff, having obtained a verdict against the defendant, entered up judgment, and sued out execution against his goods; the court of Common Pleas refused to allow the sum levied to be impounded in the hands of the sheriff, until an action, which the defendant had commenced against the plaintiff, as the acceptor of a bill of exchange, had been determined.(*cc*) And the court of Exchequer would not interfere on motion, to set aside a *feri facias*, which had been issued and executed after service of the allowance of a writ of error.(*dd*) A third person, whose goods are taken under it, may also move the court, to have them restored. But if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial. On setting aside a judgment and execution, for irregularity, the court will restrain the defendant from bringing an action of *trespass*, unless a strong case for damages be shown.(*e*)

Upon an *erroneous* judgment, if there be a regular writ, the party may justify under it, till the judgment be reversed; for an erroneous judgment is the act of the court.(*f*) But if the judgment or execution has been set aside for *irregularity*, the party cannot justify under it; for that is a matter in the privity of himself or his attorney:(*g*) and if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defence.(*g*) The sheriff or officer, however, may justify under an *irregular* judgment, as well as an erroneous one;(h) for they are not privy to the irregularity: and so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser, under a *feri facias*, whether the proceedings were regular or not.(i) Accordingly, if the sheriff sell a term under a writ of *feri facias*, which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the latter cannot maintain an *ejectment*, to recover his term against the vendee under the sheriff.(k) In justifying under a writ of execution, the party need not set forth in his plea, that the writ has been returned: But a justification by the sheriff or officer, under a returnable process, is ill, without showing a return of it; *and if the plaintiff join with the officer, there must be judg- [*1033] ment against both.(a)

(bb) 4 Bing. 147.

(cc) 10 Moore, 321.

(c) 1 Chit. Rep. 134, and see *id.* 238. *Ante*, 568.

(dd) 9 Price, 606.

(f) 1 Str. 509.

(g) *Id.* *ibid.* 15 East, 615, (c), and see 2 Stark. *Ni. Pri.* 404. 5 Barn. & Ald. 746. 10 Moore, 143. 2 Bing. 523. S. C. Ry. & Mo. 278. 6 Barn. & Cres. 38. 9 Dowl. & Ry. 44, S. C.

(h) 5 Barn. & Ald. 746. 1 Car. & P. 7.

(i) 1 Ves. 195. 1 Maule & Sel. 425. 6 Maule & Sel. 110.

(k) 1 Maule & Sel. 425, and see 6 Maule & Sel. 110, but see 5 Barn. & Ald. 826. 3 Stark. *Ni. Pri.* 130, S. C. 8 Moore, 46.

(a) 2 Str. 1184. 1 Wils. 17, S. C. The general rule, as laid down by Holt, Ch. J., in the case of *Freeman v. Blewitt*, 1 Salk. 409, 10, is, that where a principal officer is to justify under a returnable process, he must show that it was returned; for he is commanded to return the writ, and shall not be protected, unless he show that he paid a full and due obedience in acting under it; but any subordinate officer, as a bailiff, may: And it is there said that the sheriff cannot justify under a *feri facias*, or *capias*, without showing a return: and see Com. Dig. tit. *Pleader*, 3 M. 24. 6 Durnf. & East, 35, *accord*. But this seems to be erroneous, as to a *feri facias* or *capias ad satisfaciendum*. The principal distinction is between

When the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there the party shall have restitution without a *scire facias*; because it appears on the record that the money is paid, and there is a certainty of what was lost; otherwise where it was levied but not paid, for then there must be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied, &c.(b) If the judgment be set aside after execution for irregularity, there needs no *scire facias* for restitution; (c) but if it be not made, an attachment shall be granted upon the rule for a contempt.(d)

An *elegit* is founded on the statute *Westm. 2* (13 Edw. I.) c. 18, by which it is enacted, that "when a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the *election* of him who sues for such debt or damages, to have a writ of *feri facias* to the sheriff, for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor, (saving only his oxen, and beasts of his plough,) and a moiety of his land, until the debt be levied, by a reasonable price or extent; and if he be evicted, he shall recover by writ of *novel disseisin*, and afterwards by writ of *re-disseisin*, if there be occasion."(e) The writ we are now speaking of lies against the defendant in his lifetime, or his heir and tertenants after his death: (f) [*1034] And *it may be had against peers of the realm, as well as others; and also against executors and administrators, upon a *devastavit* returned.(a) But it lies not against an heir, till his full age; and therefore, on a *scire facias* brought against him, the *parol* shall demur, because he may have a good plea to bar the execution, which might be mispleaded.(bb) If the plaintiff had awarded an *elegit* into one county, and extended the lands upon that writ, it was formerly doubted whether he could, after filing the writ, have sued out an *elegit* into another county: (cc) But it seems to be now settled, that on a suggestion that the defendant has more land, either in the same or another county, the plaintiff may have a new *elegit* for a moiety of the land, in whatever county it lies: (dd) And he may award *elegits* into as many different counties as he pleases, without being under the necessity of suing out *testatums*; (ee) and may

meane and *final* process: The former ought always to be returned; for otherwise the arrest thereon will be wrongful, and false imprisonment will lie against the sheriff: 5 Co. 90. 2 Rol. Abr. 563, l. 20. But where *final* process issues out of a superior court, upon which no judgment or other proceeding is to be had, no return is necessary. *Id. ibid.* Cro. Eliz. 237, 8. Moore, 468. 1 Salk. 318. 2 Salk. 700. 2 Ld. Raym. 776; and see Com. Dig. tit. *Return*, F. 1. 2 Chit. Pl. 4 Ed. 1135, (a), but see 4 Moore, 163. In the case of *Middleton v. Price*, 2 Str. 1184. 1 Wils. 17, S. C. (where a justification by the sheriff was holden ill, without showing a return,) the defendants justified under process of an *inferior* court; and it is a rule, that if an officer of an inferior court do not return process directed to him, false imprisonment lies against him. 2 Rol. Abr. 563, l. 10. (b) 2 Salk. 588.

(c) For the form of a writ of restitution in *exemption*, after setting aside a judgment and execution for irregularity, in the Exchequer, see Append. Chap. XLVI. § 125.

(d) 2 Salk. 588.

(e) For the history of the writ of *elegit*, and the proceedings under it, see 2 Wms. Saund. 5 Ed. 68, (1), 69, (2), 69, (3). And for forms of the writ, see Append. Chap. XLI. § 111, &c.

(f) Append. Chap. XLI. § 124.

(a) 1 Cromp. 3 Ed. 339.

(bb) Gilb. Exec. 58.

(cc) 1 Cromp. 3 Ed. 339, 345. Law of Exec. 287.

(dd) 2 Wms. Saund. 5 Ed. 68, a. Append. Chap. XLI. § 119.

(ee) 1 Cromp. 3 Ed. 339, 345. Law of Exec. 208. Append. Chap. XLI. § 118.

execute all or any of them at his pleasure.(ff) If a writ of *elegit* be sued out in the life time of the defendant, it may be executed after his death: For there is a distinction between writs original and judicial, in respect of the abatement of the suit, by the death of the defendant: The former generally abate, if the defendant die before judgment,(g) but the latter are not affected by it:(h) And though the statute giving the *elegit* has not made any express provision concerning the abatement of it by the death of the defendant, it ought to be construed in the same manner as other process of execution, which does not abate by death, when the defendant has no day in court.(i)

Upon this writ, the sheriff is to empanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements.(k) The goods and chattels being appraised, are to be delivered to the plaintiff, at the price set upon them;(l) and in this respect, an *elegit* differs from a *fieri facias*, upon which the sheriff cannot deliver the goods, though he may sell them, to the plaintiff.(m) If the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff ought not to extend the lands,(n) but otherwise he may extend them: And if, under a writ of *elegit*, the sheriff return *nulla bona*, and extend the lands, the extent it seems is good, though in truth the goods were sufficient.(o) And he may not only extend a moiety of the lands properly so called, but also of a reversion,(p) or rent-charge.(q)

But **copyhold* lands are not extendible;(a) nor a rent-seck,(b) [*1035] advowson in gross,(c) or glebe belonging to a parsonage or vicarage.(d) A term for years may be either extended, or sold as part of the personality:(e) If it be extended, the plaintiff is accountable for all the profits he receives out of the term, upon such extent; and if he receive the debt out of such term, before it expires, the defendant shall be restored to the term itself;(f) but otherwise he shall keep the term, and not account for the profits of it.(gg) If A. and B. recover several judgments against C., and A. sue out an *elegit*, and have a moiety of C's lands delivered to him, and then B. sue out an *elegit*, the sheriff, we have seen,(hh) can only extend a moiety of the remaining lands: But if A. have two judgments against C. of the same term, and take out two *elegits*, on the one he may have a moiety of the whole, and on the other the remaining moiety, and is not restrained on the latter, to the moiety of the moiety; for in judgment of law, the whole term is but as one day.

At common law, if a man was seised of the legal estate in lands, to the use of, or in trust for another, against whom a judgment had been obtained, or who had entered into a statute or recognizance, these lands were not liable to execution, upon the judgment statute or recognizance of *cestui que*

(ff) 2 Wms. Second. 5 Ed. 66, b. Archb. K. B. 272. Ante, 905, 6.

(g) Ante, 932.

(h) O. Bridg. 467.

(i) Id. 464, 478.

(k) Co. Lit. 289, b. 2 Inst. 396. Dyer, 100. Cro. Eliz. 584. Com. Dig. tit. Execution. C. 14. Bac. Abr. tit. Execution, 349.

(l) Gilb. Exec. 33, and see 1 Sid. 184. 1 Lev. 92. 1 Keb. 105, 261, 465, 556, 692, S. C.

(m) 1 Ld. Raym. 346. Bac. Abr. tit. Execution, 349, 352.

(n) 2 Inst. 395. 1 Cromp. 3 Ed. 330.

(o) O. Bridg. 474.

(p) Gilb. Exec. 38.

(q) Id. 39. Moore, 32.

(a) 1 Rol. Abr. 888. 3 Blac. Com. 419. 2 Barn. & Cres. 242, 3. 3 Dowl. & Ry. 603, S. C.

(b) Cro. Eliz. 656.

(c) Gilb. Exec. 39.

(d) Id. 40. 3 Bos. & Pul. 327.

(e) 8 Co. 171.

(f) Gilb. Exec. 35.

(gg) Id. 33.

(hh) Ante, 836.

trust.(i) But, by the statute of frauds, 29 Car. II. c. 8, § 10, it is enacted, that "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed, at the suit of any person or persons, of, for and upon any judgment, statute or recognizance, to do, make and deliver execution, unto the party in that behalf suing, of all such lands, tenement, rectories, tithes, rents and hereditaments, as any other person or persons are in any manner seised or possessed, *in trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued, had been seised of such lands, &c. of such estate as they are seised of in trust for him, *at the time of the said execution sued*; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed, in trust for the person against whom such execution shall be sued: And if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, then and in every such case, such trust shall be deemed and taken, and is thereby declared to be assets by descent; and the heir shall be liable to, and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as [*1036] the trust descended." The words in the act "*at the time of the said execution sued*," are held to refer to the seisin of the trustee; and therefore if he has conveyed the lands, by the direction of *cestui que trust*, before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution.(aa) And a trust created by a defendant in favour of himself and another person, is not a trust within the meaning of the above statute; which is confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person.(b) An equity of redemption cannot be taken in execution on the above statute,(c) though it is deemed assets;(d) and therefore, when the estate is mortgaged, the plaintiff's remedy is by filing a bill in equity to redeem, which he is entitled to do, on payment of principal, interest and costs:(e) But an *elegit* must be first sued out against the defendant, and delivered to the sheriff;(f) though it does not seem to be necessary to have it returned.(g) And it is holden, that if a man be *cestui que trust* of a term, it is not assets within the statute, which extends only to a trust of lands in fee.(h) An equity of redemption, however, may it seems be taken under an *extent*.(ii)

No notice is given of executing an *elegit*:(k) And if there be no lands, the sheriff need not return an *inquisition*;(l) but otherwise an inquisition must be taken and returned, describing the lands with convenient cer-

(i) Co. Lit. 374, b. 2 Wms. Saund. 5 Ed. 11, (17).

(aa) Com. Rep. 226. Com. Dig. tit. *Execution*, (C. 14); and see 4 Bing. 335.

(b) 4 Barn. & Ald. 684; and see 4 Bing. 96, 335.

(c) 3 Atk. 200, 739. 1 Ves. jun. 431. 3 Bro. Chan. Cas. 478. S. C. 8 East, 467. 2 New Rep. C. P. 461. *Ante*, 1003.

(d) 2 Freem. 115. 2 Atk. 290; and see Toll. Exec. 1 Ed. 415, 16.

(e) Powell Mortg. 1 Ed. 99; and see Forrest, 162. 1 Madd. Chan. 522, 3.

(f) 3 Atk. 200; and see 1 Vern. 399. 1 P. Wms. 445. 6 Ves. 72. 1 Madd. Chan. 205, 522, 3.

(g) *Id.* Redead. Pl. 3 Ed. p. 102. 1 Madd. Chan. 205, (r). *Ante*, 1003.

(h) 2 Vern. 248; and see 2 Wms. Saund. 5 Ed. 11, (17). 8 East, 474, 486.

(ii) Forrest, 162, 3. 1 Price, 207.

(k) 1 Crompt. 3 Ed. 356.

(l) 2 Str. 874.

tainty;(m) and after it is taken, the sheriff must deliver a moiety to the plaintiff, by metes and bounds:(n) If he do not, the return is ill, and may be quashed for uncertainty:(o) or the objection may be taken at *nisi prius*, on the trial of an *ejectment* brought upon the *elegit*:(p) and if the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return.(q) But it has been adjudged, that upon an *elegit*, the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole.(r) If he deliver more than a moiety, the execution is void.(s)

It was formerly usual for the sheriff to deliver *actual* possession of a moiety of the lands; but he now only delivers *legal* possession: and if the plaintiff do not enter, which it seems he may do by virtue of the *elegit*,(t) *he must, in order to obtain actual possession, proceed [*1087] by *ejectment*:(a) in which an examined copy of the judgment roll, containing the award of the *elegit* and return of the inquisition, is evidence of the lessor of the plaintiff's title, without proving a copy of the *elegit*, and of the inquisition.(bb)

After an *elegit*, if lands be duly extended, and delivered to the plaintiff, he cannot have any other species of execution, unless in case of eviction; when he may proceed, in the method pointed out by the statute of *Westm.* 2, or if he be evicted out of all the lands, he must sue out a *scire facias* upon the statute 32 Hen. VIII. c. 5, to have a new writ of execution, for what remains unsatisfied: but if he be evicted out of part only, or of the whole but for a time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute.(c) If the defendant has no lands, and the goods are not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*:(d) Or, if part of the money only be levied on a *feri facias*, the plaintiff, we have seen,(e) may have an *elegit* for the residue.(f) And a void *elegit* or inquisition, being as none, will not prevent the plaintiff from having a new *elegit*.(g)

A question having arisen, in the court of Chancery, whether upon an *elegit*, the plaintiff could be allowed *interest*, beyond the penalty of a judgment, Lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but if the creditors do not take out an execution against the person of the debtor or his personal estate, but extend the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value: but if the debtor come into a court of equity for relief, this court will give it him, by obliging the

(m) Moore, 8. Com. Dig. tit. *Execution*, (C. 14). Append. Chap. XLI. § 115.

(n) Dalt. Sher. 135.

(p) 1 Barn. & Ald. 40.

(q) Doug. 473.

(r) 2 Salk. 563, 4. 1 Ld. Raym. 718. 1 Vent. 259. S. C. Run. Eject. 2 Ed. 384; and see 1 Barn. & Ald. 40. 2 Barn. & Cres. 242, 3. 3 Dowl. & Ryl. 603, S. C.

(t) 6 Taunt. 202. 1 Marsh. 542, S. C.; and see 4 Ring. 98.

(a) 2 Eq. Cas. Abr. 381. 3 Durnf. & East, 235.

(bb) 2 Maule & Sel. 565; but see Gilb. Evid. (by *Lofft*), 10, 11. Run. Eject. 2 Ed. 384. 3 Wms. Saund. 5 Ed. 69, *a. contra*.

(c) Co. Lit. 289, b. Gilb. Exec. 57, 8.

(d) 1 Str. 226, 2 Ld. Raym. 1451. S. P. *Ante*, 995.

(e) Append. Chap. XLI, § 123.

(f) *Ante*, 1019.

(g) Gilb. Exec. 54.

creditor to account for the whole that he has received; and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal: And he said, he remembered very well, upon Serjeant *Whitaker's* insisting, before Lord Chancellor *Couper*, that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.(h)

When the judgment is satisfied out of the rents and profits, the mode of getting possession of lands taken under an *elegit*, has usually [*1038] been by *ejectment*, by *scire facias ad computandum*, or by application to a court of equity: And the latter is said to be the most reasonable; for at law, an account of the value only at which the land is estimated by the sheriff can be taken, whereas in equity it is of the actual proceeds, and there interest is allowed upon the debt. But in a late case,(a) the court of King's Bench referred it to the master, to take an account of the rents and profits of an estate received by the plaintiff, who was in possession by virtue of an *elegit*, and ordered that the plaintiff should give up possession, if it appeared that all the moneys due to him had been received.

It has been already seen,(b) that the execution for the defendant, upon a judgment in *replevin*, is at common law for a return of the cattle or goods, or upon the statute 17 *Car.* II. c. 7, for the arrearages of rent and costs. The writ of *retorno habendo*, in the former case, shortly recites the proceedings and judgment in *replevin*, and commands the sheriff, to cause the cattle or goods to be returned to the defendant, to hold to him irreplevisable for ever, after judgment on *verdict*,(c) or *demurrer*;(d) or, upon a *nonpros* for want of a declaration,(e) or plea in bar,(f) or *nonsuit* at the trial, that he do not deliver them, on the complaint of the plaintiff, without the king's writ, (of *second deliverance*),(g) which shall make express mention of the judgment. The latter part of the writ is founded on the statute of *Westminster* II. (13 *Edw.* I.) c. 2, previous to which the return was never irreplevisable after a *nonsuit*, whether before the avowry or after, or before or after issued joined; because, where the defendant had judgment for a return on a *nonsuit*, though after verdict, that judgment was not founded upon the verdict, but on the default of the plaintiff, in withdrawing himself at a continuance day after the verdict.(hh) When judgment is given on *demurrer*, for a return of the goods, the avowant may immediately have a writ of *retorno habendo*, and inquiry of damages;(ii) and after *verdict*, or *inquiry* executed, he may have a *retorno habendo*, and *fieri facias* for the damages and costs, in the same writ.(k)

If the cattle or goods be *eloigned*, or removed by the plaintiff, so that the sheriff cannot deliver them on the writ of *retorno habendo*, the defendant,

(h) 3 *Atk.* 517, 18; and see *Amb.* 520, 21. 1 *East*, 403, 436.

(a) 3 *Barn. & Cres.* 733. 5 *Dowl. & Ry.* 612, S. C.

(b) *Ante*, 993.

(c) *Append. Chap.* XLV. § 95.

(d) *Id.* § 94.

(e) *Id.* § 92.

(f) *Id.* § 93.

(g) *Id.* § 105, 6.

(hh) *Gillb. Repl.* 4 *Ed.* 211.

(i) *Append. Chap.* XLV. § 94.

(k) *Id.* § 95.

on the sheriff's return of *elongata*, (l) may either have a *capias in Withernam*, (m) for taking other cattle and goods and lieu of them; or he may sue out a *scire facias* (n) against the pledges, for a return on the statute *Westm. II.* (18 Edw. I.) c. 2; or, if the distress was for rent, and the sheriff has taken a replevin bond, under the statute 11 Geo. II. c. 19, *§ 23, the defendant may take an assignment of it, and bring an action [*1089] thereon against the pledges, if sufficient; or, if the sheriff has omitted to take a replevin bond, or the pledges were insufficient at the time of taking it, he may proceed by *scire facias*, or action on the *case* against the sheriff, for neglect of duty. (a) It is not necessary, in an action on the bond, to aver that a return has not been made, although it appear on the face of the declaration to have been awarded, where it is averred that the suit has not been prosecuted with effect; a breach of either of the conditions in not prosecuting with effect, returning the goods, or indemnifying the sheriff, being alone sufficient to support the action; 10 Price, 54. And the court of Common Pleas refused to set aside, on motion, an execution in an action on a replevin bond, upon an objection to the proceedings, which might have been taken before judgment. (b) But if the defendant proceed upon the statute 17 Car. II. c. 7, for the arrearages of rent and costs, he cannot have a writ of *retorno habendo*; nor consequently proceed against the pledges, on account of the plaintiff's not making a return of the cattle or goods, nor, as it seems, against the sheriff, for taking insufficient pledges. If judgment, however, be given against the plaintiff, for not prosecuting his suit with effect, his pledges will be answerable to the defendant, notwithstanding he has afterwards proceeded on the statute, and obtained judgment on a writ of inquiry, for the arrearages of rent and costs. (cc)

For executing a writ of *feri facias*, or *capias ad satisfaciendum*, the sheriff is entitled, by the statute 29 Eliz. c. 4, to twelve pence for every 20s. when the sum exceedeth not a hundred pounds, and six pence for every 20s. above that sum, that he shall levy or take the body in execution for; which is called his *poundage*. (d) But, by the statute 3 Geo. I. c. 15, § 17, poundage upon a *capias ad satisfaciendum* shall not be demanded or taken for any greater sum than the real debt *bond fide* due, and marked on the back of the writ: And, by the same statute, (e) the sheriff is entitled, upon executing a writ of *habere facias possessionem aut seisinam*, to have for poundage twelve pence for every 20s. of the yearly value of the lands whereof possession is given, where the whole exceedeth not the yearly value of a hundred pounds, and six pence only for every 20s. *per annum* above that value. The writ of *elegit*, though mentioned in the preamble of this statute, is omitted in the body of the enacting clause; and hence it seems, that the sheriff is entitled, on executing an *elegit*, to poundage on the whole amount of the debt. (f)

If the sheriff levy under a *feri facias*, he is entitled to poundage, though the parties compromise, before he sells any of the defendant's goods; (g) or though the execution be afterwards set aside for irregularity: (h) and accord-

(l) *Id.* § 98.(m) *Id.* § 99, 100.(n) *Id.* § 102, 3.

(a) Gilb. Repl. 4 Ed. 216, &c.

(b) 10 Moore, 107. 2 Bing. 445, S. C.

(cc) 4 Moore, 606. 2 Brod. & Bing. 107, S. C. 5 Barn. & Cres. 284. 8 Dowl. & Ry. 72, S. C.

(d) *Ante*, 997.

(e) § 18.

(f) 1 Maule & Sel. 105.

(g) 5 Durnf. & East, 470.

(h) 6 Esq. Rep. 111.

ingly, where the sheriff levied under a *feri facias*, and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned paid it back, [*1040] *with the assent of the plaintiff, the court of King's Bench held, that the statute 43 Geo. III. c. 46, § 5, did not take away his remedy, by action of *debt* against the plaintiff, for his poundage.(a) So, the sheriff is entitled to poundage, upon a *capias ad satisfaciendum*, though the defendant go to prison without satisfying the plaintiff:(b) And if the sheriff, having taken the defendant on one writ, detain him on another, he is entitled to poundage on both.(c) But it seems that he is not entitled to poundage, if the money be paid to him without any levy;(dd) nor on executing a writ of attachment, for non-payment of money;(ee) nor upon a *capias utlagatum* on *meane* process, under which there has been a seizure and inquisition, but no writ of *venditioni exponas*;(ff) nor where money is paid into court by the sheriff, under the statute 43 Geo. III. c. 46, § 2;(gg) nor on levying for a crown debt, under a *levari facias*:(hh) And the sheriff cannot maintain an action for the expense incurred in seizing and keeping possession of goods under a *feri facias*, at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons;(i) nor is he justified, as against the plaintiff, in retaining any thing beyond the poundage allowed by the statute 29 Eliz. c. 4, where the proceeds of the sale are not sufficient to satisfy the plaintiff's demand.(k)

For the poundage he is entitled to, the sheriff may maintain an action of *debt* on the statute;(l) or he may retain it out of the sum levied: And, under the statute 3 Geo. I. c. 15, the sheriff may retain his poundage out of the sum levied, and need not wait for the allowance of it out of his accounts;(m) or, if he have paid over the money levied to the prosecutor of the extent, without having deducted poundage, he may obtain it by motion to the court of Exchequer.(n) But he is not justified in taking goods to secure his poundage, after he has consented to their being delivered to a third person, under a claim of property. 7 Barn. & Cres. 26. If the sheriff take or retain more than he is entitled to for poundage, &c., he is liable by the stat. 29 Eliz. c. 4,(n) to an action for treble damages, at the suit of the party grieved,(o) and shall forfeit 40*l.* to the king and the informer; or an action for money had and received may be maintained against him by the plaintiff, to recover the surplus.(p) In an action by the assignees of a bankrupt, founded on the above statute, against a sheriff for extortion, in executing a *levari facias*, issued out of the court [*1041] of Exchequer; for a crown debt, the court of *Common Pleas held, that that statute applied only to cases between party and

(a) 4 Maule & Sel. 256.

(c) *Taylor v. Ward*, E. 24 Geo. III. K. B.

(ee) 2 East, 411.

(gg) 2 Barn. & Ald. 770. 1 Chit. Rep. 529, S. C. 6 Moore, 124.

(hh) 6 Moore, 338. 3 Brod. & Bing. 143, S. C.

(k) 3 Barn. & Cres. 688. 5 Dowl. & Ryl. 495, S. C.

(l) 1 Salk. 209, 333. 2 Ld. Raym. 1212, S. C.

(b) 4 Bur. 1981. Imp. Sher. 145.

(dd) 2 Maule & Sel. 296, 7.

(ff) 2 Maule & Sel. 394.

(i) 3 Campb. 374.

(m) Parker, 180.

(n) This statute was made at a session of parliament, begun on the 29th day of October, in the 28th year of the reign of Queen Elizabeth; and therefore, where it was stated in a declaration, to have been made at a session of parliament begun on the 29th day of October, in the 29th year of her reign, judgment was arrested for the misrecital; 9 Moore, 425. 1 Bing. 255, S. C., and see stat. 3 Geo. I. c. 15, § 13. *Ante*, 287.

(o) 2 Durnf. & East, 148,

(p) 1 Stark. Nl. Pri. 345.

party, and that the plaintiff's remedy was under the statute 3 Geo. I. c. 15, which gives the sheriff poundage; in cases where the debt is due to the crown; previously to which he was not entitled to such poundage, except under orders issued by that court.(a)

When the judgment is *satisfied*, by any of the above writs of execution or otherwise, the defendant has a right to call on the plaintiff for a *warrant*(b) or authority, directed to some attorney of the court wherein the judgment is recovered, authorizing such attorney to enter up satisfaction on the judgment roll; which being obtained, a *satisfaction-piece*(c) is made out, in the King's Bench, on a slip of unstamped parchment, in the form of a bail-piece, and taken, with the warrant of attorney, to the clerk of the judgments, who will make an entry thereof in his book of remembrances, and deliver it over to the clerk of the treasury, who enters the same on the roll:(d) And the defendant has been allowed to enter satisfaction on the roll, upon a judgment obtained against him in the King's Bench, on his acknowledging satisfaction for the amount, upon a judgment obtained by him in the Common Pleas, against the plaintiff, for a larger amount, although he had the plaintiff in custody in execution on that judgment.(e) So, after a plaintiff had recovered damages under a writ of inquiry in *trover*, for the conversion of his title deeds, the court permitted satisfaction of the damages to be entered on the roll, upon the terms of the defendant's delivering up the deeds, and paying all the plaintiff's costs, as between attorney and client, and submitting to other terms, by which plaintiff was placed in as good a situation as he was in before the cause of action.(f) But where the plaintiff obtained judgment against the defendant in 1802, which was satisfied in 1805, and the plaintiff died intestate in 1821, the court of Common Pleas would not allow satisfaction to be entered on the roll, on an affidavit of the defendant's attorney, that the plaintiff had received from the defendant a certain sum in full satisfaction of his demand; it appearing that administration had not been taken out to the plaintiff's effects.(g) In the Common Pleas, the clerk of the treasury brings the judgment roll into court, in *term* time, and the secondary enters satisfaction thereon: In *vacation*, a judge's *fiat*(h) is obtained for that purpose, by the clerk of the judgments, who enters satisfaction on the roll:(i) And, on entering satisfaction on the roll, it is usual, we have seen,(k) for the plaintiff to pay one shilling for every hundred pounds recovered, to the secondary, who pays it over to the *junior* judge's clerk, by whom it is distributed among the prisoners in the Fleet prison.

(a) 6 Moore, 338. 3 Brod. & Bing. 143, S. C., and see 7 Moore, 518.

(b) Append. Chap. XLI. § 128.

(c) *Id.* § 129.

(d) *Id.* § 131, 2. And see stat. 3 Geo. IV. c. 39, § 8, for entering satisfaction on a warrant of attorney, or *cognovit actionem*. *Ante*, 555.

(e) 1 Maule & Sel. 696.

(f) 1 Dowl. & Ry. 201.

(g) 8 Moore, 461.

(h) Append. Chap. XLI. § 130.

(i) Imp. O. P. 7 Ed. 607.

(k) *Ante*, 509.

*CHAPTER XLII.

Of EXECUTION by LEVARI FACIAS, and EXTENT; and the PROCEEDINGS thereon.

HAVING considered in the last chapter, the ordinary modes of execution, for debt or damages and costs, by *feri facias*, *capias ad satisfaciendum*, and *elegit*; and by *retorno habendo*, in the action of *replevin*; I shall, in the present chapter, take a practical view of the writs of *levari facias*, and *extent*, which are of less frequent occurrence, with the proceedings thereon.

The *levari facias*, of which something was said in the last chapter, (a) is a process, by which the sheriff is commanded to levy a sum of money, of the lands and chattels of the defendant; (b) and it is either for the king, or the subject. There are several sorts of execution for the king: 1. a *capias ad satisfaciendum*, which takes the body of the debtor; 2. a *feri facias*, to take his goods; 3. a writ, which is called the *long writ*, (c) comprising a *capias ad satisfaciendum*, *feri facias*, and *extendi facias*; 4. a *levari facias*, where the land is the debtor. (d) This latter process may be issued at common law, for levying a fine or debt to the king: And where a defendant convicted of a misdemeanor, was sentenced to be imprisoned for two years, and to pay a certain fine, and to be further imprisoned till the fine was paid, the court of King's Bench in a late case held, that a *levari facias* might be issued out of that court for the fine, before the expiration of the two years; (e) and that the sheriff was bound *ex officio* to levy it: at all events, that the writ of *levari facias* was regular, having been adopted by the crown. (f) This writ may also be sued out of the court of Exchequer, for levying penalties, (g) arrears of taxes, (h) or the issues and profits of lands returned by the sheriff, on a special *capias utlagatum*; (i) in which latter case it has been holden, that the cattle of a stranger, *levant* and *couchant* upon the land, may be taken and sold under it. (k) So [*1043] if lands be seized on an extent, process of *levari facias* may be issued to levy the rents half yearly, or oftener if required, until the principal debt, with costs and damages, as the court shall think fit, be satisfied. (aa) The court of King's Bench will not give a sheriff directions how he shall dispose of property remaining in his hands, which has been taken in execution, towards payment of a fine imposed upon the defendant on a conviction for a misdemeanor; but if the sheriff has made an improper return, it may be quashed. (bb) And the court of Common Pleas cannot apply the forfeited penalties of recognizances of bail, to attachments for

(a) *Ante*, 993.

(b) *Plowd.* 441, (a.), and see *Bac. Abr. tit. Execution, C. 4. Com. Dig. tit. Execution, C. 3. tit. Process, E. 4.*

(c) *Gilb. Excheq.* 117, &c. 1 *Chit. Rep.* 434.

(d) 1 *Ld. Raym.* 307, and see 3 *Co.* 12, b. *Gilb. Exch.* 125, 6; 166, 7. 171. *Skin.* 619. 3 *Salk.* 286.

(e) 2 *Barn. & Ald.* 609. 1 *Chit. Rep.* 428, S. C., and see 2 *Show.* 166. *Skin.* 12. *T. Jon.* 185, S. C.

(f) 1 *Chit. Rep.* 583, and see 1 *McClell. & Y.* 514.

(g) *Gilb. Excheq.* 125, 6, and see 2 *Barn. & Ald.* 609. 1 *Chit. Rep.* 428, S. C.

(h) *Append. Chap. XLII. § 1.*

(i) *Gilb. Excheq.* 126. *Ante*, 137, 8.

(k) 1 *Ld. Raym.* 305. 1 *Salk.* 395, 406, S. C.

(aa) *Gilb. Excheq.* 170.

(bb) 1 *Dowl. & Ry.* 474.

resisting an execution, to the discharge of the debt and costs of the plaintiff in the original action.(c)

The *levari facias* for the *subject* is either on a recognizance, or statute merchant, &c. By the common law, a *levari facias* may be sued out within a year, upon a recognizance, against the cognizor, for the money mentioned therein, to be levied of his lands and chattels:(d) And this seems to be the proper process, after judgment in *scire facias*, on a recognizance of bail, upon which a *capias ad satisfaciendum* does not lie, in the Common Pleas.(e) So, upon a statute merchant, after the recognizance is certified into Chancery, if the cognizor be an ecclesiastical person, a *levari facias* shall be awarded, to levy the debt of his moveable goods; for his body shall not be taken:(ff) which writ may be directed to the sheriff, if the clerk has a lay fee; otherwise it shall be to the bishop of the diocese where his benefice lies:(gg) or, if he has benefices in several dioceses, there may be a writ for part to one bishop, and another for the residue to the other bishop:(hh) and if part of the debt be levied by *levari facias*, an *alias levari facias* may issue for the residue.(ii) So, if the sheriff return *nulla bona* to a *feri facias*, and that the defendant is a beneficed clerk, having no lay fee, a *levari facias*, we have seen,(kk) may be sued out *de bonis ecclesiasticis*, under which the tithes or other profits of the living may be taken in execution. It should be further observed, that the execution against the goods and chattels of the defendant is sometimes, in point of form, a *levari facias*, and particularly in the court of Exchequer;(l) but this writ has no other effect than *feri facias*. There is also a *levari facias*, for executing the judgment of a county court; but this latter writ ought to be *de bonis et catallis* only, and not *de terris et catallis*:(m) and the goods cannot be sold under it, without a special custom.(n)

The writ of extent, or *extendi facias*, is a writ of execution against the body, lands and goods, or the lands and goods, or the lands only, of the *debtor: and it is either for the king or the subject; for [*1044] the former, it is an ancient prerogative writ, for obtaining satisfaction of debts originally due or assigned to the king, or found on an inquisition taken on a writ of extent, or *diem clausit extremum*. Debts originally due to the king are of record, or not of record: Debts of record are founded on judgments or recognizances, or inquisitions taken and returned on commissions issuing out of the court of Exchequer: Debts not of record are on bonds, or simple contracts; which latter are either due from the known public officers and accountants to the king, or from third persons. If a man receive the king's money, knowing it to be so, an extent may issue against him as debtor to the king:(a) otherwise if he do not know it to be the king's money:(b) And if it be found by inquisition

(c) 3 Taunt. 112.

(d) Reg. 298, b. F. N. B. 265, D., and see Com. Dig. tit. *Statute Staple*, D. 3. 1 Chit. Rep. 434. *Ante*, 993.

(e) *Post*, Chap. XLIII.

(f) Reg. 298, b. 300. F. N. B. 131. D. 265. D. 266. A. Append. Chap. XLII. § 26.

(gg) F. N. B. 266, A. B.

(hh) *Id.* 266, A.

(ii) Reg. 298, b. F. N. B. 265. H. and see Com. Dig. tit. *Statute Staple*, D. 3.

(kk) *Ante*, 1023.

(l) Append. Chap. XLI. § 2, (a).

(m) 2 Latw. 1413.

(n) 11 Co. 92, a. Cro. *Elis.* 545. 4 Leon. 32.

(b) *Id.* *ibid.* Lane, 23, and see West on *Extents*, 32, 3, 265, 6.

against a receiver general, that he has paid over money to A., an immediate extent may issue against A.; for this is the king's money.(c)

The body, lands and goods of the king's debtor, or his lands and goods after his death, were liable at common law to the king's execution;(d) but by *magna charta*, (9 Hen. III.) c. 8, the king and his bailiffs were restrained from seizing any land or rent, for any debt, as long as the present chattels were sufficient to pay the debt, and the debtor was ready to satisfy the same:(e) and accordingly, a *conditional* writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and take them into the king's hands, and if they were not sufficient to pay the debt, then to inquire of and extend the lands, &c. and to take the body of the debtor.(f) This writ (according to the opinion of lord *Coke*),(g) was made after the statute 33 Hen. VIII. c. 39, § 50, 55, but that opinion was doubted by lord chief baron *Gilbert*, in his treatise on the court of Exchequer;(h) because the writ seems to have been so contrived, that an inquisition should be found whether the debtor had any goods or chattels, and if upon the inquisition none were found, then to extend the land, and take the body of the debtor: So, that it seems, this writ might have been used before the statute of Hen. VIII. without any violation of *magna charta*; for if it were found that the debtor had no goods, they might seize the land, and take the body; and therefore it seems to be a writ that was used upon motion to the court, and in cases of necessity, before the statute of Hen. VIII.: But since that statute, the practice has been to issue the writ of extent, in its present form, to levy the king's debt of the body, lands and goods of the debtor *absolutely*, without any previous inquisition touching the goods:(i) And under this writ, the sheriff may in strictness seize the lands, although the goods should be sufficient to satisfy [*1045] the debt.(aa) But the court of Exchequer will not make an order for the sale of lands, on the statute 25 Geo. III. c. 35, § 1, if goods sufficient to pay the debt have been seized under the extent.(b)

The writ of extent, at the suit of the king, is either in *chief* or in *aid*. An extent in *chief* is an adverse proceeding by the king, for the recovery of his own debt: An extent in *aid* is sued out at the instance and for the benefit of the debtor to the crown, or his surety, for the recovery of a debt due to himself: in the former case, the king is the *real*, as well as *nominal* plaintiff; in the latter, he is the *nominal* plaintiff only.(cc) On a judgment in *scire facias* for the king's debt, or on an information for penalties in the court of Exchequer, the regular process of execution is an extent in *chief*, against the body, lands and goods of the defendant:(dd) or a *levari facias* may be issued, with a *capias* clause for taking this body:(ee) And, in the case of the king, there need not be any *scire facias* to revive the judgment, after a year and a day.(ff) So, on a *recognizance* to the king,

(c) Bunb. 128, and see *id.* 24. 134, Com. Dig. tit. *Debt*, G. 7. 2 Price, 13. West, 267, S. O. 7 Price, 633.

(d) 3 Co. 12, b and see Cro. Jac. 450. 3 Salk. 286. 2 Wms. Saund. 5 Ed. 70, a. Com. Dig. tit. *Debt*, G. 2.

(e) Gilb. Excheq. 124. 3 Salk. 286.

(f) 2 Inst. 19, Gilb. Excheq. 126, 7.

(g) 2 Inst. 19, and see West, 76, &c. 190.

(h) Gilb. Excheq. 127, 8.

(i) *Id.* *ibid.* and see West, 2, &c. Manning's Law of Extents, 2 Ed. 5, &c.

(aa) West, 76, 80, but see O. Bridg. 474. 3 Salk. 286.

(b) 3 Price, 40. West, 187, &c., 225. S. C.

(cc) West, 14, and see 8 Price, 683.

(dd) Append. Chap. XLII. § 2.

(ee) Gilb. Excheq. 125, 6. *Ante*, 1042.

(ff) 2 Salk. 603, and see Gilb. Excheq. 166, 7. 1 Price, 395. West, 316, &c.

if it be clearly forfeited, an extent may be issued in the first instance, against the body, lands and goods of his debtor.(g)

The king's remedy, for the recovery of *specialty* debts, is governed by the statute 33 Hen. VIII. c. 39,(h) which enacts, that "all obligations and specialties, which shall be made for any cause or causes touching or in any wise concerning the king's most royal majesty, or his heirs, or to his or their use, commodity or behoof, shall be made to his highness and to his heirs, kings, in his or their name or names, by these words, *to the lord the king*, and to none other person or persons to his use, and to be paid to his highness by these words, *to be paid to the said lord the king, his heirs or executors*, with other words used and accustomed in common obligations; and that all such obligations and specialties, so to be made, shall be good and effectual in the law to all intents and purposes, and shall be of the same nature, kind, quality, force and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the statute of the staple at *Westminster*, had at any time before the making of that act been taken, used, exercised and executed, against any lay person or persons.(h) And that all such obligations and specialties, the debt whereof not being paid nor contented in the life of the king, shall come, remain and be to the heirs or executors of the king, at the free liberty, disposition, assignment and appointment of the same king, to whom such obligations or specialties shall be made as aforesaid.(i) And that all suits, process, judgments, decrees and execution, thereafter to be taken, pursued, or given for the king, in any of the king's courts mentioned in that act, of or upon any of the same obligations, shall be of the same or like strength, force, *effect and intent in the law to all purposes, only against all and [*1046] all manner such person and persons as are bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the statute of the staple at *Westminster*, at any time before the making of that act, had been used to be taken, exercised and executed, against any lay person or persons."(a) It has been doubted, whether a bond to the crown, entered into by the committee of a lunatic, in consequence of a grant of the lunatic's estate having been made to him, in the usual form, under the great seal, be an obligation of the same force and effect as a statute staple, within the 33 Hen. VIII. c. 39, § 50.(b) On this statute, the king may proceed either by *scire facias*, which is the ordinary mode of proceeding when the debt is doubtful, or the debtor solvent, in which case an extent is the ultimate process of execution; or, upon an affidavit of his insolvency, and that the debt is in danger of being lost,(c) and the *fiat* of the chancellor, or one of the barons of the Exchequer,(d) the king may sue out an *immediate* extent in chief;(e) so called, from its being issued in the first instance, without the intervention of a *scire facias*:(f) And this latter is now become the common mode of proceeding on a bond, against the *principal* debtor, when the debt is in danger; but against *sureties*, it is more usual to proceed by *scire facias*:(gg) Though if a *scire facias* has

(g) Gilb. Excheq. 165, 6.

(i) § 51.

(b) M'Clel. 402.

(c) *Id.* § 5; and see West, 18, 47, 8. Gilb. Excheq. 168, &c.

(gg) Bunb. 58; and see Append. Chap. XLIII. § 1, &c.

(h) § 50.

(a) § 53.

(c) Append. Chap. XLII. § 3.

(d) *Id.* § 4.

(f) West, 18.

issued on a bond, an immediate extent may afterwards issue, on an affidavit of danger; and the king may proceed thereon either by *scire facias* or extent, or by both.^(h) It seems to have been formerly holden, that on a bond or recognizance to the king, conditioned for the performance of covenants or other collateral things, a *scire facias* should first issue, and not an immediate extent:⁽ⁱ⁾ But it was afterwards decided, that on an affidavit of danger, and that the condition of the bond is broken, an immediate extent may issue in every case, as well where the bond is for the performance of covenants or other collateral acts, as where it is for the payment of a sum certain.^(k) But if it be doubtful whether the bond or recognizance be forfeited, then it seems a *scire facias* is the proper mode of proceeding.^(l) And, when the debtor is solvent, the king has not an election to proceed against him either by extent or *scire facias*, but the latter is the only course.^(m)

For the recovery of a *simple contract* debt, the king may proceed either by action of *debt*,⁽ⁿ⁾ or, after it is recorded, by *scire facias*, or extent. But it is a rule, that writs of *scire facias* or extent must be founded [*1047] on matter *of record: And therefore, before a *scire facias* or extent can be issued for a simple contract debt, it must first be recorded; for which purpose a *commission* issues out of the court of Exchequer,^(a) under which an inquisition^(bb) is taken, to find the debt; and the inquisition, when returned, becomes a matter of record.^(cc) The commission to inquire of the king's debts is of great antiquity, being mentioned, with the proceedings thereon, in the statute of *Rutland*;^(dd) and it is issued by the clerk in court to the crown,^(ee) and directed to two commissioners, who are authorized to inquire, with the assistance of a jury, whether the defendant be indebted to the crown in any and what sum of money; and to return the inquisition taken thereon to the court. This commission is always executed in *Middlesex*;^(ff) and is *tested* in the name of the chief baron, signed by the king's remembrancer, and sealed with the Exchequer seal.^(g) It may be issued and tested in vacation, but must be returnable in term.^(g) The *immediate* extent however, for a simple contract debt, which is founded on the inquisition taken under the commission, may and constantly does issue in vacation, before the commission is returnable; though it seems the commission ought to be actually returned into the office and filed, before the extent issues.^(hh) No notice is given to the defendant, of the execution of this commission; and it was formerly not usual to adduce any evidence of the debt before the jury, except the affidavit made for the purpose of obtaining the immediate extent, on which alone it was the practice for the jury to find the debt:⁽ⁱⁱ⁾ But this practice has been altered, in consequence of a late decision of the court of Exchequer;^(kk) and it is now necessary that *vivē voce* testimony should be given to the jury, of the existence of the debt.

The affidavit for obtaining an extent in chief, which is called the affida-

(A) Bunb. 74.

(k) *Rex v. Mossley*, West, 328; and see Bunb. 203. West, 47, 8.

(l) Gilb. Excheq. 166,

(m) 3 Price, 288, 292.

(n) 3 Inst. 136. Com. Dig. tit. *Action*, B. 1.

(a) Append. Chap. XLII. § 6.

(bb) *Id.* § 7; and see 5 Price, 614, for the manner of finding the debt due to the crown.

(cc) West, 20.

(dd) 10 Edw. I. § 8. West, 21.

(ee) West, 21.

(ff) *Id.* 21, (e).

(g) *Id.* 22. 3 Price, 279.

(hh) West, 48, 242.

(ii) *Id.* 22.

(kk) 11 Price, 29.

vit of *danger*, must state the debt due to the crown, in what manner it arose, and that it is in danger of being lost; *(l)* and it should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded, or that a docket has been struck against him, *(m)* &c. To found an extent in chief against a bond debtor to the crown, the affidavit should contain a distinct, positive, and unequivocal allegation of a breach of the condition of the bond: Therefore, where the allegation of the breach in the affidavit was ambiguous, an extent issued against one of the obligors in a bond to the crown, was set aside. *(n)* But where the extent is to be issued against a *surety*, the affidavit need not state that application has been made to the principal debtor, *for [*1048] payment; or that he is in decayed and insolvent circumstances. *(a)*

The affidavit may be sworn, either before a baron of the Exchequer in town, or a commissioner of the court in the country. *(b)* The *fiat*, which is the warrant or authority for issuing the extent, may be obtained at any time, either in vacation or in term, by application to the chancellor of the Exchequer, or, as is more usual, to one of the barons; *(c)* nor is any motion in court necessary to be made for it in term time; *(d)* but if the extent be for a *bond* debt, the bond must be produced to the chancellor or baron, on his granting the *fiat*. *(e)* The commission and inquisition thereupon, if the debt be by simple contract, or the bond, if there be one, being taken, with the affidavit of danger, to the chancellor of the Exchequer, or one of the barons, he signs his name on the back of the commission, which is the warrant for issuing it; *(f)* and at the same time signs the *fiat* for an extent, at the foot of the affidavit. *(gg)* It is said to have been decided, that an extent may be issued on an inquisition and *fiat*, *eight* years old; and no new affidavit or *fiat* is requisite, nor is any proceeding, by *scire facias* or otherwise, necessary to revive such extent. *(hh)*

The writ of extent in *chief* issues out of the equity side of the court of Exchequer; *(i)* and after reciting the judgment, recognizance, bond, or finding of the simple contract debt on the inquisition taken by virtue of the commission, commands the sheriff, to whom it is directed, to omit not by reason of any liberty, but to enter the same, and take the defendant; and to inquire by a jury, what lands and tenements, and of what yearly values, the defendant *had* on the day when he first became debtor to the crown, or at any time since, (or, in the case of a simple contract debt, what lands, &c., he now *hath*,) and what goods and chattels, and of what sorts and prices, and what debts, credits, specialties, and sums of money, the defendant, *or any person in trust for him, or to his use*, *(k)* hath in his bailiwick; and to appraise and extend all and singular the said goods and

(l) West, 51.

(m) *Id.* 52. Append. Chap. XLII. § 8. And for other forms of affidavits and *fiats* for immediate extents in chief, see West, Append. 4, &c.

(n) M'Clel. 688; and see 1 M'Clel. & Y. 250.

(a) M'Clel. 689; and see 1 M'Clel. & Y. 250.

(c) *Id.* 49. Append. Chap. XLII. § 9.

(d) *Id.* 50, *(a)*, 290.

(gg) West, 49.

(i) 2 Str. 749. Gilb. Rep. 222. Bunb. 164, S. C.; but see 11 Price, 643, by which it seems, that the proceeding by writ of extent, and all proceedings thereon, interlocutory and final, are proceedings at law.

(k) The words *in italics* were inserted, in consequence of a rule of court made in *May*, 1712. See Book of Orders, No. 99, Man. L. Ex. Append. 234.

chattels, lands and tenements, debts, &c., and take and seize the same into the king's hands. It then directs the sheriff to summon before him such persons as he shall think proper, and examine them in the premises, and to return the writ to the court; with a *proviso*, that he do not sell the goods and chattels, till he shall be otherwise commanded: *(l)* And it seems, that an extent against the lands and tenements only of the crown debtor, without including his goods and chattels, is irregular. *(m)* This writ, like the commission for finding a simple contract debt, is *tested* by the [*1049] chief *baron, signed by the king's remembrancer, and sealed with the Exchequer seal: *(a)* And it is a rule, that an extent cannot be ante-dated; but must bear teste on the day it issues, though it be out of term; for, as mentioned above, it issues out of the equity side of the Exchequer, which is always open. *(b)* The writ is always made returnable on a *general* return day; and a term must not intervene between the *teste* and return. *(c)* If the *teste* of the extent be mistaken, it may be amended by the *fiat* of the baron: *(d)* But when an inquisition taken on an extent has been quashed for uncertainty, it is necessary to issue a new writ, the former having been returned. *(e)* Before or after the return of the first extent, any number of extents may issue, with the same *teste* as the first, that is, the date of the *fiat*: If they issue before the return of the first extent, they may issue as a matter of course; if they do not issue till after the return of the first extent, a motion must be made in court to obtain them, on an affidavit of the circumstances. *(f)* And any number of extents may issue into different counties, at the same time. *(g)*

On the writ of extent, it is the duty of the sheriff to take the body of the defendant, unless directed to the contrary; and as it contains, like all other process at the suit of the crown, a *non omittas* clause, the sheriff may enter any liberty, for the purpose of executing it. He may also, if the doors be not open, break the party's house, either to arrest him, or to take his goods; but before he breaks it, he ought to signify the cause of his coming, and make request to open the doors. *(h)* The defendant being taken under an extent, cannot be bailed: *(i)* And the king not being bound by the bankrupt laws, or insolvent debtors' acts, *(k)* a certificated bankrupt, or person discharged under an insolvent act, is not entitled to his discharge out of custody under an extent, *(ll)* even in *aid*: *(mm)* And for a similar reason it was holden, that a bankrupt was not entitled to be discharged, by virtue of the statute 5 Geo. II. c. 80, § 5, when arrested on an extent during the time of privilege. *(n)* But where a bankrupt was arrested on a writ of extent, while actually attending to give evidence before commissioners of bankrupt, the chancellor, we have seen, *(o)* discharged him, as being privileged from arrest at common law. A party in custody, however, may obtain a *habeas corpus*, to be brought up at his own expense, to attend the trial of his cause, under special circumstances, as where his identity is in question. *(p)* When

(l) Append. Chap. XLII. § 2, 5, 10.

(a) West, 56.

(c) West, 58.

(e) 3 Price, 269.

(f) Parker, 35, 176, 282, 3. West, 59; but see 7 Price, 238.

(g) West, 59.

(i) West, 73, 83.

(ll) 1 Atk. 262; and see 8 Price, 671.

(n) *Id. Ex parte Temple*, 2 Rose, 22; and see West, 95. Man. L. Ex. 2 Ed. 33.

(o) *Ante*, 201.

(m) M'Clel. 402.

(b) 2 Str. 749. Gilb. Rep. 222. Bunb. 164, S. C.

(d) *Id.* 59; and see 9 Price, 483.

(h) 5 Co. 91, b.

(k) *Id.* 95; and see 8 Price, 671.

(mm) Bunb. 202, pl. 279.

(p) 1 Price, 403.

the crown is concerned, the courts, we may remember, (q) will not in general change the custody of its debtor, without the express consent of its officers: And the practice is said to be, for the *crown to [*1050] take its debtor out of any other custody; but the subject never takes his debtor out of the crown's custody, without the consent of the attorney general, (a) even for the purpose of surrendering him in discharge of his bail in another action: (b) Nor are the bail entitled to an *exoneretur*, on the ground that the defendant has been taken under an extent, and that the crown will not consent to a render. (c)

The next step to be taken by the sheriff, or the first, if the defendant cannot be found, or is not meant to be arrested, is to impanel a jury, to inquire as to the defendant's lands and tenements, goods and chattels, &c.; for which purpose he is required to summon *witnesses* on the part of the crown; and if they do not attend, the court of Exchequer will attach them: (d) and a witness must answer all questions, even though against his own interest, so as they do not subject him to any penalty or forfeiture. (e) On the taking of an inquisition upon a writ of extent, all persons claiming an interest in the property sought to be extended may appear, and produce evidence, and cross examine the witnesses for the crown; (f) and for that purpose the claimant may apply to the court, for an order to give reasonable notice of the execution of the writ: (g) but in ordinary cases, no notice is given of its execution.

The lands of a debtor or accountant to the crown were liable to the debt at common law, as well as his body and goods: (h) And under an extent, the crown may take not only the legal estate of its debtor, but also trust estates, (ii) or an equity of redemption: (kk) But copyhold estates cannot be taken under it. (ll) If the extent be against several, the lands of all or any of them are liable to be seized, as appears by the form of the writ. (mm) The time from which lands are bound, depends on the nature of the debt to the crown; which, we have seen, (nn) is either of record or not of record. Debts of record are founded on judgments or recognizances, or inquisitions taken and returned on commissions for simple contract debts: *Judgments* bind the lands, from the first day of the term of which they are recorded; (o) *recognizances*, from the caption, or time they are entered into; (p) And it seems that *simple contract* debts, *found on a commission, [*1051] bind the lands from the time of their becoming of record, on the return of the inquisition. (aa) If the king's debt be prior on record, it binds

- (q) *Ante*, 287.
 (a) *West*, 95.
 (b) 5 Taunt. 503. Barnes, 223; but see *West*, 91.
 (c) 5 Taunt. 503. 1 Marsh. 166. S. C. *Ante*, 287.
 (d) Parker, 269; and see *id.* 271.
 (e) Parker, 270; and see stat. 46 Geo. III. c. 37.
 (f) Bunb. 233. 3 Price, 454. *West*, 67, &c. 330, &c. S. C.; and see stat. 1 Hen. VIII. c. 8, made perpetual by 3 Hen. VIII. c. 2.
 (g) 1 Ves. 269.
 (h) 3 Co. 12, b. Cro. Jac. 450. 3 Salk. 286. 2 Wms. Saund. 5 Ed. 70, c. d. *Ante*, 1044.
 (ii) *West*, 129.
 (kk) Forrester, 162. 1 Price, 207.
 (ll) Parker, 195.
 (mm) *Append. Chap. XLIII* § 5. *West*, 136.
 (nn) *Ante*, 1044.
 (o) Dyer, 224, 5. 8 Co. 171. 2 Rol. Abr. 156, 7; and see Gilb. Excheq. 88. Bao. Abr. tit. *Execution*, K. 2 Wms. Saund. 5 Ed. 8, k, (5), 70, d. *West*, 123. But it is said, that if a farmer of the king do not pay his rent, and the king recover it in *debt*, his land which he had on the day of the writ brought and after, into whose hands soever it comes, shall be put in execution. 19 Hen. VI. 38, B. 2 Rol. Abr. 157.
 (p) Gilb. Excheq. 83, 4; and see 2 Wms. Saund. 5 Ed. 8, k, (5), and the cases there cited.
 (aa) Wightw. 44; and see *West*, 128, 9.

the lands of the debtor, into whose hands soever they come; because it is in the nature of an original feudal charge upon the land itself, and therefore must bind every one that claims under it; and an execution may be taken out for such debt, though an *elegit* may have been issued at the suit of a subject: (b) but if the lands were aliened, in the whole or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in that case the land is not bound. (c)

Bonds to the king bind the lands, from the time they are entered into by force of the statute 33 Hen. VIII. c. 39. (d) *Simple contract* debts do not seem to have bound the lands at common law, before they were recorded, on a commission for that purpose, unless they were due from known public officers and accountants of the crown; in which case, they seem to have always bound the lands of the debtor, from the time when those debts accrued. (e) And, by the statute 13 Eliz. c. 4, § 1, "all lands, tenements, profits, commodities, and hereditaments, which any treasurer or receiver of the courts of Exchequer, &c. or other officers, &c. therein mentioned, then had, or at any time thereafter should have, within the time whilst he or they, or any of them, should remain accountable, should, for the payment and satisfaction unto the Queen's majesty, her heirs and successors, of his or their arrearages, at any time thereafter to be lawfully, according to the laws of this realm, adjudged and determined upon his or their account, (all his due and reasonable petitions being allowed,) be liable to the payment thereof, and be put and had in execution for the payment of such arrearages or debts, to be so adjudged and determined upon any such treasurer, &c., in like and as large and beneficial manner, to all intents and purposes, as if the same treasurer, &c. upon whom any such arrearages or debts should be so adjudged or determined, had, the day he became first officer or accountant, stood bound by writing obligatory, having the effect of a statute of the staple, to her majesty, her heirs or successors, for the true answering and payment of the same arrearages or debts." By this latter statute, debts due from the officers enumerated therein, bind the lands, if incurred at any time during their continuance in office, from the time of entering into the same.

By the statute 33 Hen. VIII. c. 39, § 74, "if any suit be commenced or taken, or any process awarded for the king, for the recovery of any of his debts, then the same suit and process shall be preferred before the suit of any person or persons; and that the king, his heirs and [*1052] *successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons: so always that the king's suit be taken and commenced or process awarded for the said debt, at the king's suit before judgment given for the said other person or persons." (a) This clause of the statute is not confined in its operation to bond debts only, but extends to all debts and executions at the suit of the king: (bb) And it is holden to be restrictive upon the old

(b) 2 Rol. Abr. 156, 7. Gilb. Excheq. 88, 91. Bac. Abr. tit. *Execution*, K. 2 Wms. Saund. 5 Ed. 70, d.

(c) 2 Rol. Abr. 156, 7. Gilb. Excheq. 91. Bac. Abr. tit. *Execution*, K.; and see West, 138, &c. Man. L. Ex. 2 Ed. 36, &c.

(d) § 50; and see Gilb. Excheq. 88, &c. Bac. Abr. tit. *Execution*, K. 2 Str. 754. 2 Wms. Saund. 5 Ed. 70, d.

(e) West, 123.

(a) See 2 Wms. Saund. 5 Ed. 70, d, e.

(bb) 7 Co. 18, b.

pre rogative, and introductive of a new law; for *ita quodd*, so always that the king's suit, &c. make a condition precedent, and a limitation: Hence therefore, a judgment and execution executed by *elegit*, before any suit or process commenced by the king, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution.(c) On the other hand, if the crown suit be commenced, or *fiat* for an extent granted, before judgment given for the subject, the execution of the crown is to be preferred:(d) And it is said, that if the subject's debt be by statute staple or judgment, prior to the king's debt, and the king extend the lands first, the subject shall not, by any after extent, take them out of his hands.(e) So, if after an extent on such judgment, the king's extent come before the subject has the possession delivered to him by a *liberate*, the king's extent shall, it is said, be preferred, and the subject wait till the king's debt be satisfied.(f) So, lands bargained and sold by commissioners of bankrupt to the assignees, may it seems be taken under an extent, the *teste* of which is subsequent to the bargain and sale, but prior to the enrolment.(g)

With respect to *personal* property, it is holden that under an extent, all the goods and chattels of the crown debtor, whether real or personal, may be taken, except things necessary for the support of himself and his family:(h) and also except beasts of the plough, if there be other chattels sufficient.(i) Chattels *real*, as terms for years, estates by *elegit*, &c. may be either extended at their yearly value, as lands of the debtor, or appraised at a gross price, as part of his goods and chattels:(k) In either case they are bound, like other chattels, from the *teste* of the extent only.(l) And it has been holden, that a term for years, originally created out of an estate purchased by a person who afterwards became indebted to the crown, to secure a sum of money due by him to one of the vendors, and vested in a trustee for that purpose; and, after several mesne conveyances, assigned to a trustee for another purchaser of the estate, for a valuable consideration and without notice, to attend and protect the *inheritance, such [*1053] latter purchaser claiming directly under the first incumbrancer, by a title paramount to the crown debtor, is not liable to an extent for the crown debt.(aa) Under an extent against several, the separate goods of each may be taken, as appears by the form of the writ:(bb) And, upon an extent against one partner, the crown may seize goods being the property of the partnership: but the crown can sell the interest only of the partner against whom the extent issues, which is his share of the surplus, after payment of the partnership debts.(cc) The jury therefore ought, in a case of this kind, to return the goods seized, as the property of the partnership.(dd)

An extent for the king's debt binds the property of his debtor's goods, into whose hands soever they come, from the *teste* of the writ, or *fiat* of the baron on which it issues:(ee) For though by the statute 29 Car. II. c. 3,

(c) Hardr. 23; and see Gilb. Excheq. 91. West, 160; but see Dyer, 67, b. 2 Wms. Saund. 5 Ed. 70, a.

(d) West, 102; and see 16 East, 278, (a). (e) Gilb. Excheq. 91; but see West, 151, &c.

(f) Gilb. Excheq. 91, 2; but see West, 154, &c. (g) West, 149.

(h) 2 Rol. Abr. 160, l. 5.

(i) 8 Co. 171.

(k) M'Clel. 402. 13 Price, 648, S. C.

(bb) Append. Chap. XLII. § 5. West, 117, 169. Ante, 1050.

(cc) Wightw. 51.

(dd) West, 117.

(ee) 8 Co. 171. 2 Rol. Abr. 156, 7. 7 Vin. Abr. 104. West, 227. S. C. Gilb. Excheq. 90.

§ 16, no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff, yet this statute does not extend to the king, who is not named therein: *(f)* And as no laches are imputable to the king, he is not it seems bound by an intervening sale in market overt. *(g)* So, goods fraudulently conveyed away to defeat an execution, may be taken under an extent, as well as under a *fieri facias*. *(h)* But a warrant from commissioners of taxes does not bind the goods, until it be actually executed by seizure: *(i)* And when goods are *bonâ fide* sold, or fairly assigned by the king's debtor to trustees for the benefit of his creditors, before the *teste* of the extent, they cannot be taken under it, even though the debtor, in the latter case, was a trader within the bankrupt laws, and the assignment was an act of bankruptcy, and void as against the assignees. *(k)* A *factor*, to whom goods have been sent for sale, and who has accepted bills of exchange, drawn on him by his principal, to the amount of their value, has a lien on such goods, and the purchase money; which lien is available against the crown, where the goods or money have been seized under an extent against the principal, for a debt due to the crown. *(l)* So, goods pawned or pledged before the *teste* of an extent, cannot be taken under it; because the pawnee or bailee has a special property in them; *(m)* nor, for the same reason, goods demised or let *to another for a term [*1054] certain, during the term: *(a)* But it seems that goods pawned before the *teste* of the extent may be taken, as against the pawnee, on satisfaction of the pledge: *(b)* and after the extent, a pawnee of goods cannot safely redeliver them to the pawner; for the interest of the latter is bound by the *teste* of the writ. *(cc)*

The property of goods, though *bound*, not being *altered* by a *distress* for rent, until the goods are actually sold, it has been determined, that an extent against the king's debtor, *tested* after a *distress* taken for rent, with notice to the tenant, and appraisement of the goods, but before sale, shall prevail against the *distress*: *(dd)* And the crown, we have seen, *(ee)* is exempted from the operation of the clause in favour of landlords, in the statute 8 Ann. c. 14, by an express provision; *(ff)* which has been holden to apply to extents in *aid*. *(gg)* So the crown, not being named in the acts relating to *bankrupts*, is not bound by them; and as the bankrupt's property is not altered before assignment, the commissioners having only a power to assign

Bac. Abr. tit. *Execution*, K. Bunb. 39. 2 Str. 754. Gilb. Rep. 222. S. O. Parker, 125. 2 Blac. Rep. 1251. 5 Price, 428, 423, 4; and see West, 96, 7. Man. L. Ex. 2 Ed. 47, &c.; and see 1 M'Clel. & Y. 544, 555.

(f) W. Jon. 202. Gilb. Excheq. 90. Bac. Abr. tit. *Execution*, K. Bunb. 202. 3 Atk. 739. 1 Ves. 196. Co. B. L. 858, 9.

(g) See West, 96. Man. L. Ex. 2 Ed. 48; and the cases there cited.

(h) West, 115, 16. *Ante*, 1004, &c. *(i)* 2 Str. 978.

(k) 3 Price, 6. West, 115, S. C.; and for the pleadings in this case, see *id.* Append. 111.

(l) 6 Price, 369.

(m) Bro. Abr. tit. *Pledge*, pl. 28. Parker, 118, 19; and see 7 Durnf. & East, 11, 12. 15 East, 607. 5 Barn. & Ald. 826. 3 Stark. Ni. Pri. 130, S. C.

(a) *Ibid.*

(b) Bro. Abr. tit. *Pledge*, pl. 28, tit. *Execution*, pl. 107; and see 8 East, 467, 479. *Ante*, 1003.

(cc) 1 Bulst. 29; and see Man. L. Ex. 545.

(dd) Bunb. 42, 269. Parker, 112, 141; and see Bradby on Distresses, 117.

(ee) *Ante*, 1014.

(gg) 2 Price, 17. 6 Price, 19. *Ante*, 1014. *(ff)* § 8.

But the goods of a tenant are it seems liable to satisfy a year's rent, notwithstanding an outlawry in a civil suit. Bunb. 194. 7 Durnf. & East, 359. *Ante*, 1015; but see Bunb. 5, *amb. contra*.

it, an extent will bind the property of the bankrupt from the *teste* of the writ, until an actual assignment by the commissioners: (h) And if the extent and assignment be both *tested* on the same day, the crown it seems shall be preferred. (i) But where goods taken under a distress for rent are sold, (k) or the goods of a bankrupt assigned by the commissioners, (l) before the *teste* of an extent, they cannot be taken under it; because the property in these cases is absolutely transferred to third persons: and a provisional assignment is sufficient to bar the crown. (m)

In the case of an *execution*, it is a rule, that when the king and a subject stand in equal degree, and the property of the debtor remains unaltered, the king's prerogative must prevail. (n) *Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*: (o) therefore, if an extent at the suit of the crown be *tested* before or on the day of delivering the subject's execution to the sheriff, the former shall have the preference. (o) But it has been doubted, whether goods are liable to an extent, issued for the debt of the crown, after they have been taken by the sheriff under a *fieri facias*, and before they are sold. On the one hand it is said, that as by the common law, abridged as it is by the statute of frauds, the *property of the debtor's goods is bound by the delivery of [*1055] the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach: (a) and accordingly it has been determined, in the courts of King's Bench (b) and Common Pleas, (c) that if goods be taken in execution, on a *fieri facias* against the king's debtor, and before they are sold an extent issues at the king's suit, grounded on a bond debt, and tested after the delivery of the *fieri facias* to the sheriff, these goods cannot be taken upon the extent. But on the other hand it seems, that by the ancient prerogative, the crown was entitled to priority of execution; and must have been first satisfied its debts, before the subject could have taken out any execution at all; and though the property of goods be so far bound by the delivery of the writ to the sheriff, that as between subject and subject, it determines the question of priority, yet as against the crown, it is said, the property is not altered, until it be actually sold; and accordingly it has been determined by the court of Exchequer, that if an extent issue against the king's debtor, whilst the goods remain in the sheriff's hands on a *fieri facias*, and before they are sold, though the extent be not *tested* till after the delivery of the *fieri facias* to the sheriff, the king is entitled to the preference: (d) And in the King's Bench, process sued out by the crown against a defendant to recover

(h) 2 Show. 481. 7 Vin. Abr. 104. West, 327. S. C. Bunb. 33, 202. 2 Str. 978. Parker, 126; and see Co. B. L. 7 Ed. 358, 9.

(i) 2 Show. 481. Bunb. 33. Parker, 126. West, 115. (k) Parker, 118.

(l) 2 Show. 481. 7 Vin. Abr. 104. West, 327. S. C. Bunb. 33, 202. 2 Str. 978. Parker, 126; and see West, 115. Man. L. Ex. 2 Ed. 47. 1 M'Clel. & Y. 250.

(m) 1 Atk. 95; and see 14 Ves. 87.

(n) 4 Durnf. & East, 411.

(o) 9 Co. 129, b.

(a) 4 Durnf. & East, 411; but see West, 101, 104.

(b) *Rorke v. Dayrell*, 4 Durnf. & East, 402.

(c) *Uppom v. Sumner*, 2 Blac. Rep. 1251; and see 3 Mod. 236. Comb. 123. Parker, 262. Com. Dig. tit. *Dett*, G. 8.

(d) *Rex v. Wells & Allnutt*, 16 East, 378. 6 Price, 114, 144. 8 Price, 293, per Richards, Chief Baron, and *Graham & Garrow*, Barons, Wood, Baron, *dissentiente*: and see Dyer, 67, b. 2 Rol. Rep. 295. Comb. 452. 2 Show. 481. Bunb. 8. Parker, 262. 1 Bur. 36. West, 98, &c. 8 Price, 374, &c. 1 Younge & J. 232. S. C. in Error. 11 Price, 594. This point came before the court of King's Bench on a special verdict, in the case of *Thurston v. Mills*, 16 East, 254, but was not then determined, the case being decided on the form of the action.

penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority, within the statute 33 Hen. VIII. c. 39, § 74, before the execution of a subject, issued on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff, before the actual sale of the defendant's goods under the plaintiff's execution.(e) But an extent delivered to a sheriff, on the day on which goods seized under a *feri facias* were sold and delivered to the purchasers, but which extent was delivered subsequently to the sale and delivery of the goods, is not entitled to priority over the writ of *feri facias*.(f) Where, on a judgment for the crown in an action for penalties, an extent was issued, and a levy made by the sheriff, and whilst the money was in the sheriff's hands, the defendant brought a writ of error; the court, on application, ordered the money to be paid by the sheriff to the officer of the crown, notwithstanding [*1056] ing it was objected *that if the judgment were reversed, the party would not be able to obtain a writ of restitution, but would be driven to a petition of right: the court holding, that the crown could not be placed in a worse situation than a subject under similar circumstances; and that the court could not take notice that greater difficulties existed in obtaining restitution from the crown, than from the subject.(a)

Debts owing to the king's debtor may be found under an extent,(b) whether due on record or specialty, or only on simple contract:(c) And it is now the constant practice to find debts due to the king's debtor, on bills of exchange and promissory notes;(dd) though it was formerly otherwise.(dd) And, under an extent against several, debts due to any one of them may be found;(ee) or, under an extent against one, debts due to that one and others jointly.(ff) Debts are in general bound, in like manner as goods and chattels, from the *teste* of the extent;(g) and therefore, a mere assignment of a debt to the assignees of a bankrupt, between the *teste* of the extent and caption of the inquisition, will not discharge the debtor, as against the crown:(g) but the payment of a debt to the crown debtor, after the issuing of the extent and before the caption of the inquisition, will discharge the party paying it, without notice of the crown process.(h) So, payments of money made *bona fide* by the crown debtor, before the caption of the inquisition, are it seems good payments; and the money cannot be recovered back from the creditors, to whom it has been so paid.(i)

The sheriff is required, by the writ of extent, to seize and take into the king's hands, all and singular the goods and chattels, lands and tenements, debts, credits, specialties and sums of money, appraised and extended by him under the same; and it is said to be his duty to seize all the defend-

(e) 1 East, 338, and see 8 Price, 364. 1 M'Clel. & Y. 296.

(f) Gow, 39. 3 Moore, 740. 1 Brod. & Bing. 370, S. C.; and see 1 Chit. Rep. 643, (a) Ante, 1018.

(a) 1 Younge & J. 579.

(b) 21 Hen. VII. 12, 16. Godb. 291.

(c) Godb. 296.

(dd) West, 27, 8, 164, 5. And as to the mode of finding bills or notes, when they are not due at the time of taking the inquisition, see *id.* 165, &c. (ee) *Id.* 169.

(ff) *Id.* 170. 5 Price, 464. 7 Price, 570. S. C. in Error.

(g) 7 Vin. Abr. 104. West, 327, S. C.

(h) Bunb. 265. West, 329, S. C.; and see *id.* 162, 3. Man. L. Ex. 2 Ed. 51. 8 Price, 576; but see 2 Price, 396. West, 163, 4, S. C.

(i) West, 172, 3. Man. L. Ex. 2 Ed. 55.

ant's goods, though a part only would be sufficient to satisfy the debt; (*k*) and also to seize his lands, though he have goods sufficient for that purpose: (*l*) in which respect an extent differs from an *elegit*, upon which, if the goods and chattels are sufficient to satisfy the plaintiff's demand, the sheriff, we have seen, (*m*) ought not to extend the lands. But when goods and chattels of the debtor have been seized on an extent, to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the debtor's lands cannot be sold. (*n*) The seizure of the lands is merely nominal; and the sheriff does nothing but find them, through the *medium* of a jury, which finding is in effect the *seizure; (*a*) and the sheriff is directed only to *seize* the goods, [*1057] and not to *sell* them, under the extent, as appears by the *proviso* at the end of the writ. (*b*) The sheriff has no power, on an extent against the crown debtor, to collect or levy the debts due to him; (*c*) he is merely to seize them, which seizure is a seizure in law: (*d*) and if he receive such debts, he cannot make it the ground of a charge for poundage. (*d*)

The inquisition taken by the sheriff, under an extent, is an office of *intituling*, not of *information* or *instruction* merely. (*e*) It must therefore be direct, positive, and traversable. But it need not state the interest of the parties, with the precision required in a plea: Thus, a particular estate may be found, without showing from what it is derived. The inquisition must find facts, and not evidence; and it should not be argumentative. Finding a matter of law is surplusage; which does not however destroy the effect of that which is properly stated. (*f*) The inquisition is annexed to the sheriff's return, which should regularly be filed in the king's remembrancer's office, on the *quarto die post* of the return day; (*g*) though it may be filed before, when it is desirable to institute any further proceedings, founded not upon the return of the extent, but upon the inquisition, as to issue an extent in the next degree. (*g*) Specialties used formerly to be annexed to the inquisition, and returned with it; but the sheriff now usually keeps them, till called upon to deliver them to the solicitor for the crown. (*h*)

It may here be proper to say a few words of the writ of *diem clausit extremum*; which is a special writ of *extendi facias*, or extent in *chief*, issuing after the death of the king's debtor, against his lands and chattels. This writ, which was formerly included in the *long writ*, (*i*) and seems to be founded, at least as to the goods, on *magna charta*, (*kk*) sets out with stating the death of the debtor, from whence it derives its name; and directs the sheriff to inquire, by means of a jury, when and where he died, and

(*k*) West, 75; but see Man. L. Ex. 2 Ed. 56.

(*l*) West, 76, 80; but see O. Bridg. 474. 3 Salk. 186. *Ante*, 1044, 5.

(*m*) *Ante*, 1034.

(*n*) 3 Price, 40. *Ante*, 1045.

(*a*) West, 74.

(*b*) Append. Chap. XLII. § 2.

(*c*) West, 171, and see *id.* 74. Man. L. Ex. 2 Ed. 7. 8 Price, 587.

(*d*) 8 Price, 587. *Ante*, 1040.

(*e*) There are two sorts of officers: the one vests the estate and possession of the land, &c., in the king, where he had only right or title before; the other is, when the estate is lawfully in the king before, but the particularity of the land does not appear of record, so that it may be put in charge: The first of these is called the office of *intituling*; the second, the office of *instruction*. 10 Co. 115, a., and see Gilb. Excheq. 109. Bul. Ni. Pri. 215. Man. L. Ex. 2 Ed. 87, 8.

(*f*) Man. L. Ex. 2 Ed. 35, 112, 13.

(*h*) West, 74.

(*g*) *Id.* 60.

(*i*) Gilb. Excheq. 118, *Ante*, 1042.

(*kk*) Chap. 18. West, 319, 20, and see stat. 33 Hen. VIII. c. 39, § 75, 6, 7.

what goods and chattels, debts, credits, specialties and sums of money, and what lands and tenements, he had at the time of his death, &c. and to cause the same to be appraised and extended, and seized into the king's hands; and it concludes in the same manner as the extent in chief.(l) It has been said, that a writ of *diem clausit extremum* must bear *teste* in term;(m)

but this seems to be a mistake, it being sometimes tested in [*1058] *vacation.(a) And an affidavit of danger does not seem to be necessary for grounding this writ.(b)

Whenever an extent might have issued against the king's debtor in his life time, a writ of *diem clausit extremum*, which is an extent against his lands and chattels, may issue after his death:(c) And this writ may issue against the property of a simple contract debtor of the crown, on a commission found after his death.(d) But no *diem clausit extremum* can regularly issue against the estate of a person who was not debtor to the crown, or found in his life time to be debtor to the king's debtor.(e) Under this writ, the crown may seize lands devised, before lands descended:(f) And a *scire facias* against the devisees is not necessary to ground it, where the debt is on record.(f)

The writs of extent hitherto spoken of are principally in the *first* degree, being issued for the recovery of debts immediately due to the crown; but when an inquisition is taken thereon, under which debts are found and seized into the king's hands, the crown, if they are not paid, may proceed for the recovery of them, either by *scire facias*, (which is the ordinary mode of proceeding,) or, on an affidavit of danger,(g) and a baron's *fiat*,(h) by *immediate* extent,(i) which is called an extent in the *second* degree. And upon such affidavit and *fiat*, an *immediate* extent, we have seen,(kk) may issue before the extent under which the debts are found is returnable: though it must be actually returned before the second extent can issue. In like manner, when debts are found and seized into the king's hands, under an extent in the *second* degree, an immediate extent may issue for the recovery of them, if not paid, on an affidavit of danger and baron's *fiat*, which is called an extent in the *third* degree: And it seems that on an extent in *chief*, the crown may seize debts found to be due to its debtor, &c. in *infinitum*;(ll) but, on an extent in *aïd*, debts cannot be seized beyond the *third* degree.(mm) In reckoning the degrees, however, on an extent in *aïd*, the debt due to the debtor of the crown debtor, for which the extent originally issued, is, according to a late case, considered as the *first* degree: In that case, A. was the original crown debtor, B. was indebted to A., C. to B., and D. to C.; and on an extent against C., which had issued after extents against A. and B., the debt due from D. to C. had been

(l) Append. Chap. XLII. § 13.

(m) Hardr. 125, 6, and see Bunb. 39. 2 Str. 749, 756, R. H. 1 & 2 Geo. IV. Excheq. 9 Price, 86.

(a) Man. L. Ex. 2 Ed. 10.

(b) 13 Price, 279. M'Clel. 105, S. C.

(c) Bunb. 119.

(d) Parker, 95.

(e) *Id.* 16, and see Com. Dig. tit. *Deti*, G. 5, 7. West, 320. Man. L. Ex. 2 Ed. 10, 11, 15. And for the mode of pleading *plene administravit* and a retainer by an executor, on a writ of *diem clausit extremum*, see 5 Price, 621.

(f) M'Clel. 105. 13 Price, 279, S. C.

(g) Append. Chap. XLII. § 11.

(h) *Id.* § 12.

(i) Bunb. 24, 127, 134.

(kk) *Ante*, 1047.

(ll) Bunb. 303, and see Gilb. Excheq. 177, 8. Com. Dig. tit. *Deti*, G. 15.

(mm) Parker, 259, 60. West, 302, 3, and see R. H. 15 Car. I. § 3. West, Append. 125. Man. L. Ex. Append. 230.

seized; and the court held that this was properly done, and that the debt due to the crown from its debtor was not to be counted, in reckoning the degrees.(n)

*For the purpose of obtaining an extent, in the *second* or any subsequent degree, it is not necessary to swear to the fact of the [*1059] debt being due from the former debtor, such debt being found by the inquisition against him, which therefore need not be stated in the affidavit.(a) The writ of extent in the *second* degree begins by stating the debt due to the king from his debtor, and, if it be a simple contract debt, the inquisition taken on the commission for finding it; after which it recites the inquisition, by which the debt is found to be due to the king's debtor, and that the same remains unpaid; and then proceeds with the mandatory part of the writ, which is similar to that in the extent in chief.(b) Under this writ, the sheriff is to take the body, lands, and goods, &c. of the debtor to the king's debtor, in the same manner as under an extent in *chief* against the original debtor to the crown, which has been already treated of. But the lands which the sheriff is directed to seize under an extent in the *second* degree, are bound merely from the recording of the debt, from the debtor against whom it issues, under the inquisition against him; unless indeed such debt be owing on a judgment or recognizance, in which case the crown of course takes the lien of the plaintiff in the judgment, or conuisee in the recognizance, on the land of the defendant or conuser, which they had at the time of the judgment entered, or recognizance acknowledged.(c)

Extents in *chief*, of which we have hitherto spoken, take place *inter se*, according to their *teste*;(d) and shall be preferred to extents in *aid*.(e) And an extent in *chief* in the *second* degree has been preferred to an extent in *aid*, of a prior *teste*, where the same effects had been seized under both writs, although the inquisition on the latter was taken before that on the former, and the *venditioni exponas* on the extent in *aid* was *tested* before that which issued on the extent in *chief*.(f) Nor is it necessary that the crown, in proceeding to recover the debts of its debtor, by extent within the degrees, should first apply the immediate debtor's proper effects, in discharge of its debt, before it resorts to the debtor's debts.(f) But, when the extent in *chief* has been satisfied, the parties prosecuting the extent in *aid* should apply to the court, by motion, to be paid out of the overplus, if any, which under the 57 Geo. III. c. 117, § 2, is directed to be paid into court, to abide their orders respecting it.(f)

An extent in *aid*, which will next be treated of, is a writ issued at the instance and for the benefit of the crown debtor, for the recovery of his *own debt;(aa) or it may be had against a principal debtor [*1060] to the crown, at the instance and for the benefit of his *surety*,

(n) 1 Price, 95, and see 8 Price, 293, 386, 683. But see West, 299, where it is said, that as there is no other case in the books in which extents in *aid* have been carried so far, it demands some consideration. It should be observed, however, in support of the rule established by the above case, that the object of an extent in *aid* is to recover the debt due to the crown debtor from his debtor, which may therefore be properly considered as a debt in the first degree, although an extent *pro forma* issues for the debt due to the crown.

(a) West, 245. And for the form of an affidavit and *fiat* for an extent in *chief* in the *second* degree, see Append. Chap. XLII. § 11. West, Append. 25, 6.

(b) Append. Chap. XLII. § 31. West, Append. 27, 29.

(d) Parker, 281; and see Gilb. Excheq. 67, &c.

(e) Parker, 281, 2, and see West, 117, 18.

(aa) Bunb. 24, 127, 134; and see 8 Price, 683.

(c) West, 247.

(f) 8 Price, 683.

who has paid the crown debt.(b) In these cases the king is merely the *nominal* plaintiff.(c) The foundation of an extent in *aid* is a debt due to the crown from its debtor, for which an extent in *chief* has issued against him: And, before the statute 57 Geo. III. c. 117, an extent in *aid* might have been obtained by persons indebted to the crown by *simple contract* only, as well as for a specialty debt, or debt of record;(d) and also for debts due to the crown on bonds given by *traders* for duties, and by *sub-distributors* of stamps, and *sureties* only who had not been damnified, or for insurance companies, &c. But now, by the above statute, "it shall not be lawful for any person or persons, companies or societies of persons, corporate or not corporate, who shall or may be indebted to his majesty by *simple contract* only; nor for any such person or persons, companies or societies, who shall or may be indebted to his majesty by bond, for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his majesty, from such person or persons, companies or societies respectively, for and in respect and in the course of his or their particular *trades*, manufactories, professions, businesses or callings; nor for any *sub-distributor* of stamps, who shall have given bond to his majesty; nor for any person who shall have given bond to his majesty, either jointly or separately, as a *surety* only for some other debtor to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand; to sue out and prosecute any extent or extents in *aid*, by reason or on account of any such debt or debts to his majesty respectively, for the recovery of any debt or debts due to such person or persons, companies or societies, or to such sub-distributor of stamps or surety as aforesaid; and that all and every commission and commissions to find debts, extent and extents in *aid*, and other proceedings which shall be so issued or instituted at the instance of or for such simple contract or bond debtor or debtors respectively, and all proceedings thereupon, shall be null and void.(e) Provided always, that nothing therein contained shall extend or be construed to extend to preclude or prevent any persons who shall or may become debtor or debtors to his majesty by simple contract only, by the collection or receipt of any money arising from his majesty's revenue, for his majesty's use, from applying for and suing out any commission or commissions, extent or extents, in *aid*, in case one or more of such persons shall be bound to his majesty, [*1061] by bond or specialty of record in the said court of Exchequer, *for answering, securing, paying over, or accounting for to his majesty, the particular duties or sums of money, which shall constitute the debt that may be so then due from such person or persons to his majesty.(aa) Provided nevertheless, that no extent in *aid* shall be issued on any bond given by any person or persons, as a surety or sureties, for the paying or accounting for any duties which may become due to his majesty, from any body or society, whether incorporated or otherwise, carrying on the busi-

(b) West, 13, 14; 307, &c. Man. L. Ex. 2 Ed. 71, &c.; and see 8 Price, 385, *in notis*.

(c) West, 14, *Anta*, 1045.

(d) West, 267, 273. And for the cases in general, in which an extent in *aid* might have been obtained before the statute 57 Geo. III. c. 117, see *id.* 265, &c.

(e) § 4.

(aa) § 4.

ness of insurance against any risques, either of fire or of any other kind whatever." (b)

By the above statute, an extent in *aid* cannot now be had by persons indebted to the crown by *simple contract* only, unless it be for a debt due from collectors or receivers of his majesty's revenue, and one or more of them be bound by bond or speciality of record in the Exchequer, for payment of the same. And an immediate debtor to the crown, by reason of his receipt of the crown's money as a country banker, to whom it had been paid by the district collector of excise for the purpose of being remitted by him to *London*, is not entitled to sue out an extent in aid, although he have entered into the usual bond to the crown, to pay over the money, or remit good bills for the amount within *twenty-one* days after the receipt of it; unless there have been in point of fact a literal breach of the condition of the bond. Such breach must be stated in the affidavit, made to obtain, and the *fiat* for the extent: and if there have been no breach of the condition, the obligor can only obtain an extent, upon a commission and inquisition to find a debt due to the crown, as in the ordinary course of proceeding, with respect to the crown's simple contract debtors. (c) But an extent in aid may still be had for any debt of record, or speciality debt; except on such bonds as are particularly mentioned in the statute. And bankers, who have money in their hands, arising from the land and assessed taxes paid into their house, for the purpose of being paid over to the Exchequer, on account of a receiver general, for whom they have given bond to the crown, are still entitled to sue out an extent in aid. (d) So, an obligor to the crown by bond, conditioned to sell all such sugars as *shall* be delivered to him as agent for the sale and disposal of certain sugars, and to account for and pay over the produce of the *sale* of the said sugars, may sue out a writ of extent in aid, under the proviso in the above statute, as upon a debt due from him to the crown, being the balance of moneys received by him between the date of his appointment and the time of issuing the extent, arising from the sale of sugars delivered to him, after his appointment, and previous to the date of the bond. (e) When a party is entitled to the benefit of an extent in aid, he may still issue it for a simple contract debt due to himself: the statute having introduced no distinction with respect to the nature of the debt due to the crown debtor. (f) Nor is any motion in court necessary, in order to obtain an extent in aid for the **recovery* of a simple contract debt; (a) though [*1062] it was formerly otherwise. (bb) And it may be sued out by a crown debtor, for a debt due to himself and others jointly: (cc) and if several are jointly indebted to the crown, they may sue out an extent in aid against the debtor to any one or more of them; as, under an extent in chief against several for a joint debt, debts due to any one of the parties may be seized into the hands of the crown. (cc)

This writ, however, can only be had for a debt *originally* due to the

(b) § 5. The above statute does not extend to the *prosecution* of extents in other cases, if commenced before it was passed. 6 Price, 144.

(c) 9 Price, 647.

(e) 11 Price, 598.

(a) 2 Price, 15.

(bb) R. H. 15 Car. I. § 5. R. M. 3 W. & M. in Scac. West, 126, 7. Man. L. Ex. Append. 230, 234.

(cc) West, 273. Man. L. Ex. 2 Ed. 83. Ante, 1056.

(d) 7 Price, 633.

(f) Man. L. Ex. 2 Ed. 83.

king's debtor or accountant: For, by rule of *Hil. 15 Car. I.*(d) "no debts shall be found by inquisition, for the king's debtors or accountants in aid, save such as are originally due to them *bond fide*, without any manner of trust: and he who desireth any debt or debts to be found by inquisition in his aid, shall make oath, that he is justly indebted unto A. one of the farmers of his majesty's customs, &c. and that the same is a just and true debt, originally due to the said A. *bond fide*, without any manner of trust; and that the said debt hath not been put in suit in any other court, and that he hath not received the same, nor any part thereof, except so much, &c.; and that C. is justly indebted to him the said B. originally and *bond fide*, without trust; and that C. is much decayed in his estate, so that unless a speedy course be taken against him, the said debt by him owing is in great danger to be lost." Therefore, if A. be indebted to B. who assigns to C. before the extent issues against C. an extent obtained against A. shall be discharged.(e) And where bonds are taken in the king's name, payable to his farmers, receivers, &c. they shall, before any extents go forth, make oath or certify under their hands to the court, that such bonds are, and at the time of taking the same were, for just and true debts, originally owing to themselves *bond fide*; and that they are not in trust, or for the benefit of any other.(f) It is also a rule,(g) that "no debts without specialty shall be found by inquisition, for debts in aid, unless it be by order upon motion in open court, and except it be for debts due to the king's farmers:" But this latter rule appears to have now fallen into disuse.(h)

An extent in aid is in effect an extent in the *second* degree: and being issued without any previous suit, is always *immediate*. There is indeed a rule,(i) that "no *immediate* process of extent shall be awarded for debts in aid, but in cases of extremity, and upon oath to be taken as before mentioned:"(k) But it is now issued, without any motion in court,(l) on an affidavit of danger. And where a crown debtor is entitled to [*1063] this process, *it is not necessary, by the practice of the court, that he should have the sanction of the revenue solicitors, or of the officers of any of the revenue boards.(a) This, however, being a prerogative process, is always under the care and control of the court of Exchequer, who have a discretionary power over their own rules.(b)

In order to obtain an extent in aid, an extent *pro forma* is sued out against a debtor to the crown;(c) upon which an inquisition(dd) is taken: and if it be found thereby, that another person is indebted to him, the court or a baron, on an affidavit(ee) that the debt is in danger, will grant a fiat, (ff) or warrant for an *immediate* extent in aid.(gg) The extent

(d) § 2. Gilb. Excheq. 174, 5. West, Append. 124, 5. Man. L. Ex. Append. 229, 30.

(e) Bunb. 225.

(f) R. H. 15 Car. I. § 8, in *Seac.* Gilb. Excheq. 179. West, Append. 126. Man. L. Ex. Append. 231. Post, 1067.

(g) R. H. 15 Car. I. § 5, in *Seac.* Gilb. Excheq. 176. West, Append. 126. Man. L. Ex. Append. 230; and see R. M. 3 W. & M. in *Seac.* West, Append. 126. Man. L. Ex. Append. 234. Hardr. 226.

(h) 2 Price, 13. West, 267, S. C.

(i) R. H. 15 Car. I. § 6. West, Append. 126. Man. L. Ex. Append. 230.

(k) *Ante*, 1061, 2.

(l) 3 Price, 75.

(b) Bunb. 134.

(c) Append. Chap. XLII. § 16.

(dd) *Id.* § 18.

(ee) *Id.* § 19. And for other forms of affidavits and *fiats* for extents in aid, see West, Append. 33, &c.

(ff) Append. Chap. XLII. § 20.

(gg) Bunb. 24, 127, 8; 134.

pro forma against the crown debtor does not direct the sheriff to seize his body, goods and chattels, lands and tenements; but omits these words, and directs the sheriff merely to seize his debts, credits, specialties, and sums of money, in whose hands soever they may be.^(h) The affidavit for an extent in aid states first, the debt due to the crown from its debtor, who is the prosecutor of the extent in aid; secondly, the debt due to the crown debtor from his debtor, who is the defendant in the extent in aid; thirdly, that such debt is in danger of being lost, from the insolvency of the defendant; fourthly, that the debt due to him is a debt originally and *bond fide* due to him, without trust; fifthly, that it has not been put in suit in any other court; and lastly, by a late rule of the court of Exchequer,⁽ⁱ⁾ "no *fiat* for an extent in aid shall be granted, unless the party applying for the same, or some person or persons on his behalf, shall make affidavit, that unless the process of extent for the debt due to him from his debtor be forthwith issued, the debt due to the crown from the party applying, will be in danger of being lost to the crown." If the debt to the crown be due by *bond*, the affidavit sets out the penal part of the bond; and usually proceeds to state that the obligor has received money, for which the party is accountable by the condition of the bond.^(k) And it is not necessary, since the statute 57 Geo. III. c. 117, that the affidavit made to obtain the *fiat* of a baron for an extent, should contain any allegations tending to show that the party on whose behalf the application is made, is entitled to use the process on his behalf, or that it should set out the condition of the bond for that purpose: It is sufficient that the baron be satisfied that there is ground for his granting a *fiat* for the extent.^(l)

In the case of a simple contract debt to the crown, a commission^(m) issues out of the court of Exchequer, under which an inquisition is taken, to find the debt. And formerly, by the practice of the Exchequer, the affidavit of the prosecutor of the extent was received [*1064] by the jury on the commission, as evidence of the debt due from him to the crown, and also, on the extent *pro forma*, of that alleged to be due to him from the defendant: But that practice was abolished by a late decision,^(a) in the court of Exchequer; and it is now necessary, that *vivâ voce* testimony should be given to the jury, of the existence of the debt. The commission and extent *pro forma* being taken, with the inquisitions thereon, to a baron of the court, or the chancellor of the Exchequer, he indorses his initials on the commission, which is the warrant for its issuing,^(b) and signs his *fiat* for the extent in aid, at the foot of the affidavit, at the same time.^(c) If the debt to the crown be due by judgment, recognizance, or bond, then of course no commission issues; but an extent *pro forma* is taken out, and the jury, on evidence of the judgment, &c. will find the debt. For the extent in aid there is commonly but one *fiat*; it not being usual to grant a *fiat* for the extent *pro forma*, though that is sometimes done.^(c)

The form of the extent in aid is precisely the same as that of an extent

(A) West, 15; and see *id.* 264, 292. Man. L. Ex. 2 Ed. 78.

(i) R. T. 3 Geo. IV. in *Seac.* 11 Price, 160. Previously to this rule, it was deemed sufficient to swear, that the crown debtor was thereby less able to pay the debt due to the crown.

(k) West, 275, 6. Man. L. Ex. 2 Ed. 82, r.

(l) 9 Price, 311.

(m) Append. Chap. XLII. § 6.

(a) 11 Price, 29.

(b) 3 Price, 278. *Ante*, 1048. In this case a writ of *scire facias* was set aside, for want of an indorsement by a baron, of the warrant on the commission.

(c) West, 288, 9.

in chief in the *second* degree; (d) and under it, the body of the defendant may in strictness be taken in execution, and his lands and tenements, goods and chattels, &c., as under the latter extent. (e) The *capias* clause however, of the writ of extent in aid, is not usually enforced: And where there had been effects seized sufficient to satisfy the debt, the court seemed disposed to order the discharge of a defendant taken under it, on his giving security for his appearance at the return of the writ. (f)

Before the making of the statute 57 Geo. III. c. 117, it had become the practice in many cases, to issue extents in *aid*, for the levying and recovering of larger sums of money than were due to his majesty, by the debtors in whose behalf such extents were issued: (g) and the court of Exchequer having refused to set aside an extent in aid, on the ground that the debt levied under it was of greater amount than the debt sworn to be due from the original debtor of the crown, although the party moved it on the condition of paying the crown's debt; (h) it was enacted, by the above statute, (i) that "upon the issuing of every extent in aid, on behalf of any debtor to his majesty, his majesty's court of Exchequer at *Westminster*, or the chancellor of his majesty's Exchequer, or lord chief baron or other baron of the said court, granting the *fiat* for the issuing of such extent in [*1065] aid shall cause the amount of the debt or sum of *money due or claimed to be due to his majesty, to be stated and specified in the said *fiat*; and that in all cases in which the debt or debts found due to the debtor to his majesty shall be equal to or exceed the debt stated and specified in the said *fiat* as aforesaid, *the amount of the debt so stated and specified in the said fiat* shall be endorsed upon the writ; and the writ so endorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute such writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that in all cases in which the debt or debts found due to the debtor to his majesty, shall be of less amount than the debt stated and specified in the said *fiat* as aforesaid, *the amount of such debt or debts found due to such debtor to his majesty* shall be endorsed upon the writ; and the writ so endorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute the said writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that the money levied, taken, recovered, or received under or by virtue of every such extent in aid so prosecuted and issued, shall be by order of the said court, paid over to and for his majesty's use, towards satisfaction of the debt so due to his majesty as aforesaid. Provided always, that in every case in which the sum produced by the sale of any lands, goods or chattels taken, or by the receipt of any sum of money, by any sheriff or other officer, under any such writ of extent, for the purpose of levying the amount or sum of money endorsed upon the back of the writ, shall be more than sufficient to satisfy the amount of the sum so endorsed upon the writ, such overplus shall be paid into the court of Ex-

(d) *Id.* 292. Append. Chap. XLII. § 21. West, Append. 27, 29.

(e) *Id. ibid.* Ante, 1049, &c.

(f) 3 Price, 94.

(g) See the preamble to the statute, Ante, 375, (a).

(h) 1 Price, 394. West, 273, and see 8 Ves. 241, where the Chancellor decided, that there was no equity for a person against whom an extent in *aid* had issued to be reimbursed by his creditor, on the ground that he had property sufficient to satisfy his debt to the crown, without having recourse to the extent in aid.

(i) § 1, 2.

chequer, together with the said amount endorsed upon the said writ; and the said court shall, upon any summary application or applications, make such order, for the return, disposal, or distribution of any such surplus, or any part or proportion thereof, as to the said court shall appear to be proper." There is also a *proviso* in the statute,^(a) that it shall not prejudice the debtor to the crown, in recovering the remainder of his debt.

And, by another clause of the same statute,^(b) "it shall and may be lawful for any person or persons, imprisoned under or by virtue of any writ of *capias*, on any extent or extents in *aid*, to apply to the barons of his majesty's court of Exchequer in *England* or *Scotland*, or to any baron of the same court in vacation, for his, her, or their discharge, giving one month's previous notice in writing, to the person or persons to whom he, she, or they owed the debt or sum or sums of money for which he, she, or they is or are so imprisoned, at the time such debt was seized under such extent in aid, of his, her or their intention to make such application; and stating in such notice the ground of such application, and an enumeration and description of all and every the property, debts and effects whatsoever, of such person or persons, in his, her, or their own possession or power, or in the possession or power of *any other person or per- [*1066] sons, for his, her, or their use; and the said court, or any such baron in vacation, to whom such application shall be made, is authorized to order such person or persons to be brought before them or him, to be examined upon oath, touching and concerning his, her, or their property and effects; and if such person or persons respectively shall, upon such examination, make a full disclosure of all his, her, or their property and effects, to the satisfaction of the said court or baron, or it shall otherwise appear reasonable and proper to such court or baron, that such person or persons should be no longer imprisoned under such writ, such court or baron may order a writ of *supersedeas quoad corpus* to be issued out of the said court, for the liberation of such person or persons from such imprisonment. Provided always, that no such liberation as aforesaid shall be held or deemed to satisfy or supersede such extent in aid, or any proceedings thereon, except as to such imprisonment as aforesaid, or the debt or debts seized under and by virtue thereof, and for which such person or persons shall be so imprisoned."

There is also, we have seen,^(aa) a clause in the last general insolvent act,^(bb) that "it shall not extend to discharge any prisoner seeking the benefit of that act, with respect to any debt due to his majesty, or to any debt or penalty with which he shall stand charged at the suit of the crown, or of any person, for any offence committed against any act or acts of parliament relative to any branch of the public revenue, or at the suit of any sheriff or other public officer, upon any bail bond entered into for the appearance of any person prosecuted for any such offence, unless three of the commissioners of his majesty's treasury for the time being shall certify under their hands, their consent to such discharge." And, by another clause of the same statute,^(c) "any person, imprisoned under or by virtue of any writ of *capias*, or extent, issued and remaining in force, at the instance or for

(a) § 3.

(b) § 6.

(aa) *Ante*, 395.

(bb) 7 Geo. IV. c. 57, § 74; and see stat. 1 Geo. IV. c. 119, § 40.

(c) § 75, and see stat. 1 Geo. IV. c. 119, § 41. And for the course of proceeding, on the part of an insolvent debtor of the crown, imprisoned under an extent, for the purpose of obtaining his discharge under the latter statute, see 9 Price, 142.

the benefit and reimbursement of any surety or sureties, or other person or persons, or the inhabitants of any parish, ward or place, who shall or may have advanced and paid the debt to the crown, and by reason whereof the commissioners of his majesty's treasury may not be authorized to give their consent as last aforesaid, may apply to the barons of his majesty's court of Exchequer in *England* or *Scotland*, for his or her discharge, giving one month's previous notice in writing to the surety or sureties, or person or persons aforesaid, or to the churchwardens or overseers of the parish, ward or place, at whose instance, or for whose benefit respectively such *capias*, or extent, shall remain in force;" and may proceed thereon, for obtaining his, her, or their discharge, in like manner as is directed by the statute 57 Geo. III. c. 117.(d) But this clause does not [*1067] authorize an application for the *discharge of a prisoner, whose principal has paid part of the debt, and given a warrant of attorney for the residue.(a)

Another mode of the subject's taking advantage of the crown process, for the recovery of his private debts, was by assigning them to the king, for debts due to him.(b) This was allowed at common law; and might have been done, even though the amount of the debts assigned were not ascertained:(c) and after such assignment, the king was entitled to have execution against the body, lands and goods of the debtor.(dd) But this prerogative of the king having been abused by his debtors, for their own private benefit, a rule of court was made, that "no debt shall be assigned and set over to the king, by any person or persons, but such as shall be allowed of, and appointed to be retained, by the lord high treasurer of *England*, chancellor, and barons of the Exchequer, in open court."(e) And, by the statute 7 Jac. I. c. 15, "no debt shall be assigned to the king, his heirs and successors, by or from any debtor or accountant to his majesty, his heirs or successors, other than such debts as did before grow due originally to the king's debtor or accountant, *bond fide*; and that all grants and assignments of debts to the king, his heirs or successors, which shall be had or made contrary to the true intent of that act, shall be void and of no force." A privy seal was also made, in the 12th of *James* the First, declaring that "no debt of record, or other debt or covenant whatsoever, should at any time be assigned, granted or conveyed to him, his heirs or successors, by any debtor or accountant, or other person or persons whatsoever; nor any such assignment allowed, admitted or accepted."(f) This privy seal having determined on the death of *James* the First, a rule of court was made in the succeeding reign,(g) for enforcing the execution of the statute; which directs, that "he who assigneth any debt to the king, shall take an oath, that the debts assigned are just and true debts, and have not formerly been put in suit in any other court; and that the same are his own proper debts, originally due unto him *bond fide*, without any trust; and that he hath not received the same, nor any part thereof, except,

(d) § 6. *Ante*, 1065, 6.

(a) 1 *McClintock* & Y. 268.

(b) 2 *Leon*, 67.

(c) *Id.* 55; and see *Gilb. Excheq.* 167, &c. *Com. Dig. tit. Assignment, D.*

(dd) 4 *Inst.* 115; and see *Com. Dig. tit. Debt*, 15.

(e) *R. M.* 34 & 35 *Eliz. in Scac.* West, Append. 124. *Man. L. Ex. Append.* 228.

(f) West, 258, &c.

(g) *R. H.* 15 *Car. I.* § 1, in *Scac.* *Gilb. Excheq.* 173, 4, 5. West, Append. 124, 5. *Man. L. Ex. Append.* 229.

&c."(*h*) But a debt due to a man *jure uxoris*, is considered as a debt originally due to him, within the meaning of the statute.(*i*) It is also a rule, that "no debts without specialty shall be assigned to the king;" otherwise in case of debts in aid:(*k*) Since which latter rule, assignments of debts to the king have become obsolete.(*l*)

*Having thus far treated of writs of extent, *in chief* and *in aid*, separately, I shall, in what follows, consider them together, and [*1068] show first, the proceedings under them, to enforce payment of the debt due to the crown or its debtor; and secondly, the means of resisting such proceedings, either by the defendant or a third person.

On the return day of the writ of extent, *in chief* or *in aid*, or as soon after as the writ is actually returned, a rule or order is entered on the back of it, by the prosecutor's clerk in court, that "if no one shall appear and claim the property of the goods, &c. mentioned in the inquisition, on or before that day se'nnight, a writ of *venditioni exponas* shall issue, to sell the same:"(*a*) and where there are not *six* days remaining in term, without reckoning *Sunday*, the rule must be given for the *seal* day after term,(*b*) being a day appointed on the last day of each term, at the discretion of the court.(*c*) If no one appear and claim the property, within the time limited by the rule, a *venditioni exponas* issues, to sell the goods seized under the extent. It was formerly holden, that this writ should not issue without motion in court:(*d*) but now it is otherwise:(*e*) though the defendant is entitled, independently of the rule, to notice of an intended sale.(*f*) The *venditioni exponas* commands the sheriff to sell the goods for the best price he can, and at least for the price at which they were appraised, and to have the proceeds of the sale before the barons, to be paid to them for the use of the crown. If the sheriff cannot sell the goods for the appraised price, he should return that fact; and then a *venditioni exponas* issues, directing him to sell for the best price, without reference to the appraisalment.(*g*) And, by the practice of the Exchequer, the sheriff selling under a *venditioni exponas*, is not entitled to make a reduction in his return, either for poundage or *extra* expenses; but should return the whole sum produced by the sale, upon which the court will order it to be paid over, deducting poundage: and he must move the court for any *extra* allowance, to which he may be entitled.(*h*)

The ordinary mode of proceeding for the recovery of *debts* found to be due to the king's debtor, is by *scire facias*;(i) or, on an affidavit of danger, and the *fiat* of the chancellor or one of the barons of the Exchequer, by an *immediate* extent in the *second* degree;(k) And where the debts are small,

(*h*) *Id. ibid.* Ante, 1062.

(*i*) Parker, 271.

(*k*) R. H. 15 Car. I. § 4, in *Scac.* Gilb. Excheq. 176, 7; and see West, Append. 125. Man. L. Ex. Append. 230, where the word *otherwise* is omitted.

(*l*) West, 255.

(*a*) West, 174. Man. L. Ex. 2 Ed. 61; and see Gilb. Excheq. 170.

(*b*) Man. L. Ex. 2 Ed. 61.

(*c*) *Id.* (*d*); and see 2 Fowl. 4, 142. West, 175.

(*d*) Bunb. 45.

(*e*) West, 219.

(*f*) 2 Price, 155.

(*g*) West, 220.

(*h*) 1 Price, 205. 4 Price, 131; and see West, 220. Man. L. Ex. 2 Ed. 62. Post, 1072.

(*i*) Ante, 1058. And for the proceeding in *scire facias*, for debts due to the crown, see the next chapter.

(*kk*) Bunb. 24, 127, 134.

the court may order a receiver to collect them, and pay them to the deputy remembrancer. (U)

If the produce of the goods sold under the extent be not sufficient to pay the debt, the court will make an order for sale of the debtor's [*1069] lands, *under the statute 25 Geo. III. c. 85. Before the making of this statute, the crown it seems could not have sold the lands of its debtor; but the mode of levying the debt was by *levari facias*, under which the sheriff levied the rents and growing profits of the lands, until it was satisfied. (a) But now, by the above statute, (b) "the court of Exchequer is authorized, on the application of his majesty's attorney general in a summary way, by motion to the same court, to order that the right, title, estate, and interest of any debtor to his majesty, his heirs and successors, and the right, title, estate and interest of the heirs and assigns of such debtor, in any lands, tenements or hereditaments, which have been or shall thereafter be extended, under and by virtue of any such writ of extent or *diem clausit extremum* as therein mentioned, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold, in such manner as the said court shall direct: And when a purchaser or purchasers shall be found, the conveyance of the lands, tenements, or hereditaments, so decreed to be sold, shall be made to the purchaser or purchasers, by his majesty's remembrancer in the said court of Exchequer, or his deputy, under the direction of the said court, by a deed of bargain and sale, to be enrolled in the same court: And from and after the making of such conveyance, and the enrolment thereof as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and assigns, shall have, hold, and enjoy the lands, tenements and hereditaments therein comprised, for his and their own respective use and benefit, not only against the extent of the crown, but also against such debtor of the crown, or the surety or sureties for such debtor, and all persons claiming under such debtor, or the surety or sureties, unless by a title paramount to, and available in law against such extent as aforesaid: And all moneys which shall become payable from any such purchaser or purchasers as aforesaid, shall be paid, accounted for, and applied towards discharge of the debt due to the crown, and of all costs and expenses which shall be incurred by the crown in enforcing the payment of such debt, in such manner as the said court of Exchequer shall from time to time order and appoint: And if, after payment of the whole debt to the crown, and of all costs and expenses incurred in enforcing the payment thereof, there shall be any surplus of the moneys arising from any such sale, the said surplus shall belong to the same person or persons as would be entitled to the lands, tenements or hereditaments sold, if there had not been a sale thereof, and shall accordingly be paid to such person or persons, under the order and direction of the said court of Exchequer, upon motion or petition to the said court, to be made upon such notice to the crown, and to be supported by such affidavits or other proofs, as to the said court shall from time to time seem just and reasonable." On this statute an [*1070] application may be made *to the court, by or on behalf of the attorney general, for sale of the lands; it not being necessary that the application shall be made personally by the attorney general himself. (aa)

(U) *Id.* 293.

(a) Gilb. Excheq. 170, and see West, 220, 21.

(aa) 1 Youngs & J. 256.

(b) § 1.

But no order will be made on such application, where it appears that goods have been seized under the extent, sufficient to pay the debt.^(bb) And where the crown debtor is entitled to an equity of redemption, the prosecutor must give the mortgagee notice of his intended application for an order to sell the estate, subject to the mortgage. Under this order, the sheriff ought to sell the equity of redemption only:^(c) And where he had sold the whole estate, without reference to the mortgage, the court refused to order payment of the mortgage out of the purchase money, without the consent of the mortgagor; but directed a reference to the deputy remembrancer, to ascertain what was due on the mortgage.^(c) It is also sometimes referred to this officer, to inquire into a claim of dower,^(d) and to take an account of the sum due to the crown, for principal and interest, &c. But the statute 25 Geo. III. c. 85, does not make the order of the court, to sell the real property of a crown debtor, an equitable proceeding, so as to subject it to the immediate appellate jurisdiction of the House of Lords.^(e)

The sheriff's right to *poundage*, on an extent, principally depends on the statute 3 Geo. I. c. 15, previous to which the sheriff, it is said,^(f) was not entitled to any fee for executing an extent; but now, by that statute,^(g) all sheriffs, who shall levy any debts, duties, or sums of money, except *post fines* due to the king's majesty, his heirs or successors, by process to them directed upon the summons of the pipe or green wax, or by *levari facias* out of the court of Exchequer, shall from time to time, for their care, pains and charges, and for their encouragement therein, have an allowance upon their accounts of *twelve pence* out of every *twenty shillings*, for any sum not exceeding *one hundred pounds*, so by them levied or collected, and the sum of *six pence* only for every *twenty shillings* over and above the first *one hundred pounds*; and for all debts, &c. except *post fines* due to his majesty, his heirs and successors, by process on *feri facias* and *extent*, issuing out of any of the offices of the court of Exchequer, the sum of *one shilling and sixpence* out of every *twenty shillings*, for any sum not exceeding *one hundred pounds*, so by them levied or collected, and the sum of *twelve pence* only for every *twenty shillings* over and above the first *one hundred pounds*: Provided always, such sheriff shall duly answer the same upon his account, by the general sealing day of such term in which he ought to be dismissed the *court, or in such time to [*1071] which he shall have a day granted to finish his said accounts, by warrant signed by the lord chief baron, or one of the barons of the coif of the said court for the time being, and not otherwise. On this statute, the sheriff is entitled to his *poundage*, on a levy made under an extent in *aid*,^(a) whether the debt be paid to him, or to the prosecutor of the extent:^(b) And if the sheriff seize under an extent, and before a *venditioni exponas* the debt be paid to him, and he pay it over to the prosecutor of the extent,

(bb) 3 Price, 40. West, 187, 225, S. C. Man. L. Ex. 2 Ed. 63, 4. Ante, 1044, 5.

(c) 1 Price, 207. 2 Price, 67; and see West, 225, 6. Man. L. Ex. 2 Ed. 64.

(d) 2 Price, 71; and see Man. L. Ex. 2 Ed. 64.

(e) 11 Price, 643.

(f) West, 231. Man. L. Ex. 2 Ed. 65. Chit. Prærog. 312. But see Jones's Index to the Exchequer Records, tit. *Sheriff*, by which it seems, that before the statute 3 Geo. I. the sheriff was entitled to poundage on an extent.

(g) § 3; and see 1 Chit. Rep. 295. 6 Moore, 338. 3 Brod. & Bing. 143, S. C. 7 Moore, 518, 520, (a).

(a) Parker, 177.

(b) 3 Anstr. 718, *in notis*.

his poundage shall be allowed him. *(cc)* But sheriffs are not entitled to poundage, on *money* seized in the crown debtor's possession, under an extent against him; nor on money paid by the sureties of a crown debtor, who has been arrested on the crown process, in order to obtain the release of his person. *(dd)* And though the whole debt be paid to the prosecutor, it seems that the sheriff shall have poundage only on the amount levied: *(ee)* And where the sheriff, besides his poundage, charged *five per cent.* for an auctioneer to sell malt, the charge was disallowed. *(f)* If the sheriff, however, has been put to any extraordinary trouble in keeping possession of the defendant's goods, &c. he may apply to the court for a rule to show cause, why it should not be referred to the deputy remembrancer, to ascertain whether any and what allowance should be made him by the prosecutor of the extent, beyond the poundage: *(g)* But he is not entitled, on the rule being made absolute, to the costs of the application, or of the reference. *(g)* And where a sheriff had retained for several years a sum of money in his hands, the balance of the produce of effects of a crown debtor, seized by him and sold under an extent, after the crown debt had been satisfied, claiming himself a lien thereon for poundage, &c.; the court ordered, that he should pay interest on the amount of such balance, to the parties from whom he had withheld it, from the time when the court had determined, on a former occasion, that the claim of the sheriff was unfounded, notwithstanding which determination he had continued to keep the question before the court; and that although the sheriff should not have made interest, or any use or advantage of the money in the mean time; the court proceeding wholly on the ground of the injury done to the party entitled to the money. *(h)*

By the above statute it is declared, that "no sheriff, &c. shall take, ask or receive, any fee, gratuity or reward, of the person or persons liable to pay any debts, duties or sums of money, to his majesty, or of any other person, for or upon pretence of levying or collecting the same, except the sum of *four pence* only for an acquittance, upon pain of being deemed guilty of extortion, and forfeiting for every such offence, treble damages and costs to the party aggrieved, and double the sum so extorted; [*1072] to be ordered, decreed and given by the barons of the *Exchequer upon complaint and proof of such extortion, in such short and summary way and method, as to them shall seem meet; provided the conviction be had and made within *two* years after the offence committed." *(a)* The sheriff therefore is entitled to poundage, in the cases mentioned in the above statute, not from the defendant, but from the crown, or prosecutor of the extent; and he is not to levy poundage under it, in addition to the debt, unless it be secured by a penalty; but must levy the amount of the debt merely, and is to have his poundage out of the debt so levied; the words of the statute being, "out of the sum levied:" and therefore, if poundage be levied in such case by the sheriff, *(b)* or received by the prosecutor of the extent or his attorney under a compromise, in order to stay proceedings, *(c)* the court will order it to be refunded. But where the debt

(cc) Parker, 177; and see 5 Durnf. & East, 470.

(dd) 8 Price, 587. *Ante*, 1040, 1057.

(ee) West, 239.

(f) 2 Anstr. 412.

(g) 4 Price, 131; and see 1 Price, 205. 7 Moore, 518, 520. *(a)* *Ante*, 1068.

(h) 11 Price, 557.

(a) § 1.

(b) 1 Price, 448.

(c) 5 Price, 189.

is secured by a penalty, there poundage may be levied in addition to the debt, so that the levy do not exceed the penalty: *(d)* And whenever the crown is entitled to levy its costs and charges, and is bound by the statute 3 Geo. I. c. 15, to allow the sheriff poundage, in such case poundage may be levied by the crown, as an *item* of such costs and charges. *(e)* When two extents issue into different counties for the same debt, and both sheriffs seize goods, and the debt is paid to one of the sheriffs before a *venditioni exponas* to either, that sheriff to whom the money is paid shall have full poundage: *(f)* But in such case, when the debt is paid to the officers of the crown immediately, the poundage shall be apportioned between the sheriffs. *(g)*

Having thus shown the different modes of proceeding for the recovery of debts, at the instance and for the benefit of the crown or its debtor, it will next be proper to state the means of resisting such proceedings, either by the defendant or a third person. These means are first, by *motion*, or application to the court, to set aside the extent, and proceedings under it, or for other purposes; secondly, by *petition* of right; thirdly, by *monstrans de droit*; fourthly, by *traverse* of office; and fifthly, by *demurrer*.

Motions to set aside extents are of two kinds: first, on account of some defect apparent on the face of the proceedings; and secondly, on the ground of some objection which does not appear thereon, but must be verified by affidavit. *(h)* If the proceedings on record are bad on the face of them, the defendant, though he might demur, may also move to set them aside; *(i)* as if the extent be founded on a debt which appears on the face of the proceedings not to have been due at the time of the caption of the *inquisition, *(a)* or the inquisition itself is argumentative, so [*1073] that no certain traverse can be taken thereon, *(b)* or the property found is not by law extendible, *(c)* &c.: And it is of course generally advisable to move in the first instance, instead of demurring; because if the motion be decided against the claimant, he may still plead; whereas, if after argument on demurrer, the point should be decided against him, the judgment is usually final. *(dd)*

When a motion is made to set aside an extent, for some matter not apparent on the face of the proceedings, such matter must be verified by affidavit: *(ee)* And if any party besides the defendant himself move to set aside the proceedings, such party must in his affidavit show his title to the property seized. *(ff)* If the prosecutor's affidavit be defective in the statement of the defendant's insolvency, the defendant may move to set it aside; *(gg)* and he has no other remedy in this case, as the affidavit constitutes no part of the record, and is therefore not open to a traverse or demurrer: *(gg)* But where the affidavit

(d) 2 Anstr. 369.

(e) 3 Price, 280. West, 230, 236, S. C.

(f) 1 Anstr. 279. 2 Anstr. 358. 3 Anstr. 717. Wightw. 117.

(g) Anstr. 718, *in notis*. And see further, as to the apportionment of poundage between the preceding and subsequent sheriff, stat. 3 Geo. I. c. 15, § 9, and as to the poundage in general on extents, see West, 231, &c. Man. L. Ex. 2 Ed. 65, &c.

(h) West, 180.

(i) *Id.* 181.

(a) *Rex v. Heath*, Hughes, 174.

(b) 3 Price, 269.

(c) Hardr. 226, and see West, 181. Man. L. Ex. 2 Ed. 112.

(dd) West, 182.

(ee) *Id.* *ib.*, and see 7 Price, 636.

(ff) West, 183.

(gg) 3 Price, 38. West, 53, 180. West, Append. 51, S. C.

is clear and express, no counter affidavits can be produced, for the purpose of explanation or contradiction. *(h)* So, if a party procure himself to become a debtor to the crown, for the purpose of suing out an extent in aid, *(i)* or it be sued out in breach of good faith, *(k)* the extent may be set aside on motion: And where an extent has been taken out, under circumstances in which the practice of the court does not authorize the issuing of prerogative process, the objection must be made by motion; for if pleaded and put in issue, the court will not permit the question to be tried. *(l)* But if two writs are issued, one for a joint debt and the other for a separate debt, in the same sum, on inquisitions finding a joint debt and a separate debt in different sums, the court will not set them both aside, on the ground of the irregularity of one of them, though confessedly a mistake; but they will support that which can be shown to be correct: *(m)* And where a joint debt has been found, the death of one of the debtors, in the interval between the *fiat* and extent, does not vitiate the proceedings. *(m)*

The party grieved by the extent may move to set it aside, before he enters his appearance and claim: *(n)* but the motion for that purpose should regularly be made before he has obtained time to plead: *(o)* and the writ ought to be brought into court by the officer, before the motion is made, when any objection is taken which arises upon the face of the extent. *(p)* This motion may be made either in term time, on any day except *Monday* or *Thursday*, or at the sittings after term, (now usually holden in [*1074] **Gray's Inn Hall*), which are always appointed by the court on the last day of every term except *Easter* term, when, on account of the shortness of the vacation, *Thursday* next after the last day of that term is always fixed as a day for motions only. *(a)* In term time, motions in revenue matters are commonly heard on *Fridays* and *Saturdays*. *(b)* It is usual to give *two* days' previous notice of motion to set aside an extent; *(c)* but this is not necessary when the party moves for a rule to show cause merely: *(d)* and when the necessity for applying to the court is urgent, and the term is drawing to a close, the court will sometimes direct that short notice for the next day be accepted. *(e)* When a rule *nisi* for setting aside an extent in chief has been regularly argued and confirmed, the court will not grant an application, on the part of the crown to have it re-argued. *(f)*

Besides the motions to set aside the extent, there are others which are sometimes necessary to be made by the defendant, or claimant; as to pay the debt for which the extent issued; or that the sheriff, who has levied money, shall pay the debt out of it, into the receipt of the Exchequer, and that on such payment an *amoveas manus* do issue, *(g)* &c. This may, it seems, be done at any time during the pendency of the extent. *(g)* And when goods of the debtor have been seized under an extent, to an amount, according to the appraisement, beyond what is sufficient to satisfy the debt due to the crown, the court on motion will grant an *amoveas manus*, on the

(h) *Rex v. Lawton*, M. 57 Geo. III. West, 180.

(i) *Rex v. Huxley*, M. 1687. West, 295, 6, 7; but see Bunb. 127.

(k) West, 297; but see 9 Price, 525.

(l) 4 Price, 11.

(m) 1 Price, 395.

(n) 3 Price, 280.

(o) *Id.* 38; and see West, 184. Man. L. Ex. 2 Ed. 114, 15.

(p) 1 Price, 395.

(a) 1 Fowl. 284.

(b) Man. L. Ex. 2 Ed. 118.

(c) West, 173.

(d) *Rex v. Collingridge*, *id. ibid.*, and see Man. L. Ex. 2 Ed. 118.

(e) 1 Price, 117; and see Parker, 89.

(f) M'Clel. 683.

(g) West, 187; and see 7 Price, 636.

defendant's paying into court, or the receipt of the Exchequer, the debt without the costs.^(h) So, when the sheriff has collected debts under the extent, which is often done, (though the sheriff, as before observed,⁽ⁱ⁾ has no authority by the writ to do so,) it is sometimes moved, that he shall pay such sums into the hands of the deputy remembrancer, to be laid out *pendente lite* in the funds, or in Exchequer bills, or in such way as the court shall direct.^(k) And where property, and books of account, had been seized under an immediate extent in chief, issued against a collector of taxes and his partner in trade, for a debt to the crown, and a claim had been entered by the assignees of the defendants, who had become bankrupts; the court held, that the assignees were entitled to an inspection and copies, &c., of the books, previous to the trial of the issue between them and the crown.^(l) But where an extent in chief had been issued for the recovery of a sum of money, being the proceeds of assessed taxes for part of a year, deposited by a collector with a banking house which had stopped payment, and such sum was partly composed of balances left in the hands of the collector, upon his several monthly payments to the receiver general, the court refused to refer it to the king's remembrancer, to see in effect whether the poundage upon all those payments ought not to be deducted from the sum mentioned in the extent, as being the collector's, *and not the king's money; upon the grounds, first, that the [*1075] application was without precedent: secondly, that the collector's title did not accrue till the completion of his collection, and payment of his entire assessment: thirdly, that the same did not come within the jurisdiction of the court, as a debt or liquidated demand, but was subject to the control of the lords of the treasury, who have all the requisite accounts before them, as an equitable claim to be adjusted, or wholly disallowed, according to circumstances: and fourthly, that it would be impossible for the master, without the accounts, to see whether ultimately the collector would have any claim.^(a)

By the common law, whenever the king was in possession by virtue of an inquisition, the subject was put to his *petition* of right, unless the right of the party appeared in the inquisition, and then at the common law he might have had a *monstrans de droit*: but when the inquisition only entitled the king, and he was obliged to bring a *scire facias* against the party to recover possession, there at common law the party might have *traversed* the king's title; for in that case, the king being in nature of a plaintiff, the party in possession might by pleading have put him to prove the title upon which he would recover. But when the king was in possession by virtue of the inquisition, there the party who would get that possession from him was in nature of a *plaintiff*, and therefore had no method of proceeding but by way of petition; for no action could lie against the king, because no writ could issue, as he could not command himself. This remedy by petition, however, being attended with great delay and charge to the party grieved, the statutes of 34 Edw. III. c. 14; 36 Edw. III. c. 13,^(b) and 2 & 3 Edw. VI. c. 8, were made, to enable the subject to traverse inquisitions, or otherwise to show his right. Thus were traverses and *monstrans*

(h) 3 Price, 40.

(i) *Ante*, 1057.

(k) 1 Price, 299; and see West, 186, 7.

(l) 2 M'Clel. & Y. 33.

(a) M'Clel. 681.

(b) By this statute, if an office taken for the king be false, the party aggrieved thereby may in all cases traverse the fact found, though the act speaks of offices taken before *assessors* only. 4 Co. 58, a. Finch L. 323, &c. Man. L. Ex. 2 Ed. 87.

de droit introduced, in lieu of petitions; (c) the only difference between them being, that in a traverse, the title set up by the party is inconsistent with the king's title found by the inquisition, which he therefore must traverse; in a *monstrans de droit*, he confesses and avoids the king's title. But in both cases he must make a title in himself: and if he cannot prove his title to be true, although he be able to prove that the king's title is not good, it will not serve him. (d) In traverse at common law, however, the party is in nature of a *defendant*, and therefore need not set up any title in himself. (e)

The method of proceeding at common law by *petition* was, that the king's title being found by inquisition, the party petitioned to have an inquest of office, to inquire into his title: If his title were found by such office, then he came into court, and traversed the king's title: So that the record began by setting out the first inquisition found for the [*1076] king, and *after that, the return of the inquisition taken upon the petition, and then went on with "*Et modo ad hunc diem venit*," and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *monstrans de droit* given by the statutes, begin by stating the inquisition, and then go on, "*Et modo ad hunc diem venit*," &c. (a) And from this manner of pleading, some have considered the party traversing as *defendant*: (b) but when it is considered that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition, and that the judgment for the party is an *amoveas manus*, and the judgment against him a *nil sapiat*, it seems clear he ought to be deemed a *plaintiff*, and as such is capable of being nonsuited. (cc)

The first step to be taken on a traverse, by the party grieved, is to enter his appearance and claim of property on the back of the writ, if possible, within the time limited by the rule to appear and claim. (dd) The appearance is entered either by the defendant or claimant in person, or in the name of one of the sworn clerks of the king's remembrancer's office, in which the return is filed: (dd) The claim is made in the court into which the inquisition is returned; and though a common law proceeding, the traverse is taken in the remembrancer's office, on the equity side of the Exchequer, (ee) from which extents commonly issue. (f) In cases of bankruptcy, it is usual and advisable to enter a claim in the name of the bankrupt, as well as in the names of the assignees. (g) And by the statute 6 Geo. IV. c. 108 § 89, claims to goods seized for any cause of forfeiture, and returned into the Exchequer, are to be entered in the name of the real owner: and, by § 102, the *onus probandi* of payment of duties, &c. lies on the claimer. Where the assignment of a bankrupt's estate was not made until after the expiration of the rule to appear and claim, the court allowed a claim to be entered, upon a motion made in the following term. (h)

(c) 3 Hen. VII. 3.

(d) Staundf. Prærog. c. 20, p. 65. 2 Salk. 448.

(e) 2 Salk. 447. 6 Mod. 32, S.O.

(a) The only difference between the pleading is a traverse and *monstrans de droit* is that in the one, the party *pro placito dicit*, in the other, *pro placito et monstrationse juris dicit*.

(b) 2 Str. 1208.

(cc) 2 Salk. 448. 4 Hen. VI. 12; and see Bul. Ni. Pri. 215, 16. 3 Blac. Com. 256. Man. L. Ex. 2 Ed. 84, 86, 7, 8. 2 Madd. Chan. 722, 726, 733, &c. Chit. Prærog. 339, &c.

(dd) Man. L. Ex. 2 Ed. 90, 91.

(ee) 2 Str. 749. Ante, 1049.

(f) Man. L. Ex. 2 Ed. 96.

(g) Id. 94, 5. West, 176, 7.

(h) 5 Price, 39. Man. L. Ex. 2 Ed. 95, S. C.

So, where the claim was omitted to be entered by the mistake of the clerk in court,(i) and in other cases, when the delay is satisfactorily accounted for by affidavit, the court will grant relief.(k) And the court will extend the time for assignees to appear and claim, when a question, raised by motion to set aside proceedings under an extent, is pending and remains to be disposed of.(l) But where a defendant on an extent had moved to quash it, on facts stated by affidavits which were *satisfac- [*1077] torily answered, whereupon a *venditioni exponas* issued, the court would not afterwards permit him to enter a claim, and traverse the inquisition.(aa)

If an appearance and claim be entered, within the time limited by the rule, a rule to plead is given, under the entry of the appearance and claim,(b) on the back of the writ. This is a *four day rule*; on the expiration of which the defendant or claimant may obtain further time, upon a motion of course, requiring in the first instance only counsel's hands.(c)

Pleas to extents are either by the *defendant*, or party against whom the extent issued, or by *third persons*; and they are of two kinds: first, pleas which go in denial or discharge of the *debt*, and which can be pleaded only by the defendant, or those claiming under him; and secondly, pleas which do not go to the discharge or denial of the debt, but are pleaded to the *extent* by third persons, who claim the goods, &c. which have been seized as the defendant's, and which pleas go to the property of the goods, &c. seized under the extent.(d) The common pleas by the defendant to an extent; in *chief* or in *aid*, are *non est factum*, or performance,(e) if the debt be founded on a bond; or if it be claimed on a simple contract, *non indebitatus*, or that the defendant is not indebted to the crown or its debtor, as alleged in the inquisition: Under this latter plea, the defendant may give in evidence any matter in denial or discharge of the debt, in like manner as under the plea of *nil debet*, in any action of *debet* on a simple contract:(f) And on an extent in *aid*, the defendant may negative the debt to the crown, as well as that which is found to be due to the king's debtor.(g) But it is sufficient, in an inquisition on an extent in *aid*, that the prosecutor of the extent be found to be indebted to the crown generally, at the time of taking the inquisition, without stating the amount of the debt, or the time and manner of its accrual.(h) Also by the statute 33 Hen. VIII. c. 39, § 79, "if any person, of whom any debt or duty is demanded or required, shall allege, plead, declare, or show good, perfect and sufficient cause and matter in law, reason or good conscience, in bar or discharge of the said debt or duty, or why such person ought not to be charged or chargeable with the same, and the same cause or matter so alleged, &c. be sufficiently proved, that then the court shall have full power and authority to accept, adjudge and allow the same same proof, and wholly and clearly to acquit and discharge the person so impleaded, &c." From this clause, the statute 33 Hen. VIII. is frequently called in the books, the

(i) 3 Price, 38, n. *Rex v. Aspinall*, West, 178; and see 5 Price, 576. 1 M'Clel. & Y. 173.

(k) Man. L. Ex. 2 Ed. 95; and see 8 Price, 668.

(l) 11 Price, 29.

(aa) 4 Price, 323; and see 7 Price, 633, 636.

(b) Man. L. Ex. 2 Ed. 95.

(d) West, 193.

(c) *Id.* 96. West, 193.

(e) Trem. P. C. 584, 608.

(f) *Ante*, 648, 9; and see West, 199, 200. Man. L. Ex. 2 Ed. 99.

(g) Man. L. Ex. 2 Ed. 99.

(h) 5 Price, 614.

statute of equity : (i) And, under this statute, matter in equity may be pleaded to the inquisition, (k) or brought before the court by motion, (l) or bill in equity. (m)

*On an extent in *chief*, the defendant cannot plead a set off; (a) [*1078] nor the statute of limitations, or bankruptcy; nor, on a bond, payment *after* the day mentioned in the condition; (bb) nor any other plea given by statute, in which the crown is not named. (cc) But, on an extent in *aid*, the defendant may plead any matter which would be a good defence against his creditor; as a set off of money due from the crown debtor to himself, (d) or, as it seems, the statute of limitations, (e) or bankruptcy. (f)

In pleas by a *third* person, it is not sufficient for the party pleading to traverse the title of the crown merely, that is to say, that the crown debtor was not possessed or seized, at the time when, &c. in manner and form as in the inquisition is alleged; but he must also set out a title in himself; (g) And when the assignees of a bankrupt claim goods seized under an extent against the bankrupt, upon the ground that the assignment was prior to the *teste* of the extent, if they style themselves assignees, they must set out all the proceedings under the bankruptcy: but it is not necessary for them to call themselves assignees at all; it being sufficient for them to say that they were possessed of the goods at the time of the *teste* of the extent, for the property of the goods draws to it the possession in law. (h) But it is nevertheless usually advisable for the assignees in such case to claim as assignees, and to set out their whole title through the bankruptcy; for if they were merely to state themselves to be possessed of the goods, &c. traversing the defendant's possession, and the crown were to take issue, as it most probably would in that case, upon the assignees' possession, they must prove their whole title through the bankruptcy; whereas, if they set out their title through the bankruptcy, it is not probable that the crown would traverse all parts of their title. (ii) The defendant, or party claiming the goods, &c. can plead but *one* plea to the whole inquisition; the statute 4 Ann. c. 16, § 7, which gives the liberty of pleading several matters, being holden not to extend to the crown: (kk) But he may plead several pleas to distinct parts of the inquisition; to traverse as to part, and demur to the residue. (ll)

When the inquisition finds a bad title for the crown, the claimant may *demur* in law upon the record without traversing; (mm) or he may move the court on that ground to set it aside. (n)

The defendant, or party pleading to an extent, cannot rule the crown to

(i) West, 201.

(k) 7 Co. 19. Hardr. 176, 502. West, 201, &c.

(l) 1 Price, 96; and see 1 Younge & J. 189.

(m) 7 Co. 20. Lane, 51; and see 1 Price, 216. West, 209. Man. L. Ex. 2 Ed. 102. 1 Younge & J. 169.

(a) Hughes, 204.

(bb) 1 Price, 23.

(cc) West, 199; and see 3 Price, 269. Man. L. Ex. 2 Ed. 97, 8.

(d) Hughes, 204. West, 248, 9; and see 3 Price, 269. 4 Price, 50. Man. L. Ex. 2 Ed. 99, 100.

(e) 6 Price, 24.

(f) West, 249.

(g) Staundf. Prærog. 63, a. West, 210. Man. L. Ex. 2 Ed. 96. 1 Younge & J. 249.

(h) 2 Wms. Saund. 5 Ed. 47, n.

(ii) West, 211. Man. L. Ex. 2 Ed. 104, 5.

(kk) *Ante*, 655. West, 210, 11, 12. Man. L. Ex. 2 Ed. 105.

(ll) Trem. P. C. 582.

(mm) 50 Ass. 322, pl. 1 Bro. Abr. tit. *Demurrer in Ley*, 25; and see 3 Price, 38. West, 215. Man. L. Ex. 2 Ed. 106.

(n) *Ante*, 1073, 3.

reply:(o) But when the attorney general will not reply or demur in a reasonable time, the court will order judgment to be entered for the *defendant, as if the plea were confessed, unless the attorney [*1079] general, upon being attended, will either enter a *nolle prosequi*, or proceed in the cause.(aa) The defendant, however, should first apply to the attorney general to proceed;(b) and if he will not do so, the court may give judgment, as if he had confessed the plea.(c) Upon extents in aid, the practice is to move for judgment, if the crown do not reply before the end of the *third* entire term after plea filed.(dd) If the attorney general proceed, he either replies or demurs to the plea; and when the king is in the situation of a defendant, he may reply in abatement or in bar;(ee) or in abatement as to part, and in bar as to the residue.(ee) A replication in bar is *general* or *special*; the former denying one or more of the allegations in the plea, the latter confessing and avoiding them, or concluding the defendant by matter of estoppel:(f) And, in replying to the plea, the attorney general may either traverse the title of the party pleading, or maintain the inquisition, at his election.(g) The replication must not be inconsistent in any material point, with the extent,(h) or inquisition,(i) which it is its office to support; as such a replication would be a departure:(k) But if the plea allege several facts, the king by his prerogative may traverse them all, though a common person ought to traverse but one;(l) or he may confess and avoid, and traverse also;(m) And if the king have several titles traversed, he may maintain all or only one of them at his election.(n) The replication, whether general or special, should be signed by the attorney general, all the proceedings being in his name;(oo) or if his office be vacant, by the solicitor general.(p)

When the replication or demurrer is filed, the defendant must rejoin within *four*, or join in demurrer within *six* days.(q) The rule to rejoin or join in demurrer, like the rule to plead, is entered on the back of the writ of extent.(r) After replication, the king by his prerogative may waive it, and reply *de novo*, before issue joined, in the same or another term:(s) or he may waive his demurrer to the defendant's plea, and reply to issue.(t) So, if the defendant demur, the crown, instead of joining in demurrer, may traverse, or confess and avoid, the inducement.(u) But the defendant *is not allowed to change his plea, or waive it and plead the [*1080] general issue, without the consent of the attorney general.(aa) So,

(o) West, 213. Man. L. Ex. 2 Ed. 111.

(aa) Parker, 50; and see 3 Anstr. 753. Man. L. Ex. 2 Ed. 111.

(b) 1 M'Clel. & Y. 361.

(c) Parker, 50; and see 3 Anstr. 753. Man. L. Ex. 2 Ed. 111. *Id.* (d). 1 Younge & J. 509.

(dd) Man. L. Ex. 2 Ed. 111.

(ee) *Id.* 107.

(f) *Ante*, 677.

(g) Staundf. Prærog. 65, a. Hardr. 455. Vaugh. 64.

(h) Trem. P. C. 594.

(i) Bro. Abr. tit. *Traverse d'Office*, pl. 20.

(k) Trem. P. C. 594; and see 2 Wms. Saund. 5 Ed. 84. (1.) Man. L. Ex. 2 Ed. 107.

(l) Sav. 19. Com. Dig. tit. *Prærogative*, D. 75, 85; and see West, 213, 14. Man. L. Ex. 2 Ed. 107, 8.

(m) West, 214, (u).

(n) Staundf. Prærog. 65, a. Com. Dig. tit. *Prærogative*, D. 85.

(oo) West, 214. Man. L. Ex. 2 Ed. 111.

(p) 4 Bur. 2572.

(q) R. temp. Jac. II. Man. L. Ex. Append. 232.

(r) West, 214. Man. L. Ex. 2 Ed. 111.

(s) 2 Rol. Rep. 41.

(t) Cro. Car. 347. Vaugh. 65. Hardr. 455. Plowd. 322, a.

(u) T. Jon. 9, 10. Co. Ent. 402. Man. L. Ex. 2 Ed. 108.

(aa) Cro. Car. 347. 2 Rol. Rep. 41.

after issue joined, the king may waive the issue and demur,^(b) or take another issue, in the same term, though not in another term.^(c) But if the king join issue upon a traverse of his title, he cannot it seems afterwards waive it, to traverse the title of the defendant;^(d) at least this cannot be done after the term has expired, and the jury process issued:^(e) Neither can he waive the issue, after verdict.^(ff)

Issue in fact being joined, the cause may be tried either at bar or *nisi prius*:^(gg) And the king may try it in what country he pleases.^(hh) In practice, however, it is always tried at *nisi prius* or *Middlesex*:⁽ⁱⁱ⁾ And if one of the defendants plead to issue, and another demur, the king may either bring on the trial or demurrer first, as he pleases.^(kk) The king cannot be compelled to proceed to trial: And laches not being imputable to him,^(l) there can be no trial by *proviso*, when the king is a party;^(m) but in cases of great delay, the court on motion will it seems give judgment for the defendant or claimant, if the attorney general will not proceed in a reasonable time.⁽ⁿ⁾ The notice of trial is of course always given *by*, and cannot be given to the crown.^(o) And when the defendant or claimant resides more than *forty* miles from *London*, he is entitled to *ten* days' notice of trial.^(p) In other cases, he seems to be in strictness entitled to six days' notice only.^(p)

Notice of trial being given, the record is entered, and cause called on: And at the trial, the defendant or claimant, being considered as a *plaintiff*,^(q) may be non-suited:^(r) but the nonsuit on a traverse is peremptory,^(s) at least after issue joined.^(t) And when the traverse offers to demur upon evidence given for the king, the counsel for the crown cannot be compelled to join in demurrer:^(u) The court in such case, however, may direct the jury to find the special matter.^(x)

[*1081] *The *verdict* on a traverse, which may be either general or special,^(a) is confined to the points in issue; the jury having no damages or costs, nor any other collateral matter, to inquire into;^(bb) And the *postea* being returned, a rule for judgment is given, which is a *four* day rule, when there are so many days between the trial and end of the term; otherwise the rule is for the *last* day of term.^(cc) Before the expiration of the rule, the unsuccessful party may move in arrest of

(b) Staundf. Prærog. 65, b. Plowd. 332, a. Hardr. 455. Vaugh. 65.

(c) 13 Edw. IV. 8, a. Staundf. Prærog. 65, b. Vaugh. 55.

(d) Semb. Vaugh. 64. 1 Mod. 276. 13 Edw. IV. 8, a. pl. 1.

(e) *Id. ibid.* Man. L. Ex. 2 Ed. 108.

(ff) Hardr. 455; and see Com. Dig. tit. *Prærogative*, D. 85. West, 213, 14. Man. L. Ex. 2 Ed. 108.

(gg) Sav. 2. Cro. Car. 348, 9. *Ante*. 747.

(hh) 1 Sid. 412. 1 Vent. 17. Parker, 189; and see Cro. Car. 348. 2 Price, 113. *Ante*, 753.

(ii) West, 216. Man. L. Ex. 2 Ed. 120. *Ante*, 753.

(kk) 1 Str. 266.

(l) Co. Lit. 57, b.

(m) 6 Mod. 247; and see F. N. B. 241, A. Plowd. 243, b. 2 Leon. 110, pl. 144.

(n) Parker, 51; and see 3 Anstr. 753. West, 216. Man. L. Ex. 2 Ed. 120. *Ante*, 1078, 9.

(o) Man. L. Ex. 2 Ed. 120.

(p) B. temp. Jac. II. Man. L. Ex. Append. 233; and see West, 216, 17. *Id.* App. 128.

(q) *Ante*, 1075.

(r) 2 Salk. 448. *Ante*, 1076.

(s) 9 Hen. IV. 7. 4 Hen. VI. 12, pl. 9.

(t) Semb. M. 7. Hen. VII. fo. 13, pl. 19, and see Man. L. Ex. 2 Ed. 87, 121.

(u) Man. L. Ex. 2 Ed. 121.

(x) Co. Lit. 72, a. 5 Co. 104; and see Cro. Eliz. 752. Hughes, 58. Man. L. Ex. 2 Ed. 121. And as to demurrers to evidence *by* the crown, see Plowd. 4, 8.

(a) Hughes, 33. (bb) Man. L. Ex. 2 Ed. 122.

(cc) *Id.* 123; and see R. temp. Jac. II. Man. L. Ex. Append. 233.

judgment; or for a new trial, or judgment *non obstante veredicto*: And when the trial is in vacation, the motion must be made within the first four days of the following term.(d)

The king being in possession under the extent, is seldom at the trouble of entering up *judgment*, upon a verdict in his favour, unless a writ of error render it necessary.(e) The form of the judgment for the king, whether upon a verdict or nonsuit, is that the defendant or claimant take nothing by his traverse:(f) And upon such judgment, no *execution* issues for the king, such execution being anticipated by the extent itself; but the lands, goods, and choses in action, are dealt with as if no claim had been made.(g) On the other hand, when the defendant or claimant obtains judgment on the extent, the judgment is, that the king's hands be *removed* from the possession of the goods, &c., and that the defendant or claimant be restored to the possession thereof:(h) and on such judgment being entered, the legal possession is transferred immediately, by operation of law, from the king to the party, who may put himself into actual possession without further process,(i) or sue out a writ of *amoveas manus*, if necessary, to *remove* the king's hands.(k) On this writ, the sheriff must forthwith restore the whole of the property seized, to the defendant or claimant; and has no right to deduct any thing for fees or poundage, or expenses of any kind; the sheriff being entitled to his fees, when he is entitled to them at all, not from the defendant or claimant, but from the crown or prosecutor of the extent.(l) The judgment against the king usually concludes with a *salvo jure regis*; the effect of which is to prevent the king's being concluded, with respect to any title which is not expressed in the pleadings.(m)

With regard to *costs*, it is a general rule that the king, or any person suing to his use,(n) shall neither pay nor receive them; for, besides, that he *is not included under the general words of the statutes [*1082] which give costs, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.(a) But this rule does not it seems apply to motions, upon which parties may be compelled, under circumstances, to pay costs to the crown.(b) And there are some exceptions to this rule, created by different statutes: Thus, by the statute 33 Hen. VIII. c. 39, § 54, "the king, in all suits upon any obligations or specialties made to himself, or any to his use, shall have and recover his just debts, costs and damages, as other common persons use to do, in suits and pursuits for their debts." This act is confined to suits on obligations or specialties made to the king, or any to his use; and therefore, where a bond debtor to the crown took out an extent in *aid* against his simple contract debtor, the latter was holden not to be liable to pay costs; for though the simple contract debt,

(d) Man. L. Ex. 2 Ed. 123.

(e) *Id.* 125.

(f) Bro. Abr. tit. *Traverse d'Office*, 54. 4 Co. 57, b. Staundf. Prærog. 77, b. 2 Salk. 448. Bul. Ni. Pri. 216. Man. L. Ex. 2 Ed. 125.

(g) Man. L. Ex. 2 Ed. 126.

(h) West, 217. Man. L. Ex. 2 Ed. 125. And for the form of an issue and judgment of *amoveas manus* in the Exchequer, on a writ of extent in *aid*, defended by the assignees of a bankrupt with, continuances by imparlance, *vicecomes non misit breve*, and *curia advisari vult*, see Append. Chap. XLII. § 23.

(i) 3 Salk. 145.

(k) West, 217. Man. L. Ex. 2 Ed. 127.

(l) West, 217, 236. *Ante*, 1072.

(m) Hil. 9 Edw. IV. fo. 51, pl. 14. F. N. B. 35. P. Hardr. 128; and see M. 2 Edw. II. Fitz. tit. *Voucher*, 208. P. 20, Edw. III. Fitz. tit. *Droit*, 15. Man. L. Ex. 2 Ed. 126.

(n) Stat. 24 Hen. VIII. c. 8.

(a) 3 Blac. Com. 400; and see Cowp. 367. 1 Anstr. 50. 7 Durnf. & East, 367. Hul. Costs, 2 Ed. 18, 19. West, 227. Man. L. Ex. 2 Ed. 69, 70.

(b) M'Clel. 105.

when found by inquisition, may be considered as a specialty debt to the king, yet it does not come within the meaning of the term of a "specialty made to the king, or to his use." (c) When lands are sold by virtue of the statute 25 Geo. III. c. 85, § 1, the moneys produced by the sale are directed to be paid, accounted for and applied, towards discharge of the debt due to the crown, and of all *costs* and *expenses* which shall be incurred by the court, in enforcing the payment of such debt, in such manner as the court of Exchequer shall order and appoint: And, by the statute 43 Geo. III. c. 99, § 41, *costs* may be levied against collectors of taxes, in certain cases. (d) But costs are not recoverable on the statute 25 Geo. III. c. 85, even in the case of an immediate extent in *chief*, when goods and lands are seized, the goods alone being more than sufficient to pay the debt levied; this statute being holden to give the crown a right to costs, in cases only when it is necessary to resort to a sale of the lands. (e) So, costs are not recoverable on an extent in *aid*, under the statute 53 Geo. III. c. 108, although sued to secure the stamp duties on policies of assurance, in the hands of an insolvent agent of the company, and founded on their bond to the crown, for the due payment of those duties; and although the debt be of such a nature, as that an immediate extent might have been issued on it. (f) The bill of costs of the crown solicitor, for business done under an extent, we have seen, (g) is taxable: And if, on the taxation of his bill, a considerable sum be disallowed, the court will not only order the costs of the taxation to be paid to the defendant by the solicitor; but if he have received the whole amount of his bill by sums paid him on account, they will order him to pay interest on the balance reported to be due from him. (h) And if a greater sum than is actually due, and costs, have been levied under an extent in [*1083] *aid*, out of personal effects; (i) *or received by the prosecutor of the extent or his attorney, under an agreement for a compromise in order to stay proceedings; (a) the court on motion will order the surplus, and costs which have been so levied, to be refunded to the defendant, together with the costs of the application. (a)

The writ of extent for the *subject* is founded on a recognizance, at common law or by statute; or on a judgment in an action of *debt* against an heir, on the obligation of his ancestor.

A *recognizance* is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, (b) with condition to do some particular act; And it is either at common law, or by statute. A recognizance at common law is either to the king, or a subject; and may be acknowledged before any one of the judges out of term, and in any part

(c) 1 Price, 434; and see 5 Price, 189. 2 Anstr. 369. West, 228. Man. L. Ex. 2 Ed. 69, 70.

(d) 3 Price, 280.

(e) *Id.* 40.

(f) 1 Price, 434.

(g) *Ante*, 329.

(h) 9 Price, 349; but see 1 Younge & J. 527.

(i) 1 Price, 448; and see 3 Price, 280.

(a) 5 Price, 189. And see further, as to the law and practice of Extents for the king, in *chief* and in *aid*, Mr. West's Treatise on that subject, and Mr. Manning's Summary of the Law of Extents, 2 Ed. 1, &c., *per tot.*, from which, as will be seen by the references, the foregoing account of the practice on Extents for the king, has been principally taken. See also Mr. Chitty junior's Treatise on the *Prerogatives* of the Crown, Chap. XII., XIII., in which Extents are fully treated of, with the means of obtaining redress from the Crown.

(b) Bro. Abr. tit. *Recognizance*, 24.

of *England*, and may be entered on record, as well out of as in term: So, the Chancellor or Keeper may take recognizances and award execution, or hold plea of *scire facias* and *audita querela* in Chancery, to avoid execution, &c. as the case requires, on all recognizances taken in that court.(c) By the custom of the city of *London*, the mayor and aldermen, or the mayor singly, may take recognizances; for the custom is not only reasonable in itself, but, as all other customs of the city, has been confirmed by act of parliament.(d) And the king, by special commission, may appoint any person to take recognizances from one man to another; and such recognizances, duly certified with the commission into Chancery, are binding: and though the commission be so particular as to mention only a recognizance to be taken from A. to B. yet the commissioners have a general power to take a recognizance from any other person.(e)

But recognizances at common law are not perfect records, till they are *enrolled* in some court of record;(ff) for since the law allowed any one judge out of court, and in any part of the kingdom, to take these recognizances, which are the highest security of the common law, it was very necessary they should be enrolled, to perpetuate the contract, and by that means secure the creditor his just debt; which must have been very precarious and uncertain while the security lay in the hands of a private person, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it.(g) It is the acknowledgment, however, that gives a *recognizance its force as a record, and the [*1084] enrolment is for safe custody, and notifying it to others: Therefore, although enrolment be necessary to the validity of a recognizance, yet it bound the lands at common law, from the time of the caption.(a)

Recognizances by *statute* are either founded on a statute-merchant or statute-staple; or are in nature of a statute-staple, by the 23 Hen. VIII. c. 6.(b) A *statute-merchant* is a bond of record, acknowledged before the mayor of *London*, or chief warden of some other city or town, or other discreet men for that purpose chosen and sworn, or before one of the clerks of the statute-merchant, pursuant to the statute of *Acton Burnel*, (11 Edw. I.) enforced and amended by the statute 13 Edw. I. stat. 3, c. 1, *de mercatoribus*. This recognizance is to be entered by the clerk on a roll, which must be double, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the debtor shall be affixed, together with the seal of the king, for that purpose appointed.(cc)

The *statute-staple* is a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or one of them, pursuant to the statute 27 Edw. III. stat. 2, c. 9. To this end, the statute requires that there shall be a seal ordained, which shall remain in the custody of the mayor of the staple, under the seals of the constables; and that all obligations made on such recognizances, shall be sealed therewith.(dd) This security was only designed for the merchants of the staple,

(c) Bac. Abr. tit. *Execution*, (B). 2 Wms. Saund. 5 Ed. 8, i. (5.)

(d) Bac. Abr. tit. *Execution*, (B).

(e) *Id. ibid.* F. N. B. 267.

(ff) But see 2 Vern. 750. 1 Barn. & Ald. 153.

(g) Bac. Abr. tit. *Execution*, (B). F. N. B. 267. 2 Wms. Saund. 5 Ed. 8, i. (5.)

(a) 2 Wms. Saund. 5 Ed. 8, i. (5), and the cases there cited.

(b) For an account of these different securities, and the proceedings thereon, see 2 Wms. Saund. 5 Ed. 69, a. &c.

(cc) Bac. Abr. tit. *Execution*, (B).

(dd) *Id. ibid.* By the statute 27 Eliz. c. 4, § 7, 8, the whole tenor and contents of all sta-

and for debts on the sale of merchandizes brought thither; yet, in process of time, others began to apply it to their own purposes, and the mayor and constables would take recognizances from strangers, surmising that they were made for the payment of money, for merchandizes brought to the staple; To prevent this mischief, the parliament, in the 23 Hen. VIII. reduced the statute-staple to its former limits; and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple. But though the statute 23 Hen. VIII. c. 6, deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognizance on the 23 Hen. VIII. or recognizance in the nature of a statute-staple; so called, because this act limits and appoints the same process, execution and advantage, in every particular, as is provided for the statute-staple.(e)

A recognizance therefore, in nature of a statute-staple, as the words of the act declare, is the same with the former, only acknowledged [*1085] before *other persons; for, as the statute runs, the chief justices of the King's Bench and Common Pleas, and each of them, or, in their absence out of term, the mayor of the staple at *Westminster* and the recorder of *London* jointly together, shall have power to take recognizances for payment of debts, in the form set down in the statute.(a) In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices shall have the keeping of one such seal, and the mayor and recorder another of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief-justice, or seals of the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names.(b) Besides this, a clerk was appointed to make, write, and enrol all obligations thus acknowledged, and at the request of the conusee, his executors or administrators, to certify such obligations into Chancery, under his seal.(c)

By the last general *stamp act*,(d) "every recognizance, statute-merchant, and statute-staple, entered into as a security for the payment of any sum or sums of money, annuity or annuities, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the governor and company of the Bank of *England*, or of the *East India* company, or *South Sea* company, is subject to the same duty or duties, as a bond given for the like purpose in *England*, where such payment or transfer is not already secured by a bond or mortgage, or by some other instrument, thereby charged with the same duty as a bond or mortgage; and where such payment or transfer is already secured as above mentioned, to a duty of 1*l.*; And every recognizance, statute-merchant and statute-staple, entered into as a security for the performance of any cove-

tures-merchant and statutes-staple shall, within six months after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 Hen. VIII. c. 6, who is to enter the same statutes in a book provided for that purpose; otherwise they are made void, as against subsequent purchasers.

(e) Bac. Abr. tit. *Execution*, (B).

(a) 23 Hen. VIII. c. 6, § 2.

(b) *Id.* § 3.

(c) 23 Hen. VIII. c. 6, 4, 5. And for the mode of enrolling these recognizances, and certifying them into Chancery, see the same statute; also stat. 8 Geo. I. c. 25, § 1, 2.

(d) 55 Geo. III. c. 184. Shed. Part I. *Quære*, whether this statute extends to recognizances of bail?

nant, contract, or agreement, or for the due execution of any office or trust, or for rendering a due account of money received, or to be received, or for indemnifying any person or persons against any matter or thing, is subject by the same act, to the duty of 1*l.* 15*s.*: And where any such recognizance or statute, together with any schedule or other matter put or endorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, to a further *progressive* duty of 1*l.* 5*s.*”

The statute-merchant having the seal of the conusor, besides the king's seal, the conusee may waive the execution given by the statute 13 Edw. I. stat. 3, c. 1, and use it as an obligation, by bringing an action of *debt* thereon: So may the conusee, for the same reason, on the 23 Hen. VIII. c. 6. But it is otherwise of a statute-staple, because the king's seal only *is affixed thereto, without that of the party, which is [*1086] absolutely necessary in all obligations at common law.(*aa*)

These several securities bind the land, as against the parties, at common law, from the time they are entered into: (*bb*) Therefore, if a man be conusee of a statute, and the debtor, before execution sued, alien by fine, and *five* years pass, yet the conusee may still sue out execution.(*cc*) But a creditor by statute of J. S., who becomes *bankrupt* before the statute is sued and executed, shall come in only *pro rata*, though there were lands bound by the statute.(*d*) And by the statute of frauds and perjuries,(*e*) “the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll, where the said recognizances are enrolled; and no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bonâ fide* and for valuable consideration, b.t from the time of such enrolment.”(*f*) It is also declared by the *register acts*,(*g*) that “no statute or recognizance (other than such as shall be entered into in the name, and upon the proper account of his majesty, shall affect or bind any manors, lands, tenements or hereditaments, in *Middlesex* or *Yorkshire*, but only from the time that a memorial of such statute or recognizance shall be entered at the register office, in such manner as therein directed.”

The execution on a recognizance, at common law, seems to have been by *levari facias*, of the lands and chattels of the defendant; under which his corn, and other present profits of his land, might have been taken: For at common law, we have seen,(*h*) the body of the defendant, or his land, could not have been taken in execution, unless in special cases. But, by the statute *Westm.* 2, (13 Edw. I.) c. 18, “when a debt is acknowledged in the king's court, (that is, by recognizance in any court of record, that hath power to receive the same,(*i*) the plaintiff may sue out a writ of *elegit*, under which the sheriff shall deliver to him all the chattels of the debtor, (except his oxen, and the beasts of his plough,) and a moiety of his land, until the debt be levied by a reasonable price or extent.” The plaintiff

(*aa*) Bac. Abr. tit. *Execution*, (B). And for a fuller account of these securities, the differences between them, and the mode of proceeding thereon, see Bac. Abr. tit. *Execution*, (B.) Com. Dig. tit. *Statute Merchant*. (bb) 2 Bac. Abr. 363. 3 Co. 14.

(*cc*) 1 Chan. Cas. 268. 1 Mod. 217.

(*d*) 1 P. Wms. 92.

(*e*) 29 Car. II. c. 3, § 18, extended to Wales and the counties palatine, by the 8 Geo. I. c. 25, § 6.

(*f*) See 2 Wms. Saund. 5 Ed. 7, (5), as to the time of enrolment.

(*g*) *Ante*, 941.

(*h*) *Ante*, 993.

(*i*) 2 Inst. 395.

therefore may, it seems, since this statute, proceed either by *levari facias* or *elegit* at his election, on a recognizance at common law.(k)

On a statute-merchant, the first process, after it was forfeited and certified into Chancery, was a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the conusor, if a layman, to [*1087] satisfy *the debt:(a) And if the sheriff returned upon this writ, that the party was dead, or not found in his bailiwick, a writ issued to extend the lands,(b) which might be made returnable in either bench: and the sheriff might thereupon deliver the lands, &c., to the conusee, upon a reasonable extent, without the delay or charge of a *liberate*.(c) If the conusor was a *clerk*, the sheriff was directed to levy the debt of his movable goods and chattels.(dd)

On a statute-staple, or recognizance in nature of a statute-staple, if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, after the certificate under seal in Chancery, is a writ in nature of an extent, to take the body, lands and goods, all in one writ; in which respect it is preferable to the statute-merchant, as being a speedier remedy.(ee) This writ is returnable in Chancery;(ff) and the same sort of proceedings are had under it, for extending the lands, &c., as upon an *elegit*:(g) But the sheriff, after the extent, cannot deliver the lands, &c., to the conusee, but must seize them into the king's hands: and in order to get possession of them, the conusee must sue out a *liberate*, which is a writ issuing out of Chancery, reciting the former writ and return, and commanding the sheriff to deliver to the conusee all the lands, tenements and chattels, by him taken into the king's hands, if the conusee will have them, by the extent and appraisment made thereof, until he shall be satisfied his debt.(h) Upon this writ, the sheriff cannot turn the tertenant out of possession, as upon an *habere facias possessionem*; but is only to deliver the legal possession, as upon an *elegit*, and in order to obtain the actual possession, the conusee must proceed by *ejectment*.(i)

By the common law, after a full and perfect execution had by extent, returned and entered of record, the conusee could have no re-extent on the effects of the conusor, (because there was one satisfaction given to the creditor on record,) though the lands had been recovered from him before he had levied the debt out of them.(kk) But by the statute 32 Hen. VIII. c. 5, it is provided, that "if after any lands, tenements or hereditaments, be had and delivered in execution, upon a just and lawful title, wherewithal the said lands, &c., were liable, tied and bound, at such time as they were delivered and taken into execution, shall be recovered, divested, taken, or evicted out of or from the possession of any such person and persons as have

(k) Bro. Abr. tit. *Elegit*, pl. 6, tit. *Execution*, pl. 42, cites 38 Ed. III.; 12, tit. *Recognizance*, pl. 7, cites 38; Ass. 5. Vin. Abr. tit. *Recognizance*, F. 1.

(a) F. N. B. 130. Append. Chap. XLII. § 24.

(b) F. N. B. 130, A. Append. Chap. XLII. § 25.

(c) F. N. B. 130, A. 1 Vent. 41.

(dd) F. N. B. 131. 2 Wms. Saund. 5 Ed. 70, b. Append. Chap. XLII. § 26. *Ante*, 1043.

(ee) 2 Bac. Abr. 334. Append. Chap. XLII. § 27.

(ff) 4 Inst. 79. But the execution upon a statute merchant is returnable either into the King's Bench or Common Pleas. *Id. ibid.*

(g) *Ante*, 1034, 5.

(h) F. N. B. 132. 1 Lutw. 429. Append. Chap. XLII. § 28.

(i) 1 Vent. 41. *Ante*, 1036, 7. And for the form of the inquisition on this writ, see 2 Wms. Saund. 5 Ed. 70, c.

(kk) Co. Lit. 290, a. Bac. Abr. tit. *Execution*, (B. 6.)

and hold the same in execution, without any fraud, deceit covin, collusion or other default of the said tenant or tenants, by *execution, before such time as the said tenants by execution, their executors or assigns, shall have fully levied their whole debt and damages, for which the said lands, &c., were delivered and taken in execution; then every such recoveror, obligee and recognizee, shall have a *scire facias*, out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heirs, executors or assigns, to have execution of other lands, &c., liable to be taken in execution, for the residue of the debt and damages."

This statute by a favourable construction, was extended to the executors, administrators and assigns of the recoveror, (a) &c.; and to executions issuing out of any court, where the record is removed by writ of error and affirmed; (a) But the statute we have seen, did not extend to a partial eviction. (b) By a subsequent statute (c) however, which was made for supplying some defects in the statute 23 Hen. VIII. c. 6, it is enacted, that in case it shall, at any time or times, before or after the filing or returning of any *liberate* or *liberates*, sued out on any extent or extents, upon a recognizance in the nature of a statute-staple, be made appear to the court of Chancery, that sufficient has not been extended and levied, or sufficiently extended and levied, to satisfy such recognizance; or that any omission, error or mistake has happened, in making, suing out, executing or returning any of the said writs, or any process thereupon; or it should happen, that any lands, tenements or hereditaments shall be evicted from any person or persons, who shall have extended the same, by virtue of any such writ or process as aforesaid; that then, and in every such case, the said court of Chancery shall and may award one or more re-extent or re-extents, for the satisfying the same as aforesaid, and that writs of *liberate* or *liberates* may be sued out thereupon." (d)

By the statute 23 Hen. VIII. c. 6, § 8, there was due to his majesty, a fee of one *half penny* in the pound, according to the value or sum entered into and contained in every recognizance in nature of a statute staple, taken in pursuance of the said statute, to be paid on sealing the first process on every such recognizance. But, by the 8 Geo. I. c. 25, § 3, "the prosecutor of every such recognizance shall, at the time of suing out the first process or writ of extent thereon, deliver in to the officer who shall make out such process or extent, a note in writing under his hand, testifying the sum or value of the damages thereby intended to be extended, or levied thereon; which sum or value the said officer shall insert in the said writ, to be only extended or levied thereon, and no more; and that the said poundage of one *half penny*, payable on all process as aforesaid, shall be taken and paid only for every pound, according to the said sum or value so inserted and intended to be extended and levied as aforesaid, and not otherwise: and that no sheriff of any county shall take for the extent and *liberate*, and *habere facias possessionem* or *seisinam* on the *real estate, and levy on the personal estate, by virtue of such [*1089] extent, any more than the same fees as are appointed by the 3 Geo. I. c. 15, for executing a writ of *elegit* and *habere facias possessionem*, or *seisinam*; under the like penalties and forfeitures, and to be in like

(a) Co. Lit. 290, a.

(c) 8 Geo. I. c. 25, § 4.

(d) 2 Wms. Saund. 5 Ed. 70, c.

(b) *Anta*, 1037.

manner recovered, against every sheriff or person therein offending, as are mentioned and appointed in and by the same act."(a)

We have before seen, that in *debt* against an heir, on the obligation of his ancestor, the judgment for the plaintiff is *general*, for the debt and damages, or *special*, directing them to be levied of the lands descended.(b) On a general judgment, the execution may be general also, against the defendant, his goods and chattels, or a moiety of his lands, by *fiery facias*, *capias ad satisfaciendum*, or *elegit*:(c) But when judgment is special, the execution is so likewise, by a writ in nature of an extent, to levy the debt and damages, of all the lands descended.(dd) And it seems that on a general judgment, although the plaintiff may have execution by *elegit* of a moiety of all the heir's lands, yet may he also at his election surmise, that the heir hath certain lands by descent, and pray to have execution of the whole of them.(e) For if the plaintiff had not this election, he might be a loser by the general writ of *elegit*, upon which he could have only a moiety in execution, inasmuch as the heir might not have any other lands except those descended.(f)

[*1090]

* CHAPTER XLIII.

Of Writs of SCIRE FACIAS; and the PROCEEDINGS thereon.

A *Scire Facias* is a writ founded on some matter of record, as a recognizance or judgment, &c. on which it lies to obtain execution,(aa) or for other purposes,(bb) as to repeal letters patent,(cc) hear errors,(d) &c. In general, it is a *judicial* writ, issuing out of the court where the record is:[A] but a *scire facias* to repeal letters patent is an *original* writ,(ee) issuing out

(a) *Ante*, 1039.

(b) *Ante*, 937, 8; and see 3 Co. 72, a. Cro. Jac. 450. 3 Salk. 287. 2 Wms. Saund. 5 Ed. 7, (4).

(c) 2 Rol. Abr. 71; and see Vin. Abr. tit. *Heir*, (D). Bac. Abr. tit. *Heir & Ancestor*, (H). 2 Wms. Saund. 5 Ed. 7, (4).

(dd) *Id. ibid. Off. Brev.* 83, 4. Append. Chap. XLII. § 29, 30.

(e) Append. Chap. XLII. § 31.

(f) 2 Rol. Abr. 72. Bac. Abr. tit. *Heir & Ancestor*, (H). 2 Wms. Saund. 5 Ed. 7, (4).

(aa) Bac. Abr. tit. *Scire facias*, A. Lit. § 505. Co. Lit. 290, b. 291, a. F. N. B. 267; and see 3 Lev. 220.

(bb) Bac. Abr. tit. *Scire facias*, A. B.

(cc) *Id.* C. 3. For the proceedings in general on writs of *scire facias*, see Bac. Abr. tit. *Execution*, H. Com. Dig. tit. *Pleader*, (3 L). Run. Eject. 2 Ed. 477, &c. 2 Wms. Saund. 5 Ed. 6, (1), 71, (4), 72, v. u. (5, 6). Bingham on *Executions*, 118, &c. In treating of these proceedings, as well as those on writs of error, the reader will observe, that the learned editor of *Saunders* has followed pretty closely the order and arrangement in this and the following chapters.

(d) *Post*, Chap. XLIV.

(ee) Append. Chap. XLIII. § 6; and see Skin. 682. Comb. 455, S. C., where it is said that though a *scire facias* be properly a *judicial* writ, yet being the foundation of an action, it is sometimes considered as in nature of an *original*.

[A] A *scire facias* to revive a judgment, although a continuation of the original proceedings, is in the nature of an action as to the parties sought to be charged, and should contain sufficient certainty to enable the court to give judgment. *Pickett v. Pickett*, 1 How. (Miss.) 267.

of Chancery; and though in other cases it is a judicial writ, yet because the defendant may plead thereto, it is considered in law as an *action*:^(f) therefore, a release of all *actions* is a good bar to a *scire facias*.^(g) And for the same reason, there must be a new warrant, to authorize the appearance of the plaintiff's attorney;^(h) and there is no occasion for a rule to change the attorney in the former suit.⁽ⁱ⁾ [A] So, where a judgment was entered for securing the payment of an annuity, before the 17 Geo. III. c. 26, which requires that, "before any execution shall be sued out, or *action* brought on any such judgment, a memorial of the consideration, &c. shall be enrolled in Chancery;" the court of King's Bench set aside a *scire facias*, &c. issued after the act, to revive the judgment, for want of such a memorial.^(k) A *scire facias*, disclosing the facts upon which it is founded, and requiring an answer from the defendant, was in one case said to be in nature of a *declaration*; ^(l) And when the object of it is to obtain execution, on a judgment or recognizance, &c. it is properly called a writ of *execution*.^(m)

*A *scire facias* is either for the *king* or the *subject*. For the [*1091] former, it is either to have execution on a judgment or recognizance, &c. or for other purposes, as to repeal letters patent, &c. On a judgment or recognizance, there need not be any *scire facias* for the king, where more than a year has elapsed since the judgment was recovered, or recognizance acknowledged; for *nullum tempus occurrit regi*:^(aa) but the regular mode of proceeding thereon is by suing out an extent in *chief*, against the body, lands and goods of the crown debtor; and, after his death, a *scire facias* is unnecessary, the proceeding in that case being by writ of *diem clausit extremum*, against his lands and chattels. A *scire facias*, however, is sometimes issued on a recognizance, if it be doubtful whether it is forfeited.^(b)

When the debt arises on a bond or obligation, taken pursuant to the statute 33 Hen. VIII. c. 39, § 50, which is declared to have the same force and effect as a statute staple, the ordinary mode of proceeding against the principal or sureties, when solvent, is by *scire facias*, to have execution thereof, or, upon an affidavit of danger, and the *fiat* of a baron, the king, we have seen,^(c) may proceed by suing out, in the first instance, an immediate extent in *chief*; but without such an affidavit, a *scire facias* is the only course.^(d) And this is also the common mode of proceeding against sureties;^(e) or for the recovery of debts found to be due to the king's debtor from other persons, when solvent, by inquisition on writs of extent,^(ff) or *diem clausit extremum*, or on a special *capias utlagatum*.^(gg)

The *scire facias* to have execution for the debt of the king, is a *judicial writ*, issuing out of, and under the seal of the court of Exchequer: And it

(f) Co. Lit. 290, b. 291, a. 2 Wils. 251. 2 Blac. Rep. 1227. 2 Durnf. & East, 46.

(g) Co. Lit. 290, b. Comb. 455. Skin. 682. S. C. 2 Ld. Raym. 1048. 2 Wils. 251.

(h) Cro. Eliz. 177. 2 Ld. Raym. 1048, 1252, 3. 1 Salk. 89. 2 Salk. 603, S. C.; and see 2 Bos. & Pul. 357, (b). *Ante*, 93, 4.

(i) Say, Rep. 218; and see 7 Durnf. & East, 337. 2 Bos. & Pul. 357. *Ante*, 94.

(k) 1 Durnf. & East, 267, 8.

(l) 1 Sid. 406.

(m) Lit. § 505.

(aa) 2 Salk. 603; and see Gilb. Excheq. 166, 7. 1 Price, 395. West on *Extents*, 316, &c. *Ante*, 1045.

(b) Gilb. Excheq. 166. Trem. P. C. 613, 14. *Ante*, 1046.

(c) *Ante*, 1046.

(d) 3 Price, 288, 292; and see Gilb. Excheq. 168. *Ante*, 1046.

(e) *Ante*, 1046.

(ff) *Ante*, 1046, 1068.

(gg) *Ante*, 137.

[A] Accord, *Gonnigal v. Smith*, 6 Johns. 108. *Osgood v. Thurston*, 23 Pick. 110.

may be issued of course, without the *fiat* of a baron.(h) In point of form, it recites the judgment, recognizance, bond, or commission and inquisition, on which it is founded; and commands the sheriff to warn the defendant, to appear before the barons of his majesty's Exchequer at *Westminster*, on a day *certain*, to show cause, why the crown should not have execution of the sum recovered, acknowledged, or found to be due:(i) And every *scire facias* for debts in *aid*, must be awarded into the proper county where the debtor is mentioned in the specialty to reside, unless upon a *scire facias* returned in *London* or *Middlesex*.(k) This writ is signed by the king's remembrancer, and *tested* in the name of the chief baron:(l) And [*1092] though it may be sued out in vacation, yet it must be **always tested* and returnable in term: Therefore, a *scire facias* cannot be sued out in vacation, on an inquisition taken under an extent, after the end of the preceding term; because as the *scire facias*, if sued out in vacation, must be *tested* as of the antecedent term, and must recite the inquisition as the foundation of it, it would appear in such case, that the *scire facias* was sued out before the inquisition was taken on which it is founded: And accordingly the court of Exchequer, in a late case,(a) quashed the *scire facias* on motion; and ruled, that the objection could not be got rid of by a special *memorandum* upon the record, showing the day on which the *scire facias* was really issued. But where a *scire facias*, founded on an inquisition, mis-recited the inquisition, and fixed by such recital a day on which the debt had been found to be due, differing from the true day mentioned in the inquisition, the court of Exchequer (on cause being shown,) gave leave to amend the writ, on payment of costs, &c. even after the defendants had pleaded.(bb)

On this writ, if the sheriff warn the defendant, he returns *scire feci*:(c) if he do not warn him, he returns *nihil*:(c) in which latter case a second *scire facias* issues. On the return of *scire feci*, or of two *nihils*, a *four* day rule is given on the writ, for the defendant to appear and plead thereto, or an extent to issue;(d) and when the *scire facias* is returnable on the last day of term, a rule may be given to appear by the sealing day after that term. If the defendant appear, then another *four* day rule is given, for the defendant to plead, or an extent to issue;(e) and after the expiration of *four* days the defendant may obtain *six* weeks further time to plead, on a motion of course, on the signature of counsel: and he may obtain further time, after the expiration of the six weeks, by motion in court, on an affidavit of special circumstances.(f) If the defendant do not appear on the first rule, or appearing, do not plead on the second, judgment may be entered up for the king;(g) or process of extent may issue, without any judgment on the *scire facias*:(hh) And it is an indulgence in the court that they do not enter up judgment; for if judgment were entered, then the court would be concluded, though perhaps the defendant had no notice of the debt.(ii) The defendant having appeared to the *scire facias*, may

(h) 3 Price, 279.

(i) Append. Chap. XLIII. § 1; and see Trem. P. C. 572, 600, 608. Gilb. Excheq. 177.

(k) Gilb. Excheq. 168. R. H. 15 Car. I. § 7, in *Soce. Id.* 178. West, Append. 126. Man. L. Ex. Append. 230.

(l) West, 316.

(a) 3 Price, 288. West, 316, 17, S. C.

(bb) 4 Price, 181.

(c) Trem. P. C. 609.

(d) West, 317; and see Gilb. Excheq. 168, 9. Append Chap. XLIII. § 3.

(e) Gilb. Excheq. 169. Append. Chap. XLIII. § 4. (f) West, 318.

(g) Gilb. Excheq. 169. Parker, 94. (hh) West, 317, 18. (ii) Gilb. Excheq. 170.

either move the court to set aside the proceedings, if irregular; *(k)* or, after declaration, *(l)* plead in abatement or in bar, or demur, as in other actions. *(m)* And the statute of limitations may be pleaded to a *scire facias*, issued by the crown against the drawer of a bill of exchange, *in [*1093] the hands of the crown debtor, and which has been seized by the sheriff under an inquisition, on prerogative process. *(a)*

When a person has entered into a recognizance to keep the peace, which becomes forfeited by his committing any breach of the peace, if it was acknowledged at the sessions, or before a magistrate, a writ of *certiorari* must be obtained, to remove it into the crown office. This writ is obtained on laying an affidavit of the circumstances before a judge at chambers, who will grant a *fiat* for the writ to issue; and when the writ has been served, and the recognizance is returned, a writ of *scire facias* is sued out at the crown office, stating the recognizance and suggesting the breach of it. This is delivered to the sheriff of the county in which the defendant resides; and he gives notice of it to the defendant, who must enter an appearance at the crown office, and may plead any matter in defence: and on this issue is joined, and the issue tried in the same way as any other issue joined in the crown office, except that no proclamation is made at the trial, there being no crime to be tried. If the jury find that the recognizance has been forfeited, they find a verdict for the crown; and judgment is entered up, and a *feri facias* or *capias ad satisfaciendum* issued out of the crown office, for the amount of the recognizance; but if to those writs there be a return of *nil*, or *non est inventus*, or if the prosecutor take no steps on the judgment so signed, the recognizance is escheated into the Exchequer, by the master of the crown office, in the same way as a recognizance forfeited by the non-appearance of the party to receive judgment; and process on it issues from the Exchequer. *(b)*

In treating of the *scire facias* to repeal letters patent, it will be proper to consider, 1st, in what cases it lies, and in what not; 2dly, the writ itself, and mode of suing it out; and 3dly, the proceedings thereon. If the king grant any thing which by law he cannot grant, he, *jure regio*, for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent; *(c)* as if he grant lands which were conveyed to the king by covin, to defeat a subject of his seigniority: *(d)* But if the patent be void in itself, *non concessit* may be pleaded without a *scire facias* to repeal it. *(e)* So, if the king's grant be founded upon fraud, or false suggestion, he may have a *scire facias* to repeal it; *(f)* as if the patent recite another to have an office, who had in truth forfeited it, and grant it when it shall happen to be vacant, after the death, surrender, &c., of that other; *(g)* or that the invention, for which it was granted was a new one, when it had been previously invented, or used by others. And it is said to have been determined, that the failure of one of several subjects of a patent, vitiates

(k) 3 Price, 278, 290, 91.

(l) Append. Chap. XLIII. § 2.

(m) For the form of an issue in *scire facias*, on an extent in *aid*, against the assignees of a bankrupt, see Append. Chap. XLIII. § 5; and see 13 Price, 181. M'Clel. 67, S. C., as to the grounds of putting off the trial in *scire facias* on an extent.

(a) 6 Price, 24.

(b) 2 Car. & P. 11, n.; and see *id.* 10. 11 Price, 637.

(c) 4 Inst. 88.

(d) Dyer, 269, a.

(e) 2 Rol. Abr. 191, (S.) pl. 2.

(f) 4 Inst. 88.

(g) Dyer, 197, b.

Brq. Abr. tit. *Patent*, 14, tit. *Petition*, 11. Co. 74, b. 2 Rol. Abr. 191, (T).

the whole; because, the consideration being entire, it cannot be avoided as to part, and remain good as to the rest.(h) So, if an officer [*1094] make a *forfeiture of his office, granted by patent, the king may have a *scire facias* for repealing his patent;(a) and that, without an inquisition or office found of the forfeiture.(bb) So if the king, by his letters patent, grant the same thing to two persons, the first patentee may have a *scire facias* to repeal the second patent;(cc) but the second patentee cannot bring a *scire facias*, though the better right should be in him:(dd) And in general, when a patent is granted to the prejudice of another, he may have a *scire facias* to repeal it, at the king's suit; as if a market, fair, &c., be granted to the annoyance and prejudice of an ancient market, or fair of another.(ee) It has indeed been holden, that the person prejudiced by the patent may, upon the enrolment of it in Chancery, have a *scire facias* to repeal it, as well as the king.(ff)

The *scire facias* for repealing letters patent is an *original writ*, issuing out of Chancery; and is usually directed to the sheriff of *Middlesex*, and returnable in the petty bag office, for it is a record there:(gg) Or it may be brought in the King's Bench:(hh) and if it be returnable there, that court only have jurisdiction to examine the irregularity of the issuing and return,(i) &c. This writ ought to be founded on some matter of record: And therefore, a *scire facias* to repeal a patent ought to be in Chancery, when the patent is upon record; or in a court where a forfeiture, or other cause of repeal, appears by office, or other matter upon record in the same court.(k) But the patent itself is a sufficient record, upon which a *scire facias* may be founded for repealing it.(l) So an inquisition, which finds a patent and cause of forfeiture, is a sufficient ground for a *scire facias*;(m) or an information or indictment for an offence which is a cause of forfeiture, and a conviction thereon;(m) Previously to suing out the writ, a *petition* or *memorial*(n) must be presented to his majesty, and a *warrant*(o) obtained thereon to the attorney-general, upon which he will grant his *fiat*.(p) for suing it out: but it is said, that when a patent is granted to the prejudice of a subject, the king of right is to permit him, upon petition, to use his name for the repeal of it, in a *scire facias* at the king's suit, in order to prevent multiplicity of actions upon the case, which will lie notwithstanding such void patent.(q) In point of form, the *scire facias* recites the patent, and states the ground upon which it is meant to be impeached; as, if the patent be for a new invention, that the patentee was not the first and true inventor, but that it had been previously invented, or [*1095] used by others:(r) *And a *scire facias* by the king to repeal a patent, upon the forfeiture of an office, ought to set forth the cause of the forfeiture:(aa) but it is not necessary to do so, in a *scire facias* by a

(A) Law, Rep. 5; but see Holt. Nl. Pri. 64, *contra*.

(a) Dyer, 197, b. 198, a. 211, a.

(bb) Dyer, 211, a.

(cc) 4 Inst. 88. Dyer, 197, b. 198, a. 2 Rol. Abr. 191, (U.) pl. 2.

(dd) Dyer, 276, 7.

(ee) *Id.* 276. 3 Lev. 220. 2 Vent. 344, S. O.

(ff) 6 Mod. 229; and see 2 Wms. Saund. 5 Ed. 72, o. p. Com. Dig. tit. *Patent*, F. 6. 7 Durnf. & East, 367.

(gg) 4 Inst. 88. 3 Lev. 223.

(hh) 4 Inst. 72; but see 6 Mod. 229.

(i) 6 Mod. 229.

(k) 3 Lev. 223; and see 6 Mod. 229.

(l) 3 Lev. 223.

(m) Com. Dig. tit. *Patent*, F. 7.

(n) 2 Rich. Pr. C. P. 391.

(o) *Id.* 392.

(p) *Id.* 395.

(q) 2 Vent. 344.

(r) Append. Chap. XLIII. § 6. Lil. Ent. 411. 2 Rich. Pr. C. P. 395.

(aa) Dyer, 198, b. 2 Rich. Pr. C. P. 395.

former patentee;(b) and if the writ allege matter by the words, "whereas we are given to understand and be informed," &c., it is well enough; for they are sufficient to put the party to answer.(c) A *scire facias* out of the petty bag office, to repeal a patent, returnable before the king in his Chancery, *ubicunque*, &c., generally is good, without limiting it to *England*.(d)

The judgment on a *scire facias* for repealing letters patent, may be either by confession or default: If the defendant can say nothing for maintaining the patent, judgment may be for annulling it, upon his confession;(e) or if he do not appear, upon *scire feci* or two *nilis* returned, judgment shall be given in like manner for his default.(f) If he appear to the writ, he may plead thereto, in abatement or in bar; or he may demur upon the *scire facias*, if the matter alleged be not sufficient for a repeal of the patent.(g) If the writ be returnable in the petty bag office, and issue be joined thereon, the court of Chancery cannot try it by a jury; but the chancellor delivers the record to the court of King's Bench, to be tried there:(h) and though it is said, that after trial had, the record is to be remanded into Chancery, and judgment to be there given, yet the practice has been to give judgment in the King's Bench:(i) And if there be a demurrer to part, and issue on the residue, the chancellor delivers the whole record to the court of King's Bench, and judgment is given there upon the demurrer, as well as upon the issue.(k) Formerly, it seems, the chancellor used to deliver the record *proprid manu*, to the court of King's Bench himself; but the present course is to deliver it by the clerk of the petty bag; for what is done by his officer, may be said to be with the proper hand of the chancellor:(l) And it is not necessary that the issue should be tried at bar: It may be tried at *nisi prius*:(mm) And if, on a *scire facias* to repeal the grant of a market, it be found that the *grant* was to the prejudice of another, it is sufficient, though it be not found that the *user* was prejudicial.(n) The judgment in a *scire facias* for repealing a patent is, that "the said letters-patent of our said lord the king be revoked, cancelled, vacated, annulled, void, invalid, and altogether held for nothing; and that the inrolment thereof be cancelled, quashed, and annulled."(o) On 'this judgment, the prosecutor is not entitled to his costs; it being holden, that the statute 8 & 9 W. III. c. 11, § 8, giving costs in all suits upon writs *of *scire facias*, does not extend to a *scire* [*1096] *facias* to repeal a patent, prosecuted in the name of the king.(a)

A *scire facias* for the *subject* is in general founded on a recognizance or judgment: Upon the former, it is an *original* proceeding; but upon a judgment, it is only a *continuation* of the former suit:[A] and therefore, where the defendant's attorney, pending an action, agreed that no writ of

(b) Dyer, 198, b. (c) 3 Lev. 222. (d) 1 Str. 146. (e) Dyer, 197, b.

(f) *Id. ibid.* 198, a. 2 Rol. Abr. 192, (X.) pl. 1; and see 2 Durnf. & East, 554, 557.

(g) 3 Lev. 221. (h) 1 Eq. Cas. Abr. 128.

(i) *Id. pl.* 7, (b). (k) Latch. 3. 1 Eq. Cas. Abr. 128.

(l) 1 Eq. Cas. Abr. 128, 9. 2 Wms. Saund. 5 Ed. 6, (1).

(mm) Cro. Car. 313. (n) 1 Str. 43.

(o) 4 Inst. 88. Dyer, 197, b. And for the proceedings in general, on a *scire facias*, to repeal a patent, see Com. Dig. tit. *Patent*, F. 2 Wms. Saund. 5 Ed. 73, o, p. Chit. *Prærog.* 330. 31.

(a) 7 Durnf. & East, 367.

[A] Accord, *Wolf v. Pounsford*, 4 Ham. 397. *Treasurer v. Foster*, 7 Verm. 52. *Potter v. Luccomb*, 1 Shep. 36. *Pickett v. Pickett*, 1 How. (Miss.) 267. *Byder v. Glover*, 3 Scam. 547.

error should be brought, and afterwards the defendant died, between the execution and return of the writ of inquiry, and thereupon a *scire facias* issued against his executors, to show cause why the damages assessed upon the writ of inquiry should not be recovered against them, upon which they brought a writ of error; the court of King's Bench held that the executors were bound by the agreement of their testator's attorney, and accordingly ordered him to *nonpros* the writ of error: (b) for this is not a new action, but a continuation of the old one; it is only a *scire facias* to revive the former judgment; and as the testator himself, if he had lived, could not have brought a writ of error, so neither can his executors. (b)

Recognizances, we have seen, (c) are at common law, or by statute; and the latter are either founded on a statute-merchant or statute-staple, or are in nature of a statute-staple, by the 23 Hen. VIII. c. 6. But a distinction is to be made, with regard to the time of suing out execution, between recognizances at common law, and statutes-merchant, &c.; for, upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue out execution within a year after the money became payable. This was altered by the statute *Westm. 2*, (13 Edw. I.) stat. 1, c. 45, which gives the conusee a *scire facias* to revive the recognizance, and put it in execution, if the conusor cannot stay it, by pleading such matters as the law judges sufficient for that purpose, such as a release, &c. But the conusee of a statute-merchant, &c., may at any time sue execution, without the delay or charge of a *scire facias*. (d)

Another distinction is to be made between recognizances at common law, and by statute: for on the first, if the conusee die before execution sued, his executor shall not sue it, even within the year, without bringing a *scire facias* against the conusor: The reason is, because the law presumes that the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the recognizance, and for that purpose a *scire facias* must be brought by the executor; for the alteration of the person altereth the process at common law. But this tending to delay, the *scire facias* was taken away, on recognizances created by statute law, by the several acts of parliament which introduced them; and therefore, upon the death of the conusee

[*1097] of a statute merchant, &c. his executors may come into *Chancery, and upon producing the testament and the statute, have execution without a *scire facias*, as the testator himself might have had. (e)

But the recognizance which will here principally claim our attention, is the recognizance entered into by the *bail* in an action, or upon a writ of error, either alone or jointly with the principal. The *form* of the recognizance of bail in an action differs, accordingly as the action is by *bill* or *original*; In actions by *bill*, in the King's Bench, the undertaking of the bail is general, that if the defendant be condemned in the action, they will

(b) 1 Durnf. & East, 388.

(c) *Ante*, 1083.

(d) Bac. Abr. tit. *Execution*, B. 2, 3, tit. *Scire facias*, C. 2.

(e) Bac. Abr. tit. *Execution*, B. 2, 3, tit. *Scire facias*, C. 2. And see further, as to the *scire facias* on recognizances at common law or by statute. 2 Wms. Saund. 5 Ed. 6, (1), 71, b, c; and for the *scire facias ad rehabendam terram*, which lies for avoiding executions on statutes merchant, &c., see Bac. Abr. tit. *Scire facias*, 414, 15. 2 Wms. Saund. 5 Ed. 72, v, w, x, (5, 6).

pay the condemnation money, if the defendant shall not pay the same, or render himself to the prison of the marshal.(b) In actions by *original* in the King's Bench, as well as in the Common Pleas, their recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to, or 1000*l.* beyond that sum, if it exceed 1000*l.* upon the like condition.(b) Therefore, if the defendant be condemned in the action, and do not pay the condemnation money, or render himself to the prison of the marshal or warden, in due time, or if there be several defendants, and they do not all render themselves,(c) the recognizance is forfeited, and the bail are liable to be sued thereon, unless discharged by some of the means stated in a preceding chapter:(d) And a *cognovit* by the principal, without notice to the bail, does not discharge them;(e) unless time be given to the former, beyond that in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original cause.(f) But if the principal be not condemned, or (which is tantamount,) be not condemned in the same action, as where the plaintiff declares against the defendant, for a different cause of action from what is expressed in the process,(g) or affidavit to hold to bail,(h) or, by *original* in the King's Bench, in a different count from that where the action is brought,(i) his bail are discharged: And they are also discharged when the cause is referred to arbitration, unless it be agreed on the reference, that a verdict shall be taken, and judgment entered for the plaintiff's security.(k)

Before any proceedings can be had against the bail in the action, upon their recognizance, a *capias ad satisfaciendum* must be sued out against the principal, and returned *non est inventus*: For it is clearly settled, that no *scire facias*, or action of *debt*, lies against the bail in the action, until a *non est inventus* be returned, upon a *capias ad satisfaciendum* against the principal; for the bail are not bound to render the principal, till they *know, by the plaintiff's suing out this writ, that he [*1098] means to proceed against the person of the defendant:(aa) And where the defendant having put in and perfected bail, a *capias ad satisfaciendum* was lodged and returned *non est inventus*, and proceedings being had against the bail, they rendered the principal in time, after which the defendant was bailed again and discharged; the court held, that proceedings could not be had against the last bail, without taking out a fresh *capias ad satisfaciendum*(bb) If the principal be already in custody of the sheriff, on *civil* process,(cc) or a *criminal* charge,(dd) the sheriff will not be justified in returning *non est inventus*: but otherwise this return will be good, though the plaintiff knew where to find the defendant:(ee) And where the defendant had surrendered in discharge of his bail, before the return of a writ of *capias ad satisfaciendum*, which had been sued out by the plain-

(b) *Ante*, 250.

(c) 2 Lev. 195. 1 Vent. 315.

(d) Chap. XIII. p. 281, &c.

(e) 5 Durnf. & East, 277; and see 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59, S. C. *Ante*, 295.

(f) 4 Taunt. 456. 5 Taunt. 319. 1 Marsh. 59, S. C.; and see 1 Taunt. 159.

(g) 1 Str. 202. 2 H. Blac. 278.

(h) 6 Durnf. & East, 363. 7 Durnf. & East, 80.

(i) 3 Lev. 235. R. E. 2 Geo. II. K. B. Barnes, 116.

(k) *Ante*, 838, 9.

(aa) Poph. 186. W. Jon. 29, 139. Cro. Car. 481. Sty. Rep. 281, 288, 323. 2 Lutw. 1273. 1 Ld. Raym. 156. 10 Mod. 267. R. E. 5 Geo. II. reg. 3, a, K. B.

(bb) 1 Barn. & Ald. 212.

(cc) *Per Cur.* M. 42 Geo. III. K. B. 1 New Rep. C. P. 251. 16 East, 2.

(dd) 2 Maule & Sel. 238.

(ee) *Sillitoe v. Wallace & another*, bail of Cawthorne, M. 43 Geo. III. K. B. 8 Moore, 8.

tiff, and lodged with the sheriff, for the purpose of fixing them, and afterwards became bankrupt; the court of Exchequer, on motion, refused to quash the writ, although the plaintiff would have undertaken to enter an *exoneretur* on the bail-piece, and make an affidavit that it was not his intention to take the defendant in execution.(f)

The *capias ad satisfaciendum* against the principal, should be directed to the sheriff of the county where the original action was laid. And, in the King's Bench, when the proceedings are by *bill*, there must be *eight* days, or, if by *original*, *fifteen* days between the *teste* and return of the writ;(g) the latter being a case excepted out of the statute 13 *Car.* II. stat. 2, c. 2, § 7. This writ must be made returnable, like the former proceedings, on a day certain, or general return day: And, in order to charge the bail, it must lie *four* days exclusive in the sheriff's office,(h) which must be the *last* four days before the return;(i) and *Sunday* is not reckoned as one of them.(k) In *London* and *Middlesex*, it appears that two books are kept in the sheriff's office, wherein entries are made of writs of *capias ad satisfaciendum* against principals: the one a *public* book, for such writs to be returned *non est inventus*, and on which no warrant is issued or proceedings had, and in which book the bail and all other persons may search; the other a *private* book, from which warrants are made out for actual arrest:(l) But, in order to fix bail, the *capias ad satisfaciendum*, in the King's Bench, must be entered *four* days in the *public* book in the office, and not in the [*1099] *private* book:(l) This, however, does not seem to *be necessary in the Exchequer.(a) In the Common Pleas, there must be *fifteen* days between the *teste* and return of the *capias ad satisfaciendum*;(bb) which must be *tested* in or after the term in which the judgment was signed against the principal: and therefore, where it was tested of a prior term, the court of Common Pleas set aside the proceedings against the bail.(cc) In that court also, the writ must lie in the sheriff's office, *four* days exclusive before it is returnable.(dd) The writ of *capias ad satisfaciendum*, if regularly sued out and returned, may be *filed* at any time; the filing being mere matter of form.(ee) But if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed; and the court will not stay the filing of the return, in favour of the bail.(ff)

Upon the return of *non est inventus* to the *capias ad satisfaciendum*, the recognizance being forfeited, the plaintiff may proceed thereon against the bail in the action, by action of *debt*, or *scire facias*: And the proceeding may be commenced on the return day, or, by *original*, on the *quarto die post* of the return, of the *capias ad satisfaciendum* against the principal.(gg) In *debt*, the plaintiff may bring one action against all the persons bound in the recognizance, or several actions against each of them:

(f) 8 Price, 512.

(g) 2 Salk. 602. 2 Ld. Raym. 1177. S. C. B. E. 5 Geo. II. reg. 3, a. K. B.

(h) 2 Salk. 599. B. E. 5 Geo. II. reg. 3, a. K. B.; and see 4 Barn. & Ald. 538.

(i) 13 East, 588.

(k) 1 Barn. & Ald. 528; and see 11 East, 271. 6 Maule & Sel. 133. 2 Chit. Rep. 192. S. C. 2 Dowl. & Ryl. 869.

(l) 5 Maule & Sel. 323. 2 Chit. Rep. 102, S. C.; but see 3 East, 570, *contra*. 1 M'Clel. & Y. 483.

(a) 1 M'Clel. & Y. 483.

(bb) Barnes, 76.

(cc) 1 H. Blac. 74. Imp. C. P. 7 Ed. 519.

(dd) Cas. Pr. C. P. 34. Barnes, 64.

(ee) 1 Lev. 225. 3 Bur. 1360. 1 Blac. Rep. 393, S. C.

(ff) *Field v. Lodge*, E. 24 Geo. III. K. B. 6 Durnf. & East, 284.

(gg) 8 Durnf. & East, 628; and see 2 Ld. Raym. 1567. 2 Str. 866, S. C.

But one *scire facias* seems in all cases to be sufficient; and the recognizance being joint and several, it is holden that the execution may be several though the *scire facias* was joint; for the judgment is not to *recover*, but to have *execution* according to the recognizance.(h)

In an action of *debt* upon a recognizance of bail, the defendant cannot be arrested, for the sufficiency of the bail must have been proved or admitted previous to their being allowed; and if the defendant were arrested in such an action, there would be bail *in infinitum*.(i) And when a writ is sued out upon a recognizance of bail, it is necessary, that after the words "*in a plea of trespass*," there should be inserted the following clause, "*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited*;" otherwise the defendant, or his attorney, is not bound to accept a declaration in *debt* upon such recognizance.(k)

We have already seen,(l) what time the bail are allowed to render their principal, when they are proceeded against in an action of *debt* upon their recognizance. We have also seen,(m) that in an action of *debt* on recognizance, when the proceedings are stayed on payment of debt and costs, the bail must pay the costs in that, as well as the debt and costs in the *original action, though they apply within the time allowed [*1100] them for surrendering the principal: And on that account, it is in general more advisable to proceed against the bail, by action of *debt* on the recognizance, than by *scire facias*, wherein no costs are allowed, unless they appear and plead, or join in demurrer.(a) There is also a further reason for proceeding by action of *debt* on the recognizance, namely, that in such an action, the plaintiff may recover damages for the detention of the debt, which he cannot do in *scire facias*.(b) But as a copy of the process must be served in *debt*, if the bail be out of the way, or the plaintiff do not mean to give them notice, he must proceed by *scire facias* on the recognizance.

A *scire facias* against the bail to the action, issues out of the court in which the action was depending; and begins by stating the recognizance, after which the judgment is set forth, *prout patet per recordum*: And on a recognizance of bail, taken in an action by *original*, there is no incongruity in stating, that the recognizance was taken in an action "then lately commenced, and depending in the King's Bench;" for the action may be said to commence in this court, when its jurisdiction attaches upon the original writ sued out of Chancery.(c) The writ, which is issued on a proper *præcipe*,(d) then states, that the principal has not paid the debt or damages recovered, nor rendered himself to the prison of the marshal, or warden;(e) and in the King's Bench, it concludes, by requiring the sheriff to make known to the bail, that they be before the king at *Westminster*, on a day certain, (by *bill*, or by *original* on a general return day, wheresoever, &c.) to show if they have or know of any thing to say for themselves, why the plaintiff ought not to have his execution against them, for the debt or damages aforesaid, (by *bill*, or by *original* for the sum acknowledged,)

(h) Bac. Abr. tit. *Execution*, G. 1 Lev. 225. 1 Sid. 339, S. C.

(i) *Ante*, 173.

(k) R. E. 15 Geo. II. reg. 1, K. B. *Ante*, 150, 51. Cas. Pr. C. P. 18. Imp. C. P. 7 Ed. 511.

(l) *Ante*, 283, 4.

(m) *Ante*, 542.

(a) Stat. 8 & 9 W. III. c. 11, § 3. 3 Bos. & Pul. 14.

(b) 2 Bur. 1791.

(c) 14 East, 539.

(d) Append. Chap. XLIII. § 7.

(e) 2 Salk. 439. 4 Salk. 320. 2 Ld. Raym. 804, S. C.

according to the force, form and effect of the recognizance, if it shall seem expedient for him so to do; and further, (f) &c. In the Common Pleas, the bail are required, by the writ, to be before the king's justices at *Westminster*, on a general return day, to show, &c. why the penalty of the recognizance should not be made of each of their lands and chattels, (g) &c. On a recognizance of bail, the *scire facias* against the principal is *in hac parte*, or that he do and receive what the court shall consider of him in *this* behalf; but against the bail it is *in ed parte*, or that they do and receive what the court shall consider of them in *that* behalf. (h) And where a *scire facias* was brought against three persons as bail, upon a recognizance acknowledged by them and the principal jointly, the writ abated; because this being founded on a record, the plaintiff ought to set forth the [*1101] cause of the variance from the record, as that one *was dead. (a)

But if an action be brought upon a joint bond against three only, when there are four or five obligors, there the defendant ought to show that it was made by them and others in full life, not named in the writ; for otherwise the court will not intend that the bond was sealed by all of them. (b) In *scire facias* to have execution for the damages and costs recovered against I. B. upon a recognizance of bail, conditioned in case the said I. B. and G. K. should be condemned, that I. B. and G. K. should pay, &c. or render themselves, the plaintiffs allege that I. B. and G. K. have not paid, &c. or rendered themselves, according to the form and effect of the recognizance; the court of King's Bench held, on special demurrer, that the breach was ill-assigned: for *non constat* but that I. B. who was alone condemned, has paid or rendered. (c)

By the recognizance of bail in *error* which will be more fully treated of in the next chapter, the plaintiff or plaintiffs in the writ of error become bound, with two sufficient sureties, in double the sum adjudged to be recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, as well the debt or damages and costs adjudged upon the former judgment, as also all costs and damages to be awarded for the delay of execution. (dd) Therefore, if the writ of error be non-prossed or discontinued, or the judgment affirmed, the defendant in error may proceed against the bail upon their recognizance, by action of *debt* or *scire facias* at his election: and as a render in this case will not excuse the bail, (e) there is no occasion to sue out a *capias ad satisfaciendum*, in order to proceed against them.

The *scire facias* against bail in error should be brought in the same court where the recognizance was taken, unless it was taken in the Common Pleas, and then the *scire facias* may be brought either in that court, or in

(f) Append. Chap. XLIII. § 8, 9, 12, 13.

(g) *Id.* § 10, 14. And for the form of a *scire facias* against bail in the Exchequer, see *id.* § 15, and against bail in the palace court of *Westminster*, on the removal of a cause under 15l. by *habeas corpus*, into the King's Bench, *id.* § 16.

(h) 1 Ld. Raym. 393. 2 Salk. 599, S. C.; but see 1 Ld. Raym. 532, *semb. contra.*

(a) Aleyn, 21.

(b) *Id. ibid.* And see further, as to the *scire facias* against bail to the action. 2 Wms. Saund. 5 Ed. 71, c. to 72, a. Petersd. Part I. Chap. XIII.

(c) 4 Maule & Sel. 83; and see 2 Moore, 66. 8 Taunt. 171, S. C.

(dd) Stat. 3 Jac. I. c. 8. 13 Car. II. stat. 2, c. 2, § 9. 16 & 17 Car. II. c. 8, § 3, 19 Geo. III. c. 70, § 5; and see Append. Chap. XLIII. § 17, 18, 19, 58. Chap. XLIV. § 34, &c.

(e) R. M. 5 W. & M. (b). K. B. And see further, as to the liability and discharge of bail in error, Petersd. Part II. Chap. III.

the King's Bench, to which the record is supposed to be removed. (f) This writ is made out by the clerk of the errors; (g) and, on a recognizance taken in the King's Bench, it recites not only the recognizance, but the condition of it, and the affirmance of the judgment, (h) &c., but on a recognizance taken in the Common Pleas, the *scire facias* merely states the recognizance, and the non-payment of the sum acknowledged to be due; (i) for in that court, the condition of the recognizance in error is not incorporated, as it is in a recognizance of bail on a *capias ad respondendum*, but is subscribed by way of defeazance; so that the recognizance and *condition are two distinct records: (a) And besides, if the [*1102] condition were stated, it would be necessary to state also the affirmance of the judgment, which might occasion difficulty, if the bail were to appear, and plead *nil tiel record* of the judgment of affirmance, which remains in the King's Bench. (b)

A *scire facias* upon a judgment is either by or against the same or different parties. As between the same parties, it will be proper to treat of a *scire facias*, in the following cases: first, after a year and a day; secondly, after a writ of error brought in the King's Bench to compel the plaintiff in error to assign errors; thirdly, when judgment is given in covenant or annuity, or in debt on bond conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, and damages arise, or money becomes payable, on the same security, after the judgment; and fourthly, when the debt or damages recovered are to be levied out of the future effects of a bankrupt, or insolvent debtor, or, in the case of an executor or administrator, *de bonis propriis*. And first, of the *scire facias* after a year and a day.

At common law, in real actions, when land was recovered, the demandant after the year, might have taken out a *scire facias* to revive the judgment; because the judgment being particular *quoad* the land, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given: and therefore, if there was no execution appearing on the roll, a *scire facias* issued, to show cause why execution should not be awarded: (c) Besides, in real actions, if execution was not sued within the year, a *scire facias* lay for the land; because no other advantage could be taken of the judgment, as an action of debt could not be maintained thereon. (d)

But if the plaintiff, after he had obtained judgment in a personal action, had lain by, and taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable; because there was not a judgment for any particular thing in the personal action, with which the execution could be compared: Therefore, after a reasonable time, which was a year and day, it was presumed to be executed,

(f) Lil. Ent. 643. 3 Mod. 251. 1 Wils. 98.

(h) Append. Chap. XLIII. § 18.

(b) Barnes, 93, 339.

(a) See further, as to the *scire facias* against bail in error, 2 Wms. Saund. 5 Ed. 72, 3. Petersd. Part II. Chap. IV.

(c) Bac. Abr. tit. Execution, H.

VOL. II.—26

(g) Barnes, 93.

(i) *Id.* § 17.

(d) 3 Salk. 321.

and the law allowed him no *scire facias*, to show cause why there should not be execution; but if the party had exceeded his time, he was put to his action on the judgment, and the defendant was obliged to show how the debt, of which the judgment was evidence, was discharged.(e)

To remedy this, and make the modes of proceeding more uniform in both actions, the statute of Westm. 2, (13 Edw. I.) stat. 1, c. 45, [*1103] gave a **scire facias* to the plaintiff in a personal action to revive the judgment, when he had omitted to sue execution within the year after judgment was obtained.(a) The words of the act are, "that those things which are found enrolled before them that have the record, or contained in fines, whether they be contracts, covenants, obligations, services or customs, recognizances, or other things whatsoever enrolled, to which the king's court may lawfully give effect, from henceforth shall have such force, that hereafter it shall not be necessary to implead upon them: But when the plaintiff comes to the king's court, if the recognizance or fine levied be recent, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance. And if perchance the recognizance were made, or fine levied of a longer time past, the sheriff shall be commanded, that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to show if he has anything to say, why such matters enrolled, or contained in the fine, ought not to be executed: And if he do not come at the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled, or contained in the fine to be executed." But notwithstanding this statute, the plaintiff may still proceed, if he think proper, by action of *debt* on the judgment.

The reason why the plaintiff is put to his *scire facias* after the year is, because when he lies by so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in court of pleading the release, or showing cause, if he can; why the execution should not go:(b) And it is said, that if the plaintiff delay executing a writ of inquiry till a year after interlocutory judgment, he cannot do it after, without a *scire facias*.(c) The year must be computed from the day of signing judgment;(d) and the year depending upon the statute 13 Edw. I. c. 45, the words of which are "*infra annum*," is to be reckoned by calendar months, and not by terms.(ee) And if the plaintiff sue a *scire facias* within a year after the judgment, he cannot afterwards have a *capias ad satisfaciendum* within the year, till he hath a new judgment in the *scire facias*.(f)

The general rule, however, that the plaintiff cannot take out execution after the year, without a *scire facias*, must be understood with the following restrictions. When a *fieri facias* or *capias ad satisfaciendum* is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*; provided [*1104] the **first writ* be returned and filed,(aa) and continuances enter-

(e) Bac. Abr. tit. *Execution*, H.; but see 2 Salk. 600. 7 Mod. 64. 2 Ld. Raym. 806, S. C.

(a) Bac. Abr. tit. *Execution*, H.

(b) 2 Inst. 470.

(c) 12 Mod. 500. *Sed quare*, whether a term's notice is not in this case sufficient? *Ans*, 577. R. M. 1654, § 21, (c). C. P.; and see 6 Moore, 517.

(d) Barnes, 197.

(ee) 1 Str. 301; and see 6 Mod. 14. 1 Chit. Rep. 669, (a).

(f) 1 Rol. Abr. 900.

(aa) 2 Will. 82. Barnes, 213, S. O.

ed from the time of issuing it; (b) which continuances may be entered after the issuing of the second writ, unless a rule be made upon motion, for the proceedings to remain *in statu quo*. And formerly, if judgment had been given, and no execution sued out within the year, yet the plaintiff might afterwards have entered an award of an *elegit* on the roll of the judgment, as of the same term with the judgment, and thence continued it down by *vicecomes non misit breve*: And though the court at first inclined to think, that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the court, that it had been the practice for many years to make such an entry, &c. it was said to be the law of the court, and they ordered the execution to stand. (c) But in a late case, (d) the court of King's Bench was of opinion, that there was no reason to distinguish between an *elegit* and other executions: and therefore, where an *elegit* had been issued after a year, without a *scire facias*, or any previous writ sued out within the year, to warrant it, the court set it aside for irregularity; although the award of an *elegit* had been entered on the roll, with continuances, after the rule was moved for.

If the plaintiff have judgment with a *cesset executio*, or stay of execution, for a year, he may, after the year, take out execution without a *scire facias*; (e) because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice: But if the plaintiff do not take out execution within a year after the *cesset executio* is determined, he must sue out a *scire facias*. (f) It is usual to insert a clause in annuity deeds, &c. that when execution is not taken out within a year, it shall not be necessary to revive the judgment by a *scire facias*; and it seems that the court will give effect to this clause, by permitting execution to be taken out accordingly. (g)

So, if the defendant bring a writ of *error*, and thereby hinder the plaintiff from taking out execution within the year, and the judgment be affirmed, the plaintiff in error nonsuited, or the writ of error abated or discontinued, the defendant in error may proceed to execution after the year without a *scire facias*; (h) because the writ of error was *supersedeas* to the execution, and the defendant in error must wait till it be determined. It has even been holden, in one case, (i) that if a writ of error be brought after the year is lapsed, and thereupon the former judgment is affirmed, such affirmation will revive the former judgment, and enable the party to take out execution without a *scire facias*: But from this case it seems, *that if the plaintiff in error be nonsuited, or the writ of error [*1105] discontinued, there can be no execution of the former judgment, without a *scire facias*.

It was formerly holden, that if the plaintiff were restrained by *injunction* out of Chancery for a year, he could not take out execution afterwards,

(b) Co. Lit. 290, b. 2 Inst. 471. 2 Leon. 77, 8. 1 Sid. 59. 1 Keb. 159, S. C. Carth. 283. Comb. 232, S. C. 3 Salk. 321. 1 Str. 100.

(c) Carth. 283. Comb. 232, S. C.

(d) *Putland v. Putland & another*, E. 57 Geo. III. K. B. 2 Chit. Rep. 384, S. C.

(e) 6 Mod. 288. 1 Salk. 322, S. C.

(f) 2 Crompt. 3 Ed. 96.

(g) 2 Smith R. 68. Lee's Prac. Dic. 2 Ed. 1228, 9. 2 Barn. & Cres. 242. 3 Dowl. & Ry. 603, S. C.

(h) 2 Inst. 471. 5 Co. 88. Oro. *Eliz.* 416. Carth. 237. 6 Mod. 288. 1 Salk. 322, S. C. 1 Salk. 321.

(i) 1 Bol. Rep. 104. Oro. *Jac.* 364, S. C.

without a *scire facias*; (a) because the courts of law do not take notice of Chancery injunctions, (b) as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error. But in a modern case, (c) where it appeared that the whole delay had arisen on the part of the defendant, by bills in Chancery for injunctions, and by obtaining time for payment, &c. the court of King's Bench were unanimous that this rule, of reviving a judgment above a year old by *scire facias* before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff; and therefore they discharged the rule for setting aside the execution with costs.

The *scire facias* upon a judgment must be sued out of the same court where the judgment was given, if the record remains there; (d) or if it has been removed, out of the court where the record is. [A] If the judgment be under seven years old, the plaintiff may, in either court, sue out a *scire facias*, as a matter of course, on a proper *præcipe*, (e) without any rule or motion: If it be above seven years, but under ten, he cannot have a *scire facias*, without a side-bar or treasury rule. (f) Formerly, if the judgment had been above ten years old, there must have been a motion to the court, in the King's Bench, (g) supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living; (h) upon which the rule was absolute in the first instance, unless the judgment were of more than twenty years standing, and then there must have been a rule to show cause. But now, if the judgment be above ten and under fifteen years old, the rule is absolute in the first instance, on an affidavit of the debt being due, &c.; and may be drawn up on a motion paper signed by counsel. If it be above fifteen years old, there must be a rule to show cause. (i) In the Common Pleas, where the judgment is more than ten years old, the court must be moved in term time, for leave to issue a *scire facias* to revive it; and will order that no execution be taken out thereon, without a [*1106] return of **scire feci*, or an affidavit of personal notice to the defendant: (aa) Therefore, where a writ of *scire facias* was issued more than ten years after the judgment, on a motion paper signed by a serjeant in vacation, and the defendant had no personal notice of the proceeding, the court set aside the judgment signed thereon for irregularity: (bb) And if the judgment be above twenty years old, there must be a rule to show cause. (cc)

(a) 6 Mod. 288. 1 Salk. 322, S. C. 1 Str. 301, S. P.

(b) 1 Salk. 257.

(c) 2 Bur. 660; and see 6 Moore, 517.

(d) Com. Dig. tit. *Pleader*, 3 L. 3.

(e) Append. Chap. XLIII. § 61.

(f) 2 Salk. 598. Sty. P. R. 575. Ed. 1707. *Ante*, 484. Append. Chap. XLIII. § 59.

(g) *Id. ibid.* 2 Lil. P. R. 499. Ed. 1719. 1 *Inst. Cler.* 152.

(h) Imp. K. B. 10 Ed. 453. 2 Sel. Pr. 2 Ed. 196.

(i) Imp. K. B. 10 Ed. 453. *Blakely v. Vincent*, T. 35 Geo. III. *Waters v. Hale*, R. 37 Geo. III. K. B. 2 Barn. & Ald. 773. 1 Chit. Rep. 535, S. C. 1 Dowl. & Ry. 181. *Ante*, 485. *Id.* (m). 486.

(aa) 2 Blac. Rep. 1140. Append. Chap. XLIII. § 60.

(bb) 3 Moore, 757. 1 Brod. & Bing. 381, S. C.

(cc) 2 Sel. Pr. 2 Ed. 196; and see 2 Blac. Rep. 995.

[A] See note [A]. *Ante*, p. 1090.

A *scire facias* upon a judgment, after a year and a day, states the judgment recovered by the plaintiff; which differs according to the nature of the action, and the court in which it was obtained: And when a *scire facias* is brought on a judgment in the King's Bench, the plaintiff must show where the court of King's Bench was holden, because that court is ambulatory: But if it be brought upon a judgment in the Common Pleas, it is otherwise; because that court is confined to a certain place.(d) It then states, that although judgment be thereupon given, yet execution of the debt or damages still remains to be made; and commands the sheriff, to make known to the defendant, that he be in court at the return day, to show why the plaintiff ought not to have execution against him for the debt or damages, according to the form and effect of the recovery, &c.(e) This being a judicial writ, must pursue the nature of the judgment: therefore, if a joint judgment be obtained against two, the *scire facias* must be against both:(f)[A] And in setting out the judgment, if there be a material variance, it will be fatal, on *nul tiel record*.

When a *scire facias* is brought in the King's Bench, upon a judgment of an *inferior* court, it must appear in the writ itself, how the judgment came into the King's Bench, whether by *certiorari* or by writ of error, because the execution is different:(g) for if it came by *certiorari*, the *scire facias*, we have seen,(h) ought to show the particular limits of the inferior jurisdiction, and pray execution within those limits: But if the judgment be removed into the King's Bench by writ of error, and affirmed, the party may have execution in any part of *England*; for by the affirmance, it is become the judgment of the King's Bench.(i)

After the judgment has been once revived by *scire facias*, if the plaintiff do not take out execution within a year,(k) or the defendant die before execution,(l) the plaintiff cannot afterwards take it out, without a new *scire facias*, or action on the judgment: but he may have a new writ without motion, for the judgment was revived before.(m)

**Secondly*: As the parties, in the King's Bench, have no day in court given to either of them, on the removal of the record by [*1107] writ of *error*, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias*

(d) 3 Salk. 321.

(e) Append. Chap. XLIII. § 62, &c.

(f) 2 Salk. 598. Garth. 195, S. C.

(g) 3 Salk. 320. 1 Ld. Raym. 216, S. C.; but see the statutes 19 Geo. III. c. 70, § 4, and 33 Geo. III. c. 68, § 1. *Ante*, 401, 995.

(h) *Ante*, 400, 401.

(i) Append. Chap. XLIII. § 79, &c. 1 Ld. Raym. 216. 3 Salk. 320, S. C.; and see 3 Durnf. & East, 657.

(k) 2 Crompt. 3 Ed. 97.

(l) 2 Salk. 598.

(m) *Id. ibid.* And see further, as to the *scire facias* on a judgment, after a year and a day, 2 Wms. Saund. 5 Ed. 6, (1).

[A] All the defendants in a judgment must be joined in a *scire facias* to revive it, and a discontinuance as to one, is a discontinuance as to all. *M'Fee v. Patterson*, 2 Smedes & Marsh. 593. And hence a *scire facias* to revive a joint judgment against two or more defendants, should pursue the judgment, and issue against all the defendants, if living, or the administrator or heirs of such as have died, with the surviving defendants. *Murray v. Baker*, 5 B. Monr. 172. But in a *scire facias* to revive a judgment against the representatives of a deceased defendant, the surviving defendant must be made a party, and the judgment in such case should be several. *Gray v. M'Dowell*, 5 Monr. 501. A *scire facias* to have execution should issue in the christian names as well as the surnames of the plaintiff, with an averment that the plaintiffs are the same persons named as plaintiffs in the judgment, or it cannot be sustained. *Codding v. Moore*, 5 Blackf. 601. And in the case of a separate fine against two persons for a contempt, a joint *scire facias* against them, to show cause, &c., is not sustainable. *Thompson v. The State*, 4 Blackf. 188.

quare executionem non, &c.:(a) and if upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nils*, no errors afterwards assigned shall prevent execution.(b) This writ, and the proceedings thereon, will be more fully treated of in the next chapter.(c)

Thirdly; With respect to demands arising after the judgment, it is said to have been adjudged, that in covenants perpetual, as to repair, &c. if they be once broken, and an action of *covenant* brought, and a recovery had thereon, if they be afterwards broken, the plaintiff shall have a *scire facias* upon the judgment, and need not bring a new writ of covenant.(dd)

Upon a writ of *annuity*, the old books differ as to the necessity of a *scire facias*, in order to have execution for subsequent arrears. In some books it is said, that if judgment be given in a writ of *annuity*, the plaintiff shall have execution, within a year after every day of payment, by *feri facias* or *elegit*, though it be many years after the judgment:(e) but other books seem to hold a different doctrine, and that for arrearages incurred after the judgment, it is necessary to have a *scire facias*, in order that the defendant may have an opportunity of pleading payment, or other matter in bar of execution:(f) And this latter opinion is in some measure confirmed by the language of the judgment, which is to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment is given:(g) but the amount of the arrearages subsequent to the judgment not being ascertained, it seems to be necessary to have a *scire facias*, to warrant an execution.

In an action of *debt* on bond, conditioned for the payment of an *annuity*, after judgment had been once obtained, it does not seem to have been formerly necessary to have a *scire facias*, to warrant an execution for subsequent arrears; but an execution might have been sued out for such arrears, without a *scire facias*, at any time within a year after they were incurred; or even afterwards, if a writ of execution had been previously taken out and returned, and was properly continued down.(h) Under such an execution, however, the plaintiff was not allowed to levy the whole penalty, but only the arrears; and therefore, where he levied the whole penalty, the court of Common Pleas made a rule upon him to refund the overplus, beyond [*1108] what would satisfy the arrears, and that judgment should stand as a security, with liberty to take out execution as future arrears should arise.(aa) And if judgment be entered up for the *penalty* of a bond, given to secure an annuity, and the defendant taken in execution thereon, when the warrant of attorney, under which such judgment was entered up, only authorized the taking out execution for the *arrears*, the court, we have seen,(bb) will set aside the execution in *toto*, and not merely charge the defendant *pro tanto*.(cc) So, in an action of *debt* on bond, conditioned for the payment of money by *instalments*, where the proceedings were

(a) Godb. 68. 2 Leon. 107. Append. Chap. XLIII. § 76, 7.

(b) Carth. 40, 41.

(c) For the form of a *scire facias* to disprove a debt in the mayor's court of London, after judgment and execution on a foreign attachment, see Append. Chap. XLIII. § 83.

(dd) Cro. Eliz. 3; but see 3 Leon. 51.

(e) 21 Edw. III. 23. 2 Inst. 471. 1 Rol. Abr. 900. 2 Blac. Rep. 844.

(f) 11 Hen. IV. 34. Bro. Abr. tit. *Annuity*, pl. 17, tit. *Scire facias*, pl. 75. Co. Lit. 143. 2 Co. 37. 6 Co. 45. Jenk. 51, 2. 1 Rol. Abr. 229. 1 Salk. 258. 2 Salk. 600.

(g) Co. Ent. 50. Cro. Car. 436. Ante, 879, 931.

(h) 2 Blac. Rep. 849; and see 1 H. Blac. 297.

(aa) 2 Blac. Rep. 1111.

(bb) Ante, 997.

(cc) 16 East, 163.

stayed on payment of one or more of the instalments, and judgment entered as a security for the remainder, with a stay of execution till they should become due, it does not seem to have been formerly necessary for the plaintiff to sue out a *scire facias*, for the recovery of subsequent instalments, if execution was taken out within a year after each default.^(d) But now, as a bond conditioned for the payment of an *annuity*, or of money by *instalments*, is holden to be within the statute 8 & 9 W. III. c. 11, § 8,^(ee) it seems necessary to proceed by *scire facias* on that statute, for subsequent arrears, or instalments;^(ff) unless judgment be entered up on a warrant of attorney, which is not within the statute.^(gg)

When judgment is entered in an action of *debt* on bond, or on any penal sum, for non-performance of *covenants* or agreements in any indenture, deed or writing contained, we may remember,^(hh) that by the statute 8 & 9 W. III. c. 11, § 8, it remains as a security to answer such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture, deed or writing contained: and the statute further directs, that "the plaintiff may have a *scire facias*, upon the said judgment against the defendant, or against his heir, tertenants, executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause, why execution should not be had or awarded upon the said judgment:(i) upon which there shall be the like proceeding, as in the action of *debt* upon the said bond or obligation, for assessing damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as therein directed; and that upon payment or satisfaction of such future damages, costs and charges, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands or goods, shall be discharged out of execution." But where A. advanced to B. a certain sum in Bank Stock, for which B. executed a bond conditioned for replacing the stock on a particular day, and payment to A. of all dividends, &c. in the mean time; and B. having made default, A. recovered judgment, with damages assessed upon both breaches; the court of Exchequer held, that a plea of judgment recovered *was a [*1109] good bar to a *scire facias*; and that A. was not entitled to further dividends, &c. after verdict, whatever delay there might have been in his suing out execution.^(a)

Fourthly: With regard to the *future* effects of *bankrupts*, it was enacted by the statute 5 Geo. II. c. 80, § 9, that "in case any commission of *bankruptcy* should issue against any person or persons, who should have been discharged by virtue of that act, or should have compounded with his, her or their creditors, or delivered to them his, her or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors, then and in either of those cases, the body and bodies only of such person or persons, conforming as therein mentioned, should be free from arrest and imprisonment, by virtue of that act; but the *future* estate and effects of every such person and persons should remain liable to

(d) 2 Str. 814, 957. 2 Blac. Rep. 706, 958. Barnes, 268. *Ante*, 543. 2 Wms. Saund. Ed. 72, d.

(ee) *Ante*, 584.

(gg) *Ante*, 585.

(i) Append. Chap. XLIII. § 85.

(a) M'Clel. 377. 13 Price, 715, S. C. 1 Man. & Ryl. 492. (a).

(ff) Append. Chap. XLIII. § 84, 86.

(hh) *Ante*, 583, 4; and see 2 Wms. Saund. 5 Ed. 72, c.

his, her or their creditors, as before the making of that act: (the tools of trade, necessary household goods and furniture, and necessary wearing apparel of such bankrupt, and his wife and children, only excepted,) unless the estate of such person or persons, against whom such commission should be awarded, should produce, clear after all charges, sufficient to pay every creditor under the said commission, *fifteen* shillings in the pound for their respective debts." On this statute it was holden, that though a prior commission was superseded by consent, a second bankruptcy did not protect future effects, unless *fifteen* shillings in the pound were paid under the second commission: (b) And a deed of composition embracing *all* the creditors, under which many of them came in, was considered, in case of a subsequent commission of bankruptcy, such a compounding with his creditors, as would, within the statute 5 Geo. II. c. 30, § 9, deprive the bankrupt of the benefit of his certificate, to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition. (c) But a deed of composition framed only for the *joint* creditors of several persons, one of whom afterwards became bankrupt, was not deemed such a compounding with his creditors, as would avoid the effect of his certificate, or subject his future effects to be taken in execution: the compositions which the statute contemplated, being not such as were limited and extended to a particular class or description of creditors only, but such as were general, and calculated to admit all creditors, of whatever description they might be. (d) And the proving of a debt under a commission of bankruptcy issued against a person who had before compounded with his creditors, and whose estate under the commission had not produced, nor would produce, *fifteen* shillings in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded, the full amount of their debts, was holden to discharge the bankrupt, in respect of his future estate and effects, from an action for the debt so proved. (e)

[*1110] *Where the defendant pleaded his bankruptcy, and the plaintiff relied on the defendant having been a bankrupt before, it was deemed sufficient proof of the first bankruptcy, to produce the proceedings, and to show that the defendant submitted to that commission, without proving the trading, petitioning creditor's debt, and act of bankruptcy. (a) To prove that the defendant, who pleaded his bankruptcy, had before been discharged as a bankrupt, the plaintiff must have shown that the defendant obtained his certificate under the former commission, either by the regular proof of it, or by secondary evidence, after a notice to produce it: Without such notice, the defendant's affidavit of conformity under the former commission was holden insufficient. (bb) And the book kept in the office of the secretary of bankrupts, in which entries were made of the allowance of certificates, was not allowed as secondary evidence. (cc) But after notice to produce the former certificate, it was enough if witnesses stated they were employed by the defendant to solicit that certificate; and that looking at the entries in their books, they had no doubt it was allowed by the Lord Chancellor. (cc) And the certificate under a second commission was no bar to an execution against the bankrupt's effects, unless it appeared affirma-

(b) Doug. 46.

(d) 15 East, 619.

(e) 3 Maule & Sel. 78; and see 2 Chit. Rep. 114. *Ante*, 1010.

(a) 3 Esp. Rep. 195.

(c) 1 Maule & Sel. 182.

(bb) 4 Campb. 282.

(cc) 3 Camp. 493.

tively, that his estate had produced, clear after all charges, sufficient to pay every creditor under the commission *fifteen* shillings in the pound, for their respective debts: Evidence that it would probably produce so much, was not sufficient. (dd)

The judgment against a *bankrupt*, under the above circumstances, was *general*, if given before he had obtained his certificate under the second commission; or if given afterwards, it might have been *special*, against his future estate and effects, with the exceptions in the statute. On a general judgment, the plaintiff, it seems, could not have sued out a special execution against the future effects of the bankrupt: such an execution not being warranted by the judgment. (ee) But where the defendant, having given a warrant of attorney to confess a judgment, took the benefit of an insolvent act, and then became bankrupt and obtained his certificate, after which the plaintiff entered up a *general* judgment, and sued out a *general* execution against his effects; the court of Common Pleas held the proceedings to be regular, and that no *scire facias* was necessary to authorize either the judgment or execution; no dividend appearing to have been made, nor any goods taken under the execution more than the plaintiff was entitled to. (f)

When a writ of *scire facias* was necessary, as where the judgment had been given more than a year, and the defendant in the meantime had been taken in execution, and discharged upon obtaining his certificate, the *scire facias* must have stated the judgment, and the circumstances which made the defendant's future estate and effects liable to satisfy it, *as that he had been before a bankrupt, or had compounded with [*1111] his creditors, &c.; and in particular it was necessary to aver, that the bankrupt's estate had not paid *fifteen* shillings in the pound under the second commission, at the time of suing out the writ: It then stated, that the defendant had become seized or possessed of some estate or effects; and commanded the sheriff, that he should make known to the defendant, to appear in court at the return day, to show why the plaintiff should not have execution of the debt or damages, to be levied of the estate and effects whereof the defendant had become seized or possessed, since the obtaining of his certificate under the last commission, except his tools, &c. (a)

It should be observed, however, that in the late bankrupt act, (b) by which the former acts were repealed, there is no provision made for any particular creditors of the bankrupt, where his estate does not produce sufficient to pay them *fifteen* shillings in the pound under the commission; it being thereby enacted, that "if any person who shall have been so discharged by such certificate as therein mentioned, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become *bankrupt*, and have obtained, or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges,) sufficient to pay every creditor under the commission *fifteen* shillings in the pound, such certificate shall only protect his *person* from arrest and imprisonment; but his *future* estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife and children,) shall vest in the assignees under

(dd) 16 East, 225; and see 5 Durnf. & East, 287. 1 Bos. & Pul. 467. 3 Esp. Rep. 195. *Kingsford v. Tracey*, H. 43 Geo. III. K. B.

(ee) 1 Durnf. & East. 80.

(f) 3 Bos. & Pul. 185; and see 2 Chit. Rep. 114.

(a) Append. Chap. XLIII. § 89, 90; and see 2 Wms. Saund. 5 Ed. 72, f.

(b) 6 Geo. IV. c. 16, § 127; and see stat. 5 Geo. II. c. 30, § 9.

the said commission, who shall be entitled to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." So that, upon a commission issued since the making of this statute, the future effects of a bankrupt, who has not paid fifteen shillings in the pound under the commission, seem to be no longer liable to his particular creditors, or to any proceeding, by *scire facias* or otherwise, for the recovery of their debts; but are vested in the assignees alone, who are entitled to seize the same, for the benefit of the creditors in general under the commission. But, by a subsequent clause of the same statute,(c) "nothing therein contained shall render invalid any commission of bankruptcy then subsisting, or which should be subsisting at the time that act should take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person then had thereunder, or upon or against any bankrupt against whom any commission had or should have issued, except as therein specifically enacted."

It should also be observed, that by another clause of the same statute,(d) if any assignee indebted to the estate of which he is assignee, in respect of money retained in his hands, or employed by him for his own [*1112] benefit, *to the amount of 100*l.* or upwards, become bankrupt, if he shall obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife and children, excepted,) shall remain liable for so much of his debts, to the estate of which he was assignee, as shall not be paid by dividends under his commission, together with lawful interest for the whole debt." By the *Lord's* act, (32 Geo. II. c. 28, § 17, 20,) we may remember,(a) that "notwithstanding any discharge obtained by virtue of that act, for the person of any prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon, against the lands, tenements, rents or hereditaments, goods or chattels of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole, as if he had never been before arrested, taken in execution, and released out of prison." There is also a similar provision in the statute 48 Geo. III. c. 123, for the discharge of debtors in execution for small debts. And it has been determined, that the effects acquired by an insolvent, after his discharge under the 34 Geo. III. c. 69, are liable to be taken in execution for a debt due before.(b) But an execution sued out against the goods of a defendant was set aside, and the money which had been levied under it ordered to be restored; the defendant having been discharged, pending the action, under the insolvent debtor's act, 1 Geo. IV. c. 119.(c)

On a general judgment, obtained against a defendant before his discharge under an insolvent act, no special execution can be taken out, with-

(c) § 135.

(d) § 105; and see stat. 49 Geo. III. c. 121, § 6.

(a) *Ante*, 365.

(b) 6 Durnf. & East, 366; and see 8 East, 55, stat. 44 Geo. III. c. 108, § 63. 51 Geo. III. c. 125, § 60. 54 Geo. III. c. 28, § 59. 1 Geo. IV. c. 119, § 29, 30. 7 Geo. IV. c. 57, § 58, 9. *Ante*, 388.

(c) 8 Price, 607, and see stat. 7 Geo. IV. c. 57, § 60, 61.

out first suing out a *scire facias*.(d) And where a warrant of attorney was given before the passing of an insolvent act, of which the defendant was entitled to take advantage by pleading in discharge of his person, &c., it was holden, that a *general* judgment signed by virtue of such a warrant of attorney, after the defendant's discharge, would not warrant a *special* execution under the act.(e) But it seems that in this case, a *general* execution, pursuing the judgment, would be regular; and that a *scire facias* is unnecessary.(f)

In the case of an *executor* or *administrator*, the judgment against him is either upon the plaintiff's confession of the plea of *plene administravit*, or *plene administravit præter*, for the debt or damages and costs, to be levied, as to the whole or in part, of the goods of the testator or intestate, which shall afterwards come to the hands of the defendant to be administered; which is called a judgment of assets *quando acciderint*: or it is *after a verdict, demurrer, or issue of *nul tiel record*, or by [*1113] confession of the defendant, or *nihil dicit*, for the debt or damages and costs, to be levied of the goods of the testator or intestate, in the hands of the defendant, if he hath so much thereof in his hands to be administered, and if not, then the costs to be levied of his own proper goods.(aa) In the first case, the judgment appears to be founded on the opinion of the court in *Mary Shipley's* case,(bb) where it was holden, that upon a plea of *plene administravit*, the plaintiff may have judgment for his debt presently, for thereby the defendant confesses the debt; but he cannot have execution, until the defendant have goods of the deceased, when he may either sue out a *scire facias*.(c) or bring an action of *debt* upon the judgment, suggesting a *devastavit*: And though this opinion was questioned in the case of *Dorchester v. Webb*,(dd) yet in a subsequent case(ee) it was established, and has ever since been adhered to. So, in *debt* against an heir, if he plead *nothing by descent*, the plaintiff may have judgment presently, and a *scire facias* when assets descend.(ff) But by taking judgment of assets *quando acciderint*, the plaintiff admits that the defendant has fully administered to that time; and therefore on a *scire facias*, or action of *debt* on the judgment, suggesting a *devastavit*, the court will not allow the plaintiff to give any evidence of effects come to the defendant's hands before the judgment.(g) And for the same reason, the *scire facias* on a judgment of assets *quando acciderint*, must only pray execution of such assets as have come to the defendant's hands since the former judgment; and if it pray execution of assets generally, it cannot be supported.(h) Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro*.(i)

In proceeding upon a judgment against an executor or administrator, after verdict, &c., it is usual for the plaintiff to sue out a *feri facias de*

(d) 1 Durnf. & East, 79. Append. Chap. XLIII. § 91.

(e) 1 Durnf. & East, 80; and see 2 Wms. Saund. 5 Ed. 72, f. g.

(f) *Per. Cur. H.* 41 Geo. III. K. B. 3 Bos. & Pul. 185, C. P.

(aa) 4 Durnf. & East, 648. 7 Durnf. & East, 359.

(c) Append. Chap. XLIII. § 88.

(bb) 8 Co. 134.

(dd) *Cro. Car.* 372.

(ee) *Nelson v. Noel & others*, 2 Wms. Saund. 5 Ed. 226. 1 Sid. 448. 1 Lev. 286. 1 Vent.

94, 5. 2 Keb. 606, 621, 631, 666, 671, S. C. Hob. 199, S. P.; and see 7 Durnf. & East, 29.

(ff) 8 Co. 134.

(g) Bul. Ni. Pri. 169.

(h) 6 Durnf. & East, 1; and see 2 Wms. Saund. 5 Ed. 219, a, (2).

(i) *Perryman & Westwood*, cited in 1 Vent. 95, and 1 Sid. 448.

bonis testatoris, si, &c., et si non, de bonis propriis, according to the judgment; (k) upon which the sheriff, if he cannot execute the writ according to its tenor, either returns *nulla bona* generally, or *nulla bona* and a *devastavit* by the defendant. (l) On the latter return, the plaintiff, we have seen, (m) may have execution immediately against the defendant by *capias ad satisfaciendum*, or *feri facias de bonis propriis*: But on the former, the ancient course was to issue a special writ, for the sheriff to inquire whether the defendant had wasted any of the goods of the deceased: (n)

And if a *devastavit* were found, and returned by the sheriff, a [*1114] *scire facias* *issued for the defendant to show cause, why the plaintiff should not have execution *de bonis propriis*: to which *scire facias* the defendant might appear, and plead *plene administravit*. (a) But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting a judgment, *feri facias*, and return of *nulla bona*, and, after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition, (b) that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in court at the return of the writ, to show cause why the plaintiff ought not to have execution *de bonis propriis*: (cc) And there must be the same notice of executing such writ, as of a common writ of inquiry. (d) This method, however, though preferable to the old one, is seldom pursued at this day: as the plaintiff is not allowed any costs, unless the defendant appear and plead, or there be a joinder in demurrer; and therefore it is more usual, on the return of *nulla bona* to the *feri facias*, to bring an action of *debt* on the judgment, suggesting a *devastavit*.

The *scire facias*, upon a change of parties, is governed by the rule laid down in the case of *Penoyer v. Brace*, (e) that where a new person is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias*, to make him party to the judgment: but where the execution is not beneficial or chargeable to a person who was not party to the judgment, a *scire facias* is unnecessary. On this rule depend the cases of *marriage*, *bankruptcy*, and *death*: And first, of *marriage*.

If a *feme sole* obtain judgment, and she afterwards marry before execution, there must be a *scire facias* for husband and wife, in order to execute the judgment. And in a modern case (f) it was holden, that the husband cannot have execution for the costs, on a plea of coverture found for his wife sued as a *feme sole*, without a *scire facias*; it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process, without a *scire facias*. So, if final judgment be given against a *feme sole*, and she marry before execution, there should regularly

(k) Cro. *Eliz.* 887.

(m) *Ante*, 1025.

(a) Cro. *Eliz.* 859, 887. Lil. Ent. 667.

(cc) *Theas. Brev.* 236, &c. Lil. Ent. 666. Append. Chap. XLIII. § 87. And for the return to a *scire fieri* inquiry, see Append. Chap. XLIII. § 123.

(d) Gilb. Cas. 95. 1 Str. 235, 623. 2 Ld. Raym. 1382. 8 Mod. 366, S. C. Cas. Pr. C. P. 1.

(e) 1 Ld. Raym. 245. 1 Salk. 319, 20, S. C.; and see 2 Inst. 471. 2 Ld. Raym. 768.

(f) Doug. 637.

(l) *Theas. Brev.* 116, 17.

(n) Cro. *Eliz.* 859, 887.

(b) Append., Chap. XLIII. § 124.

be a *scire facias* to revive it against her and her husband. But when a *feme sole* marries, after interlocutory judgment against her upon a contract, the plaintiff may proceed to judgment and execution, without joining the husband by *scire facias*; and a *capias ad satisfaciendum*, following the judgment, is at all events regular, though the plaintiff had notice of the marriage before. (g) So, in *ejectment* against a *feme sole*, who married before *trial, and afterwards verdict and judgment were given against [*1115] her by her original name; the court of King's Bench held, that it was regular to issue an *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was inoperative. (a) In a *scire facias* by baron and *feme*, upon a judgment recovered by the *feme dum sola*, the plaintiffs should state their marriage; (b) but they need not allege it with a venue, this being only matter of surmise, to which no venue is necessary. (c)

If husband and wife obtain judgment for the proper debt of the wife, and afterwards the wife die before execution, the husband alone may have a *scire facias*, without taking out administration; (dd) for by the judgment, the nature of the debt is altered, and it is become a debt to the husband. (ee) So, if execution be awarded to the husband and wife, on a judgment obtained by the wife *dum sola*, for her own proper debt, the husband alone may have a *scire facias* after his wife's death; (ff) for though the award of execution does not alter the nature of the debt, yet it alters the property, and vests it in the husband jointly with his wife. And, in like manner, if judgment be obtained against a *feme sole*, and she marry, and then the plaintiff sue out a *scire facias* against a husband and wife, (gg) and have judgment *quod habeat executionem* against both, and afterwards the wife die, the plaintiff may sue out a *scire facias*, and have execution against the husband. (h) But if husband and wife obtain judgment for a debt due to the wife as executrix, and then the wife die before execution, the husband cannot have a *scire facias* upon the judgment; (i) for though he was privy to the judgment, he shall not have the thing recovered, but it belongs to the succeeding executor or administrator. (k) And where husband and wife had commenced an action for money lent by the wife before marriage, and she died pending the action; the court we have seen, held that the suit thereby abated, and that the defendant could not afterwards have judgment as in case of a nonsuit. (l)

Secondly, of *bankruptcy*: Whenever the defendant has a day in court to plead it, he may plead the bankruptcy of the plaintiff, and the assignment of his effects, in bar to his recovery, or to his having execution on a recognizance of bail, &c. (m) But if the plaintiff become bankrupt after interlocutory and before final judgment, (n) or after final judgment, and

(g) 4 East, 521.

(a) 3 Manle & Sel. 557.

(b) Append. Chap. XLIII. § 92, 94.

(c) 2 Str. 775. 2 Ld. Raym. 1504. 1 Barnard. K. B. 16, S. C.; and see 2 H. Blac. 145.

† Durnf. & East, 243.

(dd) Cro. Eliz. 844. 1 Sid. 337. 1 Mod. 179.

(ee) But see 3 Atk. 21.

(ff) 1 Salk. 116. Carth. 415. Comb. 455. Skin. 682, S. C.

(gg) Append. Chap. XLIII. § 93.

(h) 3 Mod. 186. Carth. 30. Comb. 103, S. C.

(i) Cro. Car. 208, 227. W. Jon. 248, S. C.

(k) See further, as to the *scire facias* on marriage, 2 Wms. Saund. 5 Ed. 72, i. k.

(l) 6 Barn. & Cres. 253. 8 Dowl. & Ryl. 592, S. C. Ante, 763.

(m) 15 East, 622.

(n) 2 Wils. 372.

pending a writ of error,^(o) his assignees may proceed to final [*1116] judgment, or *affirmance, in the bankrupt's name. And, in a modern case,^(a) where the plaintiff became bankrupt between interlocutory and final judgment, and sued out execution in his own name, the court refused to set aside the proceedings. It was formerly holden, that if the plaintiff became bankrupt after final judgment or affirmance, and before execution, the assignees must have sued out a *scire facias*:^(b) And a *scire facias* by the assignees of a bankrupt, stating that he became bankrupt, within the true intent and meaning of the statutes, &c. and that his effects were afterwards in due manner assigned to the plaintiffs, was deemed sufficiently certain; without alleging the particular requisites necessary to support a commission, or that the party was declared a bankrupt, or his effects assigned by deed, and without making a *profert in curia* of the deed of assignment.^(c) But the *scire facias* must state that the bankrupt's estate was assigned to his assignees: or the declaration thereon would it seems be bad, on special demurrer.^(d) Where the plaintiff became bankrupt, after he had revived the judgment by *scire facias*, the court of King's Bench ordered the special matter to be entered, to entitle his assignee to the benefit of the judgment on the *scire facias*, without bringing a new *scire facias*:^(e) And where the plaintiff became bankrupt after judgment, and a writ of error allowed, it was determined that his assignees could not sue out a *scire facias* in their own names, to compel an assignment of errors; but must go on with the writ of error in the bankrupt's name till judgment.^(f)

Thirdly of *death*; which may be considered either as it happens before, or after final judgment. At common law, the death of a sole plaintiff or defendant, at any time before *final* judgment, would have abated the suit. But now, by the statute 17 *Car.* II. c. 8, § 1, for the avoiding of unnecessary suits and delays, it is enacted, that "in all actions personal, real or mixed, the death of either party, *between the verdict and the judgment*, shall not be alleged for error; so as such judgment be entered within *two* terms after the verdict." This statute is confined to *verdicts*; and does not extend to cases where either party dies after interlocutory judgment, and before the return of the inquiry.^(g) The judgment upon this statute is entered for or against the party, as though he were alive;^(h) and it should be entered, or at least signed,⁽ⁱ⁾ within *two* terms after the verdict.

But there must be a *scire facias* to revive it before execution:^(k) [*1117] and such *scire facias*, pursuing the form of the *judgment, should be general,^(aa) as on a judgment recovered by or against the party himself.

By a subsequent statute,^(bb) it is enacted, that "in all actions to be com-

(o) 1 Durnf. & East, 463. 2 Durnf. & East, 45.

(a) 3 Durnf. & East, 437.

(b) 1 Mod. 93. 1 Vent. 193, S. C.; and see 2 Wils. 372, 378. 2 Durnf. & East, 45, where a *scire facias* issued, upon a bankruptcy happening between interlocutory and final judgment.

(c) 2 Durnf. & East, 45; and see Append. Chap. XLIII. § 95.

(d) 3 Barn. & Cres. 192. 5 Dowl. & Ryl. 1, S. C.

(e) 5 Mod. 88.

(f) 1 Durnf. & East, 463. And see further, as to the *scire facias* on bankruptcy, 2 Wms. Saund. 72, k.

(g) 4 Taunt. 884.

(h) 1 Salk. 42.

(i) 1 Sid. 385. Barnes, 261; and see 4 Taunt. 702.

(k) 1 Wils. 302.

(aa) 2 Ld. Raym. 1280. Append. Chap. XLIII. § 106.

(bb) 8 & 9 W. III. c. 11, § 6.

menced in any court of record, if the plaintiff or defendant happen to die, *after interlocutory and before final judgment*, the action shall not abate by reason thereof, if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them.(c) And if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *scire facias*, it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded; which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias*, against such defendant, his executors or administrators, respectively.”(d) This statute has been holden not to extend to cases where the party dies before interlocutory judgment; though it be after the expiration of the rule to plead.(e) And where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment, the court of King’s Bench held, that he could not have a *scire facias* against his administrator; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant.(f) It should also be remembered, that the statute is expressly confined to cases where the action might originally have been prosecuted or maintained by or against the executors or administrators of the party dying; and therefore, where the plaintiff in an action for a *libel*, died after interlocutory judgment signed and writ of inquiry executed, but before the day in bank, the court of Common Pleas held, that final judgment could not be entered for the plaintiff, for the damages assessed, the suit having abated by his death.(g)

When either party dies after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* upon this statute ought to be for the defendant, or his executors or administrators, to show cause *why the damages should not be *assessed*, and recovered [*1118] against them:(a) and to hear the judgment of the court thereupon:(b) But when the death happens after the writ of inquiry is executed, and before final judgment, the *scire facias* must be to show cause why the damages assessed by the jury should not be *adjudged* to the plaintiff, or his executors or administrators.(cc)

The judgment upon this statute is not entered for or against the party himself, as upon the 17 *Car. II. c. 8, § 1*, but for or against his executors or administrators.(dd) And when the defendant dies after interlocutory

(c) Append. Chap. XLIII. § 96, &c.

(d) *Id.* § 134.

(f) 1 Maule & Sel. 242.

(g) 4 Taunt. 884.

(a) Lill. Ent. 647.

(cc) 1 Wils. 243; and see 1 Durnf. & East, 388. Chap. XLIII. § 100.

(e) 1 Wils. 315; but see Barnes, 266.

(b) 6 Mod. 144.

2 Wms. Saund. 5 Ed. 6, b, (2). Append.

(dd) 1 Salk. 42.

and before final judgment, two writs of *scire facias* must be sued out by the plaintiff, before he can have execution; one before final judgment is signed, in order to make the executors or administrators parties to the record; the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter in their defence; for it would be unreasonable that the executors or administrators should be in a worse situation, when their testator or intestate died before the final judgment was signed, than they would have been in, if he had died afterwards.(e)

When there is only one plaintiff or defendant, who dies *after final judgment* and *before* execution, a *scire facias* may be had by or against his *personal* representatives;[A] and upon the death of the party against whom the judgment is given, the other party may proceed by *scire facias* against his *heir* and *tennants*. But when the plaintiff dies *after* the defendant is charged in execution, his executors, we have seen,(f) are not bound to revive the judgment by *scire facias*, or to charge the defendant in execution *de novo*. The personal representatives of the deceased party are his executor or administrator, or, if there be more than one, his executors or administrators, and the survivors of them; and the executor of an executor is considered as the representatives of the first testator. If any of the executors or administrators are *femes covert*, their husbands must be made parties to the *scire facias*: And though an executor or administrator become bankrupt, yet he may still proceed by *scire facias*; as the bankruptcy does not affect him in his representative character. But the administrator of an executor, claiming by the act of the ordinary, does not represent the original testator;(gg) nor does the executor or administrator of an administrator represent the first intestate: Therefore, when an executor dies intestate, or after the death of an administrator, it is

(e) Say. Rep. 266. And see further, as to the *scire facias* on the death of a party *before* final judgment, 6 Mod. 142. 1 Salk. 315, S. C. *Id.* 42. 11 Vin. Abr. 279, S. C. 2 Wms. Saund. 5 Ed. 72, k. l. m.

(f) *Ante*, 366.

(gg) 1 Bos. & Pul. 310.

[A] A *feri facias* against lands, issued and tested after the death of a defendant, is irregular without a *scire facias* to the heirs. *Wood v. Harrison*, 1 Dev. & Batt. 356. Where judgment was rendered against several, and one of them died before execution, his representatives may be proceeded against jointly with the survivors in *scire facias*; and although the deceased was liable only as surety. *Zanesville Canal and Man. Co. v. Granger*, 7 Ham. (Part 1st,) 165. A *scire facias* issuing against the representatives of a deceased person, in order to make them parties to a suit, must designate them by name, and state, in what capacity they are representatives. *Caller v. Malone*, 1 Stew. & Port. 305. And a *scire facias* to revive a judgment after the death of the defendant, should be sued out against his executors or administrators. *Brown v. Webb*, 1 Watts, 411. *Riter v. Rittenhouse*, 3 Rawle, 273.

Where two obligors are sued, and both die pending the proceedings, though it does not appear by the record which died first, on a *scire facias* against the administrator of one of them, who does not demur to it nor plead a variance between it and the proceedings on which it issued, but pleads to issue, it must be understood that the other obligor died first, and that the action survived against the obligor against whose representative the *scire facias* was sued out. *Hamlin v. Atkinson*, 6 Rand. 574. Where there is an execution against two defendants, and one dies, although the liability survives against the other, yet the creditor may revive against the decedent's representatives by *scire facias*, to increase his security. *Huey v. Redden*, 3 Dana, 488. To revive a judgment in ejectment against two, one of whom has died, the *scire facias* must issue against the heirs of the deceased, the terretenant, and survivor. *Griffith v. Wilson*, 1 J. J. Marsh. 209. *Scire facias* lies only against the surviving defendants or the representative of the last survivor. *Howe v. Gibbert*, 2 Bailey, 306. And it can only be maintained in the name of the original plaintiff, or after his death in the name of his personal representative. *M'Kinney v. M'Haffy*, 7 Watts. & Serg. 276.

necessary to take out administration *de bonis non*, or of such goods as are left unadministered. (gg)

*At common law, an administrator *de bonis non*, claiming by [*1119] title paramount, could not have had a *scire facias*, or otherwise proceeded on a judgment recovered by an executor or administrator; but it was otherwise in the case of a judgment recovered against an executor or administrator. (a) And now, by the statute 17 Car. II. c. 8, § 2, "where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment." On this statute it has been holden, that an administrator *de bonis non* may not only commence an execution, on a judgment obtained by an executor or administrator, but may perfect an execution already begun. (b) But, still, if an executor bring a *scire facias* on a judgment or recognizance, and get judgment *quod habeat executionem*, and die intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in *scire facias*. (c)

The *scire facias* on a judgment by the personal representative states, in addition to the judgment, the death of the testator or intestate, as the court have been informed by the person suing it out, who is described as his executor or administrator: (d) If the writ be brought against personal representatives, it states that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it is for the defendant to show why the plaintiff should not have execution of the debt or damages to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered, &c. (e) In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be expressly averred. (f)

When there were two or more plaintiffs in a personal action, the death of one or more of them, *pending the suit*, would formerly in some cases have abated it. (g) But now, by the statute 8 & 9 W. III. c. 11, § 7, "if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants." (h) In such case, if the death happen before declaration, it is usually suggested at the commencement of it: If it happen after declaration, [*1120] and *before issue joined, it should be suggested in making up the issue; but otherwise it need not be suggested till the judgment roll is made up. (aa) It is said that if a co-plaintiff die, the suit will be abated, unless the death be suggested according to the statute: (bb) But where

(gg) 1 Bos. & Pul. 310.

(a) 1 Rol. Abr. 890. W. Jon. 214. Cro. Car. 167, S. C.

(b) 1 Salk. 323.

(c) 2 Ld. Raym. 1049.

(d) Append. Chap. XLIII. § 103, &c. 110, 112. And see further, as to the *scire facias* against personal representatives, on the death of a party after final judgment, 2 Wms. Saund. 5 Ed. 6, (1), 72, m, n.

(e) Append. Chap. XLIII. § 107, &c., 114, 15.

(f) 1 Str. 631. 2 Ld. Raym. 1395, S. C.

(g) Cro. Jac. 19. Carter, 193. 3 Mod. 249.

(aa) 1 Bur. 363. Barnes, 469. Ante, 725.

(h) Ante, 934.

(bb) 1 Stark. Nl. Pri. 511.

one or two plaintiffs died before interlocutory judgment, and the suit, notwithstanding, went on to execution in the name of both; on a motion to set aside the proceedings for this irregularity, the court of King's Bench permitted the surviving plaintiff to suggest the death of the other on the roll, and to amend the *capias ad satisfaciendum*, without paying costs.(c) And as no new person is introduced, there is no occasion for a *scire facias* in these cases to revive the judgment.

When there were two or more defendants, and one of them died *after judgment*, and before execution, it was formerly holden,(d) that the plaintiff was put to his *scire facias* against the personal representatives of the deceased. But it was afterwards determined, that in such case a *scire facias* would lie against the survivor alone, reciting the death;(e) and he could not plead that the heir of the deceased had assets by descent, and pray judgment if he ought to be charged alone; for at common law, the charge upon the judgment, being personal, survived;(f) and the statute of *Westm. 2*, which gives an *elegit*, does not take away the common law remedy: and therefore the plaintiff may take out his execution which way he pleases.(f) But if he should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*.(g) And it is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors, without a *scire facias*:(h) But the execution in such case should be taken out in the joint names of all the plaintiffs or defendants;(i) otherwise it will not be warranted by the judgment.(k)

Upon the return of *nil* to a writ of *scire facias*, against the personal representatives, the plaintiff may have a *scire facias* against the heir of the defendant, either alone or jointly with the *tertenants*, or tenants of the lands whereof the defendant was seized at the time of the judgment, or at any time afterwards:(l)[A] But when judgment is had against one who dies before execution, a *scire facias* will not lie against his heirs or *tertenants*, until *nil* be returned against his executors or administrators;(m) and as *the heir in this case is charged as *tertenant*.(a)

(c) 5 Durnf. & East, 577.

(d) Yelv. 208.

(e) Append. Chap. XLIII. § 102. T. Raym. 26. 1 Lev. 30. 1 Keb. 92, 123, S. C. Carth. 106, S. C., cited.

(f) 2 Wms. Saund. 5 Ed. 51, (4).

(g) 3 Bac. Abr. 698. 4 Bac. Abr. 419.

(h) Moore, 367. Noy, 150. Carter, 112, 193. 1 Ld. Raym. 244. 1 Salk. 319. Carth. 404. Comb. 441. 5 Mod. 338. 1 Show. 402, S. C. 3 Salk. 319. 7 Mod. 68, S. P.

(i) 1 Ld. Raym. 244. 1 Salk. 319, S. C.

(k) See further, as to the *scire facias* on *survivorship*, 2 Wms. Saund. 5 Ed. 72, g, h, i.

(l) 2 Wms. Saund. 5 Ed. 7, (4); and see *id.* 9, a. (9), for the definition of *tertenants*.

(m) Carth. 107. 2 Wms. Saund. 5 Ed. 72, n.

(a) 3 Co. 12. Cro. Car. 295, 312.

[A] On *scire facias* to make heirs party to a judgment against administrators, and subject land taken by descent to execution, it is necessary to recite that the judgment is in force and unsatisfied; that the time allowed by the court to the administrators for the settlement of the personal estate had expired before the issuing of the writ of *scire facias*, and that the personal property which came to the hands of the administrators, had been exhausted. *M'Vicker v. Ludlow*, 2 Ham. 248. And it should specifically describe the lands sought to be charged. *Union Bank v. Meigs*, 5 Ham. 312. And where heirs are only liable jointly with the personal representative, unless the ancestor has been dead a year and there is no such representative, a *scire facias* against the heirs must show those facts. *Huey v. Rodden*, 3 Dana, 488.

the plaintiff can only have execution of a moiety of his land,(b) even when he pleads a false plea.(cc)

In a *scire facias* against the heir and tertenants, the heir cannot object that the *scire-facias* ought first to have issued against him.(dd) But it seems to be the better opinion, that the tertenants alone are not to be charged until the heir be summoned, or it be returned that there is no heir, or that the heir hath not any lands to be charged:(ee) for the heir may have a release to plead, or other matter in bar of execution: and his land is rather to be charged, than the land of the tertenants; for the heir shall not have contribution against the tertenants, as they shall against him: also, if the heir be within age, the *parol* shall demur and the tertenants shall have advantage of it.(ff)

When there are several defendants, and one of them dies before execution, since the charge upon the judgment survives as to the personalty, though not as to the realty,(g) the plaintiff may have a *scire facias*, framed upon the special matter, viz. against the survivor, to show why the plaintiff should not have execution against him of his goods and chattels, and of a moiety of his lands, and against the heir and tertenants of the deceased, to show why the plaintiff should not have execution of a moiety of the deceased's lands, without mentioning any goods.(h)

The *scire facias* against the tertenants is either *general* against all the tertenants, without naming them: or *special*, setting forth their names.(i) But if a plaintiff undertake to name them all, he must do so; and if he do not, those who are named may plead in abatement.(k) A plea to a *scire facias* against the heir and tertenants, that there are other tertenants not returned, is a dilatory plea, within the statute 4 & 5 Anne, c. 16, and requires to be verified by affidavit.(l)

There is also another writ of *scire facias*, which lies against tertenants, upon a writ of error to reverse a fine or recovery.(m) This writ is said by Lord Holt to be discretionary, and not *stricti juris*; but yet to have been the constant and usual course of the court, and therefore not to be departed from.(n) To this writ the tertenants can only plead a release of errors, to defend their own possession, or for the sake of purchasers; but they cannot plead in abatement of the writ, because they are not parties to the suit:(o) *And there is no necessity in such case, for a [*1122] *scire facias* against the heir.”(a)

Having hitherto treated of the writs of *scire facias* on recognizances and judgments, in what cases they lie, and by and against whom they

(b) 2 Wms. Saund. 5 Ed. 7, (4). (cc) *Id. ibid.* Cro. Car. 296. Carth. 93.

(dd) Cro. Eliz. 896. 2 Wms. Saund. 5 Ed. 72, n.

(ee) 2 Wms. Saund. 5 Ed. 9, (8).

(ff) Bac. Ab. tit. *Scire facias*, C. 5. Cro. Car. 295. 2 Wms. Saund. 5 Ed. 7, (4).

(g) *Ante*, 1120. 2 Wms. Saund. 5 Ed. 51, (4).

(h) Carth. 105. 2 Wms. Saund. 5 Ed. 51, (4), 72, n. o.

(i) 2 Salk. 600. 1 Ld. Raym. 669, S. C.; and see 2 Wms. Saund. 5 Ed. 7, (4). Append. Chap. XLIII. § 116, &c.

(k) Comb. 282. 2 Wms. Saund. 5 Ed. 7, (4). (l) Forrest, 144.

(m) Carth. 111. Skin. 273, S. C. 1 Bur. 360.

(n) 2 Wms. Saund. 5 Ed. 72, o. 93, a, (2).

(o) Carth. 111. Skin. 273, S. C. 1 Bur. 359, 60. 2 Ken. 19, S. C.

(a) 1 Bur. 412; and see 2 Wms. Saund. 5 Ed. 72, o.

may be brought, with the forms of them, distinctly; I shall now consider them together, and show the proceedings thereon, from the time of their being issued, till they are finally determined.

A *scire facias* on a recognizance of bail in the action, being an original proceeding, must, in the King's Bench, be brought in *Middlesex*, where the record is; for recognizances in this court are not obligatory by the caption, as in the Common Pleas, but by being entered of record.(b) But in the case of a recognizance entered into by bail on a writ of error, it is said, that if it be entered as taken at a judge's chambers in *Serjeant's Inn*, the *scire facias* may be sued out in *London*:(c) And, in the Common Pleas, upon a recognizance taken in *Serjeant's Inn*, or before a commissioner in the country, and recorded at *Westminster*, the *scire facias* may be brought in *London*, or in the county where the recognizance was taken, or in *Middlesex*.(d) A *scire facias* to revive a judgment by or against the parties or their personal representatives, not being an original proceeding, but a continuation of the former suit, must be brought in the county where the venue was laid in the original action, the defendants being supposed to reside in that county:(e) But upon a return of *nihil* to the writ against the personal representatives, the plaintiff upon a *testatum* may have a *scire facias* against the heir and ter tenants in a different county.(f)

The *scire facias*, in the King's Bench, is made out by the plaintiff's attorney: and in actions by *bill*, is signed by the signer of the writs;(g) but in actions by *original*, it is signed by the filacer.(h) In the Common Pleas, when there are two writs of *scire facias*, the first is made out and signed by the filacer: but the second is made out by the plaintiff's attorney, and signed by the prothonotary.(i)

Upon a recognizance against bail in the action, when the proceedings are by *bill*, the *scire facias* ought to be *tested* on the return day, or by *original* in the King's Bench,(k) or Common Pleas,(l) on the *quarto die* [*1123] *post* *of the return of the *capias ad satisfaciendum* against the principal.(a) Upon a judgment, it may be tested at any time after the judgment, or first day of the term to which it relates: And it may be antedated, even in term time, unless where it issues by rule of court.(bb) In the King's Bench by *bill*, the *scire facias* is made returnable before the king at *Westminster*, on a day certain;(cc) and when there is but one writ, there need be only *four* days exclusive between the teste and the return of it.(dd) But every *scire facias* by *original*, in that court, ought to have

(b) 2 Salk. 564, 600, 659. 6 Mod. 42, 132. 7 Mod. 120, 21, R. E. 5 Geo. II. reg. 3, a. K. B. 1 Bur. 409. 5 East, 461. 2 Smith R. 14, S. C. *Ante*, 278.

(c) 8 Mod. 290, R. E. 5 Geo. II. reg. 3, a. K. B. Lil. Ent. 520.

(d) Hob. 195. Brownl. 69. Moore, 883, S. C. Sty. Rep. 9. Aley, 12, S. C. 2 Lutw. 1287. Cas. Pr. C. P. 31. Barnes, 96, 7, 207. 2 Blac. Rep. 768. 2 Moore, 66. 8 Taunt. 171, S. C.

(e) Hob. 4 Yelv. 218. Cro. Jac. 331, S. C. R. E. 5 Geo. II. reg. 3, a. K. B.

(f) Cro. Car. 313. Carth. 105; and see 7 Durnf. & East, 28. 2 Wms. Saund. 5 Ed. 72, p. q.

(g) Imp. K. B. 10 Ed. 472.

(h) *Id.* 479. *Ante*, 50.

(i) Barnes, 97. Imp. C. P. 7 Ed. 513, (a), 518.

(k) Imp. K. B. 10 Ed. 472.

(l) Imp. C. P. 7 Ed. 519.

(a) 6 Mod. 86. 8 Mod. 227. 2 Str. 866. 2 Ld. Raym. 1567, S. C. R. E. 5 Geo. II. reg. 3, a. K. B.

(bb) 2 Salk. 599.

(cc) 2 Lil. P. R. 499, &c. R. E. 5 Geo. II. reg. 3, a. K. B. 2 Ld. Raym. 1417.

(dd) 4 Durnf. & East, 663; and see R. E. 5 Geo. II. reg. 3, a. K. B.

fifteen days inclusive between the teste and return; (ee) and should be made returnable on a general return day, wheresoever, &c. (ff) In the Common Pleas, the *scire facias* is returnable before the king's justices at *Westminster*, on a general return day; and when there is but one writ, as to revive a judgment, there should regularly be fifteen days between the teste and return. A *scire facias*, it has been said, is not *amendable*: and therefore, if it be defective in the teste or return, or vary from the record, &c., the plaintiff must move to quash it. (gg) But there are cases in the books where a writ of *scire facias* has been amended by the courts; not only where it was bad on the face of it, by the mistake of the clerk, but also for a variance, when the defendant had not taken advantage of it by pleading *nul tiel record*: (hh) And it seems to be now settled, that the power of amending writs of *scire facias* against *bail* is discretionary; though the Court of Common Pleas, in the exercise of their discretion, have in several recent instances refused to amend them. (i) In the King's Bench, the plaintiff must pay costs, on quashing his own writ of *scire facias*, after the defendant has appeared thereto: (k) But, in the Common Pleas, the plaintiff may move to quash his own writ, without paying costs, at any time before the defendant has pleaded. (l)

The *scire facias* being sued out, is delivered to the sheriff; and if the bail or defendants live in the county into which the writ issues, the plaintiff may cause them to be *summoned* thereon; for which purpose the sheriff will make out his warrant, (m) a copy of which should be delivered to them, or they should have some notice of the proceeding, the sufficiency of which, if disputed, must be determined by the court. (n) The bail may *be summoned at any time before the rising of the court on the [*1124] return day: (a) And where the sheriff returns *scire feci*, the court will not enter into the validity of the summons upon motion, but leave the party to his action against the sheriff, for a false return. (b) When the bail are resident in another county, as the summons must be served in *Middlesex*, this mode of proceeding, by giving the bail notice, cannot of course be adopted. (c)

On the return day of the *scire facias* by *bill*, or *quarto die post* of the return by *original*, in the King's Bench, (d) or Common Pleas, (e) the sheriff may be called on by rule for the *return* of it: and, except on a *scire facias* against the heir and tertenants, he either returns *scire feci*, (f) or *nihil*

(ee) R. T. 8 W. III. reg. 1, a. R. E. 5 Geo. II. reg. 3, a. K. B.

(ff) 2 Lil. P. R. 499. 3 Salk. 320. 1 Str. 146. R. E. 5 Geo. II. reg. 3, a. K. B.

(gg) 1 Salk. 52. 1 Ld. Raym. 182, 548. 2 Ld. Raym. 1057. 1 Str. 401. 2 Str. 892, 1165; and see Barnes, 26, 7, 114, 15.

(hh) The several cases on this subject are collected in 2 Ld. Raym. 1057; and see 2 Wms. Saund. 5 Ed. 72, p. Cas. Pr. C. P. 74, 5. Barnes, 59, S. C. *Id.* 4, 5. 2 Bos. & Pal. 275. 9 East, 316. 4 Price, 181, 2. 1 Chit. Rep. 323, (a). *Ante*, 278.

(i) 3 Bos. & Pal. 321. 2 New Rep. C. P. 103; but *vide ante*, 278. 1 Taunt. 221.

(k) 1 Barn. & Ald. 486; and see 1 Str. 638.

(l) Pr. Reg. 378, 9. Cas. Pr. C. P. 109. Barnes, 431, S. C. *Ante*, 247.

(m) Append. Chap. XLIII. § 119.

(n) 2 Blac. Rep. 337.

(a) 1 East, 86; and see 1 Str. 644. R. E. 5 Geo. II. reg. 3, (a) K. B.; but see 2 Durnf. & East, 577, *contra*.

(b) 2 Str. 213. 3 Bur. 1360. 1 Blac. Rep. 393, S. C. And for the summons and subsequent proceedings on writs of *scire facias* in general, before declaration, see 2 Wms. Saund. 5 Ed. 72, q. r.

(c) Petersd. 375.

(d) Imp. C. P. 7 Ed. 514.

(e) Imp. K. B. 10 Ed. 479; and see 13 East, 391.

(f) Append. Chap. XLIII. § 120.

habent; (g) that he has given notice to the bail or defendants, (f) or that they have nothing by which he can make known to them; (g) or that he has given notice to one, and the other had nothing, (h) &c. On a *scire facias* against the heir and tenants, the sheriff's return is either that there are none, (ii) or that he has warned them to appear: In the latter case, if the writ be general, the sheriff should return that he has warned certain persons, being the tenants of *all* the lands in his bailiwick, describing them; or the tenants of certain lands, and that there are no others; (kk) a return that he has warned the tenants of all the lands generally, (ll) or certain persons, tenants of lands in his bailiwick, (mm) being insufficient.

When the sheriff returns *nil*, the plaintiff, in the King's Bench, must in all cases sue out a second, or *alias* writ of *scire facias*; (nn) commanding the sheriff, as *before* he was commanded, &c.: and if upon this second writ, the sheriff also return *nil*, and the bail or defendants do not appear, there shall be judgment against them; (o) two *nil*s being deemed equivalent to a *scire feci*. (p) And it is not necessary to give notice of *scire facias* to the bail: it being their duty to watch the sheriff's office, where they are lodged. (q) It was formerly usual, in the King's Bench, to sue out both writs of *scire facias* together, making the *teste* of the second as if the first had been actually returned: (r) But now, there is a rule of court, that "no writ of *alias scire facias* shall issue, until the first writ be [*1125] *returnable." (a) In the Common Pleas, if a *scire facias* issue upon a judgment for debt or damages, against the defendant himself, who was party and privy to the judgment, and the sheriff return *nil*, and the defendant make default, there shall be judgment against him, without awarding a second *scire facias*: (b) And in that court, a rule is given by the prothonotaries, on the return of the first *scire facias*, for another writ to issue.

When there are two writs of *scire facias*, the second, or *alias* writ, should be tested on the return day, or, by *original* in the King's Bench, (c) on the *quarto die post* of the return of the first, except in error, (d) or unless the return day happen on a *Sunday*: (e) But, in the Common Pleas, the second *scire facias* may be tested and issued before, or on the *quarto die post* of the return of the first. (ff) The *alias* should be made returnable, like the first writ, on a day certain, (gg) or general return day, according to the nature of the proceedings. And, in the King's Bench by *bill*, it is sufficient if there be *fifteen* days inclusive between the *teste* of the first and return of the second writ, without regard to the number of days between

(f) See note (f), preceding page.

(g) Append. Chap. XLIII. § 121.

(h) *Id.* § 122.

(i) *Id.* § 125.

(kk) Co. Ent. 622, 3. Off. Brov. 278, 282, 286. Herne, 326. Dalt. Sher. 559. Append. Chap. XLIII. § 126.

(ll) Carth. 105.

(mm) 2 Salk. 598. 2 Wms. Saund. 5 Ed. 8, (7).

(nn) 2 Inst. 472. Oro. Jac. 59. 8 Mod. 227. Say. Rep. 121. Append. Chap. XLIII. § 30, 79, 127.

(o) Dyer, 168, 172, 198, 201. Yelv. 112. Sty. Rep. 281, 289, 323.

(p) See 1 East, 89. 4 East, 312.

(q) *Sillitos v. Wallace & another, bail of Cusithorne*, M. 43 Geo. III. K. B. 8 Moore, 2.

(r) 2 Salk. 599. 8 Mod. 227.

(a) R. T. 8 W. III. reg. 1, K. B. 12 Mod. 87. 7 Mod. 40, 96.

(b) Dyer, 168, a. 2 Inst. 472. 2 Salk. 599. Com. Dig. tit. *Pleader*, 3 L. 2.

(c) Imp. K. B. 10 Ed. 479.

(d) R. T. 8 W. III. a. K. B.; and see 4 Durnf. & East, 377.

(e) Dyer, 168, a.

(ff) 3 Bing. 162.

(gg) 2 Lil. P. R. 499, &c.

the teste and return of each : (h) But by *original* in that court, there should be *fifteen* days inclusive between the teste and return of the *alias*, as well as of the first writ of *scire facias*. (i) In proceeding against bail however, in the Common Pleas, there need not be *fifteen* days between the teste and return of each *scire facias*, but it is sufficient if there be *fifteen* days between the teste of the first and return of the second. (k) Every writ of *scire facias*, of which notice is given to the defendants, must be left in the sheriff's office, *four* entire days before the return : (l) And when there are two writs, the first should be left in the office some time, (l) (generally *one* day,) and the *alias* *four* entire days, before the return ; which must be the *last* four days, (m) *exclusive* both of the day of lodging it, and the day of the return : (n) and, in the King's Bench, an intervening *Sunday* is not reckoned as one of them : (o) But, in the Common Pleas, *Sunday* may be reckoned as one of the *four* days, which must elapse between the return of the second writ and signing judgment. (p) In the King Bench also, the sheriff is required to indorse on every such writ, the day of the month it is left in his office : (q) And in order to found proceedings against bail, the *capias ad satisfaciendum* in that court must be entered in the *public* book, *kept at the sheriff's office for that purpose, in [*1126] *London and Middlesex*. (a) But, in the Exchequer, where a writ of *capias ad satisfaciendum* was properly indorsed and lodged, and had remained the full time on the file of the sheriff of *Middlesex's* office, but there was no entry in the *public* book, except of the day of its return, the court refused to set aside the proceedings against the bail ; no inquiry having been made at the office, on their part, during the *four* days preceding the return, and it being sworn, (although not by any person in the office,) that if inquiry had been made, verbal information would have been given that the writ was lodged. (b)

On the return day of the second *scire facias*, or of the first, if *scire feci* be returned, the bail are absolutely fixed : (c) and a *rule* must be given with the clerk of the rules in the King's Bench, for the bail or defendants to appear : (d) which rule should be given on the return-day in actions by *bill*, or, in actions by *original*, on the *quarto die post* of the return of the second *scire facias*, or of the first, if *scire feci* be returned ; (e) and expires in *four* days exclusive : and *Sunday* is not a day within this rule, though an intermediate one. (f) In the Common Pleas, the rule to appear, which

(h) T. Jon. 228. 2 Salk. 599. Carth. 468. 7 Mod. 40. 9 Mod. 227. 2 Str. 765, 1139. R. T. 8 W. III. a. R. E. 5 Geo. II. reg. 3, a. K. B.

(i) R. E. 5 Geo. II. reg. 3, a. K. B.

(k) Lutw. 24. Cas. Pr. O. P. 114. Pr. Reg. 377, S. C. 2 Blac. Rep. 922. 3 Bing. 162.

(l) *Williams v. Mason*, M. 4 Geo. II. K. B. 1 East, 89, (a). R. E. 5 Geo. II. reg. 3. 3 Bar. 1723. 4 Bur. 2432, K. B. Imp. C. P. 7 Ed. 515.

(m) 4 Durnf. & East, 583. 13 East, 588.

(n) 4 Barn. & Ald. 537.

(o) 1 Barn. & Ald. 528 ; and see 11 East, 271. 6 Maule & Sel. 133. 2 Chit. Rep. 192, S. C. 2 Dowl. & Ry. 869. *Ante*, 1098.

(p) 3 Bing. 162.

(q) R. E. 5 Geo. II. reg. 3. K. B.

(a) 5 Maule & Sel. 323. 2 Chit. Rep. 102, S. C. *Ante*, 1098 ; but see 3 East, 570, *contra*.

(b) 1 M'Clel. & Y. 483.

(c) *Ante*, 283 ; and see 1 East, 89. 4 East, 312.

(d) Append. Chap. XLIII. § 128.

(e) Imp. K. B. 10 Ed. 475, 6, 479 ; and see 13 East, 391.

(f) 11 East, 271 ; and see 6 Maule & Sel. 133. 2 Chit. Rep. 192, S. C. 1 Barn. & Ald. 528.

also expires in *four days exclusive*, (g) is given with the prothonotaries; (h) and when *scire feci* is returned, it should be given on the *appearance day* of the return of the writ: (h) but when there are two writs of *scire facias*, the rule, it is said, should be given on the *return day* of the last writ. (h) Before the rule expires, the bail or defendants either appear, or make default. In the latter case, the plaintiff is entitled to judgment, (i) or rather to an award of execution, (k) which he may sign on the expiration of the rule: And if a man have judgment for damages against two, and sue out a *scire facias* against both, if one be returned summoned and make default, and the other have nothing, the plaintiff may have execution against him who made default, for the whole. (l) So, if it be returned that one of them is dead, he shall have execution for the whole against the other. (l)

Judgment being signed, the proceedings in *scire facias* should be forthwith entered on a roll, with an award of execution, and the roll docketed. (m) The *entry* of the proceedings is either against bail, (n) or in other cases: (o) And, in the King's Bench, when two writs issue, returnable in different terms, the first must be entered of the term wherein it is returnable; and an award of the second is sufficient, without setting it forth at large. (p) In the Common Pleas, if there be two writs of *scire facias*, return- [*1127] able in *different terms, there must be two rolls, one of the term the first writ was returnable, and the other of the term the second is returnable: on one of which rolls, the first writ is entered, with the sheriff's return thereto, and an award of the second writ only; and the other roll, which begins with an *alias prout patet*, contains a copy of the former roll, with the addition of the return to the second writ, and the entry of the judgment of the court. (a)

If the bail or defendants *appear* to the *scire facias*, which in the King's Bench, if the action were by *bill*, is signified by delivering a note in writing to the plaintiff's attorney, (b) a declaration must be delivered, a rule to plead given, and a plea demanded, as in other cases: (c) But if the action were by *original*, an appearance should regularly be entered with the *filacer*. (d) In the Common Pleas the appearance is entered, on a *præcipe*. (e) with the prothonotaries: (f) And if the declaration, in that court, be not delivered *four days exclusive* before the end of the term, the defendant will be entitled to an *imparlance*. (gg)

The *declaration* in *scire facias*, in the King's Bench, begins by stating that the king sent to the sheriff, his writ close in these words, (setting forth the writ *verbatim* :) It then states the plaintiff's appearance at the return of the writ, and the sheriff's return thereto; and if he return *nil*, it contains a recital of the mandatory part of the second writ of *scire facias*, and goes on to state the plaintiff's appearance, in like manner, at the return of that writ, and the sheriff's return thereto: Then follows the appearance

(g) Imp. C. P. 7 Ed. 514, 15.

(i) Com. Dig. tit. *Pleader*, 3 L. 8, 9.

(j) Bac. Abr. tit. *Execution*, G.

(m) Append. Chap. XLIII. § 30, 135, 6, 7.

(n) *Id.* § 129, &c.; and see 2 Wms. Saund. 5 Ed. 72, r.

(p) R. E. 5 Geo. II. reg. 3, a. K. B.

(a) Imp. C. P. 7 Ed. 515, 520. Append. Chap. XLIII. § 27; and see Petered. 373, 80.

(b) Append. Chap. XLIII. § 31, 138.

(c) R. E. 5 Geo. II. reg. 3, a. K. B. Imp. C. P. 7 Ed. 520.

(d) 2 Archb. K. B. 89.

(f) Imp. C. P. 7 Ed. 502, 515, 520.

(h) *Id.* 514.

(k) 11 East, 516.

(n) *Id.* § 21, &c.

(e) Append. Chap. XLIII. § 32, 139.

(gg) *Id.* 520, 21.

of the bail or defendants; and the declaration against *bail* concludes, by praying execution of the debt or damages recovered, by *bill*, or of the sum acknowledged, by *original*, according to the force, form and effect of the recognizance: *(h)* And an allegation in a declaration with a *prout patet*, &c., that the plaintiffs by the judgment of the court *recovered* against the bail, is not proved by the production of the recognizance of bail, and the *scire facias* roll, which latter concluded in the common form, that the plaintiffs have their *execution* thereupon against the bail; for this is an *award of execution*, or at most a judgment of *execution*, and not a judgment to *recover*. *(i)* But though the original action was for *damages*, it is not demurrable, in *scire facias* against bail, to pray judgment in a replication of *debt* and damages. *(k)* Upon a *judgment* after a year and a day, the declaration concludes by praying execution of the debt or damages generally; *(l)* or, against executors or administrators, of the debt or damages, to be levied of the goods and chattels of the original defendant, in their hands to be administered; *(m)* or, against the heir and tertendants, to be levied of the lands and tenements *whereof they are returned tenants, [*1128] or which have descended and come to the heir by hereditary descent from the defendant, according to the force, form and effect of the recovery. *(aa)* In the Common Pleas, the declaration begins by stating that the sheriff was commanded, whereas, &c., (reciting the writ of *scire facias* throughout;) after which it proceeds in substance as in the King's Bench. *(bb)* A declaration in *scire facias*, returnable the last return of a term, may, in the former court, be entitled of the same term generally. *(c)* And it is usual for executors and administrators, in declaring on a *scire facias*, to make a *profert in curia* of the letters testamentary, or of administration; but it may be inserted either in the middle or at the end of the writ. *(d)*

To a *scire facias* on a recognizance or judgment, the defendant may plead in abatement or in bar, as in other actions. *(e)* On a *general* writ of *scire facias* against the heir and tertendants, if some of the tertendants only are summoned, they may plead that there are other tertendants not named, in the *same* county, and pray judgment if they ought to answer, *quousque* the others be summoned, but ought not to pray *quod breve cassetur*; for the court ought never to abate the writ, but when the plaintiff can have a better writ: *(f)* But upon a *special* writ, if all the tertendants are not named in it, those who are may plead in abatement; for there, the party may have a better writ, by naming them all: *(f)* And it seems to be a good plea, that there are other tertendants not named, in *another* county. *(g)* When a tertendant is summoned, and doth not plead that there are other tertendants, not summoned or named in the writ, he shall never afterwards have a *scire*

(h) Append. Chap. XLIII. § 33, 4, 5.

(k) 2 Chit. Rep. 322.

(m) *Id.* § 150, 51.

(aa) Append. Chap. XLIII. § 151.

(bb) *Id.* § 36, 7, 145, 6. And see 2 Moore, 66. 8 Taunt. 171, S. O., as to the mode of declaring in *Middlesex*, on a recognizance taken before a commissioner in *Durham*.

(c) 3 Wils. 154. 2 Blac. Rep. 735, S. O.

(d) Carth. 69. 1 Show. 60. 6 Mod. 134. 7 Mod. 15; and see 2 Wms. Saund. 5 Ed. 9, 5. (12), 73, r.

(e) 2 Inst. 470. 10 Mod. 112; and see 2 Wms. Saund. 5 Ed. 73, r, s, t, v. 4 Moore, 163.

(f) 2 Salk. 601. 6 Mod. 199, 226. 2 Ld. Raym. 1253. 3 Salk. 321, S. C. 2 Wms. Saund. 5 Ed. 9, a, (10).

(g) 2 Vent. 104. Bac. Abr. tit. *Scire facias*, C. 5. 2 Wms. Saund. 5 Ed. 9, a, (10).

(i) 11 East, 516.

(l) Append. Chap. XLIII. § 140, &c.

facias, or *audita querela*, to compel the others to contribute.(h) To a *scire facias* against a tertenant, upon a judgment in *debt*, or other personal action, the defendant cannot plead non-tenure generally, because it is contrary to the sheriff's return; but he may plead a special non-tenure in such case, as that he has only a term for years.(i)

To a *scire facias* against bail in the action, they may plead *nul tiel record* of the recognizance,(k) or of the recovery against the principal; payment by, or a release to the principal or bail:(l) or that the principal rendered himself, or was rendered by his bail, before the return of the *capias ad satisfaciendum*.(m) They may also plead, in dis- [*1129] charge of their liability, *that there was no *capias ad satisfaciendum* sued out and returned against the principal:(a) and if there be a *void writ*, it is as none.(b) But if the writ be merely *irregular*, as if it was sued out after a year, without a *scire facias*.(cc) or made returnable on a day out of term,(dd) or if it has not lain *four days* in the sheriff's office,(ee) the bail cannot take advantage of the irregularity by pleading:(ff) And the validity of a *feri facias* cannot be impeached at *nisi prius*, on the ground that the judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ.(gg) So, while the judgment against the principal remains in force, the court will not, on account of its irregularity, set aside the *capias ad satisfaciendum*, or other proceeding against the bail: But where judgment was irregularly signed against the principal, without first obtaining the usual rule for judgment, and the plaintiff proceeded to execution against the bail, after procuring a return of *non est inventus* to a *ca. sa.* against the principal, and two *nihil* to be returned to two writs of *scire facias* against the bail, the court of King's Bench, upon the application of the bail, together with the principal, held, that they were entitled to be released from such judgment against the principal, and its consequences against the bail; upon an affidavit made by them, that they had no notice of such judgment, till the writ of *ca. sa.* issued against the bail, when they applied to vacate the proceedings.(hh) The practice of the court however is pleadable, when the merits of the case depend upon it: Therefore where bail, sued in *scire facias* upon their recognizance, plead that no *ca. sa.* was *duly* sued out, returned and filed against the principal, according to the custom and practice of the court, to which the plaintiff in his replication shows a writ of *ca. sa.* issued into *Middlesex*, it is no departure for the defendant to rejoin, that the venue in the action against the principal was laid in *London*, for that sustains the plea.(ii)

(h) Moore, 524. 2 Wms. Saund. 5 Ed. 9, a, (10).

(i) 2 Salk. 201. 3 Salk. 321. 6 Mod. 199, 226. 2 Ld. Raym. 1253, S. C.; and see Bea. Abr. tit. *Scire facias*, E. Com. Dig. tit. *Pleader*, 3 L. 11.

(k) *Thes. Brev.* 265.

(l) Sty. Rep. 324. 1 Ld. Raym. 157. Stat. 4 Ann. c. 18. § 12.

(m) 1 Ld. Raym. 158, 7. *Healey v. Medley*, M. 24 Geo. III. K. B.

(a) Sty. Rep. 281, 288, 324. 5 Dowl. & Ryl. 615. And the replication to such plea should conclude to the record. 1 Ken. 347, 8.

(b) 3 Keb. 671. 6 Mod. 304.

(cc) 2 Ld. Raym. 1096. 6 Mod. 304. Holt, Rep. 90, S. C.; and see 1 Ken. 120.

(dd) 2 Bur. 1187, 8.

(ee) 1 Wils. 334. 16 East, 41. 1 Dowl. & Ryl. 50. *Ante*, 689.

(ff) *Powell v. Taylor*, M. 28 Geo. III. K. B.; and see 5 Moore, 168. 5 Dowl. & Ryl. 615.

(gg) 4 Camp. 58; and see 4 Price, 13.

(hh) 4 East, 310.

(ii) 16 East, 39; and see 5 Dowl. & Ryl. 615; but see 1 Dowl. & Ryl. 50. *Ante*, 689.

If the principal die before the return of the *capias ad satisfaciendum*, this will operate in excuse of performance, and the bail may plead it in their discharge.(k) So, they may plead that a writ of error was sued out and allowed after the issuing and before the return of the *capias ad satisfaciendum* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognizance of bail, prosecuted after a return by the sheriff of *non est inventus*, made pending such writ of error.(l) But *it is not a good plea that the principal died before the [*1130] issuing,(a) or after the return(b) of the *capias ad satisfaciendum*; for though a plea that the principal died before the writ be issued, be conclusive if found for the *defendant*, yet it is not so, if found for the *plaintiff*; inasmuch as the principal might still have died after the issuing, and before the return of the writ: And when the principal dies after the return of the *capias ad satisfaciendum*, this will not discharge the bail; for upon the return of *non est inventus*, their recognizance is in strictness forfeited; and though a render afterwards, and before the return of the *scire facias*, is allowed, yet that is merely *ex gratia*, not *ex debito justitiæ*, and therefore cannot be pleaded.(c) So, it is not a good plea, to an action on a recognizance of bail, that after the judgment, the plaintiff entered into an agreement with the principal, without the privity of the bail, to take goods from the principal, to secure the payment of part of the money recovered, and that such goods were consigned to him accordingly.(d) Where the principal died after a *capias ad satisfaciendum* returned, and before it was filed, the court of King's Bench on motion would have formerly stayed the filing of it, in favour of the bail:(e) But in a late case it was holden, that if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed; and the court would not stay the filing of the return.(f) To a plea of the death of the principal, before the return of the *capias ad satisfaciendum*, the plaintiff in his replication must set forth the writ, and that the principal was alive at the return of it:(g) and such replication must conclude with an averment.(h)

If a *scire facias* be brought on a judgment, the defendant may plead *null tiel record* of the recovery,(i) payment,(k) or a release;(l) or that the debt or damages were levied on a *feri facias*,(m) the defendant's lands extended for them upon an *elegit*,(n) or his person taken in execution on a *capias ad*

(k) 1 Bol. Abr. 338. Cro. Jac. 165. W. Jon. 139. Sty. Rep. 324. 12 Mod. 601. 10 Mod. 267. R. E. 5 Geo. II. reg. 3, a. But they cannot plead the *bankruptcy* and certificate of their principal. 1 Bos. & Pul. 448, 450, (b). 2 Bos. & Pul. 45. Ante, 291, 2, 304.

(l) 2 East, 439. In a similar case, *Buller, J.* said, "*The capias ad satisfaciendum* must be returnable before the suing out of the writ of error to authorize proceedings against the bail: They have a right to bring the principal into court at the return of the writ, if they can; but the writ of error rendering that impossible, shows that from the nature of the case, the execution must not only be sued out, but also returnable, before the issuing of the writ of error. *Anon.* H. 29 Geo. III. K. B. (a) 10 Mod. 267, 308.

(b) 12 Mod. 112, 236. 8 Mod. 31. 1 Str. 511, S. C. 2 Ld. Raym. 1452. 2 Str. 717, S. C. Say. Rep. 121. 2 Wils. 67. 2 Taunt. 246.

(c) Ante, 283.

(d) 3 Price, 467.

(e) 1 Lill. P. R. 113; and see R. E. 5 Geo. II. reg. 3, a. K. B. 2 Cromp. 3 Ed. 83. 1 Rich. Pr. K. B. 445.

(f) 6 Durnf. & East, 284. Ante, 1099; and see 2 Wms. Saund. 5 Ed. 72, a, i.

(g) Carth. 4.

(h) 2 Wils. 65. Doug. 58. 2 Durnf. & East, 576. 1 Ken. 345.

(i) Off. Brev. 279. Mod. Int. 368.

(k) Stat. 4 Ann. c. 16, § 12.

(l) 3 Lev. 272.

(m) 4 Leon. 194. Sav. 123. Cro. Car. 328. Clift, 675.

(n) Dyer, 299, b. 1 Lev. 92.

satisfaciendum.(o) But it is a rule, that the defendant cannot plead any matter to the *scire facias* on a judgment which he might have pleaded in the original action.(p) If the *scire facias* be brought against an [*1131] *executor or administrator, he may plead *plene administravit* ;(a) but then, the judgment being entitled to a preference, he must show in what manner he has administered.(b) And when, in an action against an executor, the plaintiff dies after interlocutory and before final judgment, the defendant cannot plead to the *scire facias* for assessing damages, a judgment upon bond against his testator, and no assets *ultra* : for the statute never intended that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar, arising *puis darrien continuance.*(c) All pleas and demurrers upon writs of *scire facias*, ought to be delivered ;(d) and all issues thereon made up by the attorneys, in the King's Bench.(ee) In the Common Pleas, pleas and demurrers in *scire facias* are delivered, as in other cases, to the plaintiff's attorney, or filed with the prothonotaries ;(ff) and issues are made up in like manner by, and delivered to the attorneys, or, in country causes, by or to the agents in town.(gg)

When the party has a release, or other matter which he might have pleaded to the *scire facias* in his discharge, and for want of pleading it, execution is awarded upon a *scire feci* returned, he is estopped for ever, and cannot by any means take advantage of that matter.(h) But when execution is awarded on two *nilis* returned, he may relieve himself by *audita querela*, though not by writ of error :(i) And when the case is clear, and the application recent, the courts will interpose in a summary way, and relieve the party upon motion,(k) without putting him to an *audita querela.*(l) But they will never do it, when the fact is disputed ;(m) or there has been a long acquiescence, and several steps have been taken subsequent to the award of execution :(n) or the ground of relief is doubtful in point of law, (1 Moore & P. 261. 4 Bing. 498, S. C.) or such matter of fact as may be proper to be tried by a jury.(oo)

(o) *Off. Brev.* 300. 1 Salk. 271. *Ante*, 1029, 30; but see 1 Lutw. 641, 643.

(p) *Cro. Eliz.* 283, 588. 1 Sid. 182. 1 Salk. 2. 2 Str. 1043. *Cas. temp.* Hardw. 233, S. C. Cowp. 727; and see 1 Man. & Ryl. 496, (a).

(a) For the form of a replication and award of execution, in *scire facias* against an executor, who pleaded *plene administravit proter* for the sum confessed in part, and for the residue of assets *quando acciderint*, see Append. Chap. XLIII. § 152; and for the form of a judgment for the plaintiff, on demurrer to a plea in *scire facias* against an executor, in K. B. see *id.* § 153.

(b) 1 Ld. Raym. 3, 4.

(c) 1 Salk. 315. 6 Mod. 142, S. C.; and see 2 Wms. Saund. 5 Ed. 72, *i.* But *quære*, whether the interlocutory judgment in this case was not obtained against the testator, and, he dying, the *scire facias* issued against his executor? (d) *Ante*, 672.

(ee) R. T. 12 W. III. a, K. B. *Ante*, 717. For the form of the issue in *scire facias* against bail, see Append. Chap. XLIII. § 38; and for the entry of issue and award of execution, &c. after verdict, see *id.* § 39.

(ff) *Ante*, 672.

(gg) *Ante*, 718, 726.

(h) F. N. B. 104. 1 Salk. 93, 264. 1 Wils. 98.

(i) Sty. Rep. 281, 288, 323. 1 Salk. 262. 4 Mod. 314, S. C. 1 Str. 197. 1 Maule & Sel. 199.

(k) 2 Ld. Raym. 1295. Barnes, 277. 1 Maule & Sel. 199.

(l) For the nature of the remedy by *audita querela*, for whom and in what cases it lies, and in what not, and the proceedings thereon, see 2 Wms. Saund. 5 Ed. 148, (1). *Ante*, 672, 717, 918.

(m) 2 Str. 1198.

(n) *Id.* 1075.

(oo) 1 Salk. 264; and see 9 Moore, 114. 2 Bing. 41, S. C.

No *damages* were recoverable in *scire facias* at *common law, [*1182] for delay of execution ;(a) and the parties were consequently not entitled to *costs*,(b) until the statute 8 & 9 W. III. c. 11, § 3, by which it is enacted, that "in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining an award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance; or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*,(c) *feri facias*,(d) or *elegit*:" with a *proviso*, that the statute shall not extend to executors or administrators.(e) And costs are it seems recoverable, when a *scire facias* is brought on the statute 8 & 9 W. III. c. 11, § 6, for assessing damages upon the death of a plaintiff or defendant, after interlocutory and before final judgment ;(f) or, on the same statute, § 8, for assessing further damages, on a suggestion of other breaches, in *debt* on bond for the performance of covenants, &c.(g)

The *execution*, in *scire facias* is governed by the award of it. But where two writs of *scire facias* had been sued out, one to revive the judgment in the original action, and the other to revive the judgment in error, for the costs in error, a *feri facias* issued on the first *scire facias*, for the damages and costs in the original action only, and not including the costs in error, was holden to be regular.(hh) After judgment against the principal, and award of execution against the bail, the plaintiff may sue out execution against either of them.(ii) And though, in the case of bail, the recognizance be to levy of the lands and chattels, yet in the King's Bench, execution of the body by *capias ad satisfaciendum* is good,(kk) even as against bail in error,(ll) by the course of the court; and a *capias ad satisfaciendum* may be taken out against bail, without any *feri facias*, or return of *nulla bona*.(mm) But it is otherwise in the Common Pleas; where no *capias* lies against the bail, after an award of execution on a *scire facias*; but the plaintiff must proceed against their lands and chattels, by *levari facias* or *elegit*, according to the terms of the recognizance:(n) Therefore, where the sheriff, having taken the bill on a *capias ad satisfaciendum*, after an award of execution on a *scire facias*, and discharged them, was sued for an escape, and the plaintiff declared for it in *debt*, with a count for money had and received, the court of Common *Pleas [*1183] ordered the *capias ad satisfaciendum* to be set aside, and the count for the escape to be struck out of the declaration; the sheriff paying the costs of that count, and of the application.(aa) But a *capias* lies, after judgment given against the bail, in action of *debt*.(bb) If the plaintiff pro-

(a) 2 Bar. 1791. *Ante*, 881, 946.

(b) *Sed vide ante*, 947.

(c) Append. Chap. XLIII. § 52, &c.

(d) *Id.* § 40, &c.

(e) 1 Str. 188. 3 East, 202. Petersd. 386. *Ante*, 947. And for the determinations on this statute, *vide ante*, 947.

(g) *Ante*, 881, 947.

(f) *Ante*, 947.

(hh) 2 Chit. Rep. 240.

(ii) Cro. Jac. 320; and see Com. Dig. tit. *Bail*, R. 11.

(kk) 1 Rol. Abr. 897. 1 Lev. 226. 3 Salk. 286. Append. Chap. XLIII. § 52, &c.

(ll) 2 Str. 822; but see 1 Rol. Abr. 898. 3 Salk. 286, 7, *contra*.

(mm) 2 Str. 1139.

(n) Dyer, 306. Cro. Jac. 450. Lit. Rep. 238. 1 Rol. Abr. 897. 2 D'Anv. Abr. 496. 3 Salk. 286. *Troughton v. Clarke & another, bail of Hammerton & another*, T. 49 Geo. III. per Lawrence, J. 2 Taunt. 113, 14. 6 Taunt. 490. 2 Marsh. 186, S. C. *Id.* 187, (a). 1 Chit. Rep. 190. *Ante*, 1026, 1043.

(aa) 6 Taunt. 490. 2 Marsh. 186, S. C.

(bb) 3 Salk. 286.

ceed against the bail, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be discharged on payment of five shillings in the pound, but upon an express understanding that the plaintiff shall be at liberty to proceed against the principal.(c) And so, if the principal be in execution, the plaintiff, it is said, cannot take the bail:(d) But if two be bail, although one be in execution, yet the plaintiff may take the other;(e) and the recognizance being joint and several, the execution may be several, though the *scire facias* was joint.(f)

[*1184]

*CHAPTER XLIV.

Of WRITS of ERROR, and FALSE JUDGMENT; and the PROCEEDINGS thereon.

A WRIT of *error* is an *original writ*, issuing out of Chancery; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record;(aa) [A] and is in nature

(c) 2 Maule & Sel. 341. *Higgen's Case*, Cro. Jac. 320. 2 Bulst. 68, S. C. 1 Rol. Abr. tit. *Execution*, (G). 10 Vin. Abr. 578, tit. *Execution*, (G. a.) pl. 1, *accord*. But where a plaintiff, acting under what he conceived to be sound advice, took the defendant, after he had taken his bail in execution, it was holden, that he was not liable to an action for maliciously arresting the defendant; although previously to the arrest, he had notice from the defendant, that his proceeding was illegal. 1 Stark. Ni. Pri. 502; and in 1 Sid. 107, it was determined, that if execution be taken against the bail, and they pay part, yet the plaintiff may afterwards take execution against the principal for the residue, the bail being previously set at liberty; and this was said to be the constant practice of the court, and that in *Higgen's case*, it must be intended that the bail were in custody: and see Cro. Jac. 549. 1 Vent. 315. *Ante*, 1029, 30.

(d) Cro. Jac. 320; but see T. Jon. 75. 1 Vent. 315. 2 Mod. 312. 2 Lev. 195. 2 Bos. & Pul. 440, *semb. contra*. (e) Cro. Jac. 320.

(f) 1 Lev. 225. 1 Sid. 339, S. C. Bac. Abr. tit. *Execution*, G. *Ante*, 1099.

(aa) Co. Lit. 288, b. And for the proceedings in general on a writ of error, see 2 Wms. Saund. 5 Ed. 100, (1), to 101, z.

[A] The writ of error is a common law writ, and the Supreme Court of Alabama may bring criminal cases before it by that writ. *Lynes v. The State*, 5 Port. 236. It lies of right to the Probate Court, in Mississippi from the High Court of Errors and Appeals. *Green v. Whiting*, 1 Smedes & Marsh. 579. It will lie to revise a decision refusing to quash a forthcoming bond, so as to avoid an execution thereon. *Lansford v. Richardson*, 5 Ala. 618. *Bank of United States v. Patton*, 5 How. (Miss.) 200. The dismissal of an appeal for want of jurisdiction, does not bar a writ of error. *Bull v. Harrell*, 7 How. (Miss.) 9. Error will lie to an order amending a judgment. *Varnon v. Moore*, 1 Monr. 213. A party succeeding upon a minor point, but failing in the main object of his suit, may bring error to reverse the judgment, though in his favour. *Gentry v. Barrett*, 6 Monr. 113. It will lie in Missouri, to a judgment of the county court upon a claim presented against an administrator as such. *Rankin v. Perry*, 5 Mis. 501.

It will lie upon an order of a Probate Court, requiring an administrator to retain in his hand all the money of his estate which should come to him, subject to the order of court for the purpose of paying administrators, and guardians in preference to all other demands. *Gamble v. Hamilton*, 7 Mis. 469. Or to a judgment of nonsuit, where the plaintiff suffers the judgment, in consequence of an express instruction to the jury against his right to recover. *English v. Davarro*, 5 Blackf. 588. And in Indiana, to a judgment of the Circuit Court on appeal from the judgment of two justices of the peace, in a case of forcible detainer. *Barton v. Osborn*, 6 Blackf. 145. In Illinois, from the Circuit Court to the Supreme Court, although the judgment complained of be less than \$20. *Bowers v. Green*, 1 Scam.

of a commission to the judges of the same or a superior court, by which they are authorized to examine the record, upon which judgment was given, and

42. A plaintiff may maintain a writ of error to reverse his own judgment, in order to bring a new suit where judgment was erroneously entered by default, where a plea had been filed. *Jones v. Wright*, 4 Scam. 338. It will lie in Alabama, on a refusal to quash an execution. *Page v. Coleman*, 9 Port. 275. In Illinois, it will lie to the decision of the Circuit Court, upon a motion to set aside a judgment, and quash an execution issued thereon. *Sloo v. State Bank*, 1 Scam. 428.

A writ of error lies upon final judgment in proceedings of prohibition. *Williams, Ex parte*, 4 Pike, 537. Where a cause, by consent of parties, is submitted to the court for trial, without the intervention of a jury, error will lie for the ruling of the court on questions of law, as in other cases. *Franklin Bank v. Buckingham*, 12 Ohio, 482. A plaintiff against whom a judgment is rendered, may maintain a writ of error to reverse it, on the ground that the court to which he resorted had no jurisdiction. *Jordan v. Dennis*, 7 Met. 590. In Connecticut, a writ of error lies to the Superior Court to revise the judgment of a court below under the statute in relation to forcible entry and detainer. *Dutton v. Tracy*, 4 Conn. 79. *Stuart v. Peirce*, 1 Root, 75. In Massachusetts, a writ of error lies on a judgment of the Common Pleas rendered on a report of referees, under a submission before a justice of the peace, pursuant to statute. *Short v. Pratt*, 6 Mass. 496. So in Pennsylvania, a writ of error lies to an award of arbitrators, on which judgment has been entered in the Common Pleas. *Lewis v. England*, 4 Binn. 5. In New Hampshire, error lies to reverse a judgment rendered upon a report of referees, made under a rule entered into before a justice of the peace, pursuant to their statute of June 21st, 1797. *Huse v. Grimes*, 2 N. Hamp. 208. A writ of error will lie where a motion to set aside a nonsuit is refused, although the nonsuit was voluntary. *Graham v. Greene*, 4 Hayw. 187. *Collins v. Bowman*, 2 Mis. 195. *English v. Mullanphy*, 1 Mis. 780. *Haight v. Morris*, 2 Halst. 289. *Lovell v. Everton*, 11 Johns. 52. *Wilson v. Force*, 6 Johns. 110; but see *Keane v. Phillips*, 4 Wheat. 73. *Cain v. Byrd*, 1 Stew. 189.

If the aggrieved party, without any laches on his part, cannot avail himself of an appeal, he is entitled to a writ of error. *Valier v. Hart*, 11 Mass. 300. *Putnam v. Churchill*, 4 Ib. 516. *Smith v. Rice*, 11 Ib. 507. *Skipwith v. Hill*, 2 Ib. 35. Thus a writ of error lies to reverse a judgment against an infant, where an appeal lay, since the infant could not appeal. *Valier v. Hart*, 11 Mass. 300. So if a party to an action, pending in the court of Common Pleas, enters into an agreement that he will not appeal from the judgment of that court, he will nevertheless be entitled to his writ of error, although he might have appealed, if he had not waived his right. *Putnam v. Churchill*, 4 Mass. 516. So, a writ of error lies on a judgment of the court of Common Pleas, rendered against the defendant by default, who had no notice of the suit. *Skipwith v. Hill*, 2 Mass. 35. *Smith v. Rice*, 11 Ib. 507. *Gay v. Richardson*, 18 Pick. 417. *Thatcher v. Miller*, 11 Mass. 413. *Thatcher v. Miller*, 13 Ib. 270. In New Hampshire, a writ of error lies to reverse an order of the court of Common Pleas, arresting judgment in an action. *Tavor v. Philbrick*, 5 N. Hamp. 358. So also in Missouri and Pennsylvania. *State v. Foster*, 2 Mis. 210. *Benjamin v. Armstrong*, 2 S. & R. 392. But it will not lie upon what is matter of discretion, in a court. *Wall v. Wall*, 2 Har. & Gill, 79. *Romaine v. Norris*, 3 Halst. 80. *Chase v. Davis*, 7 Verm. 478. *Edgell v. Bennett*, Ib. 534. Thus, the granting or refusal of a new trial, on a petition for that purpose, is a matter of discretion, and therefore not a subject of error. *Magill v. Lyman*, 6 Conn. 59. *Lewis v. Hawley*, 1 Ib. 49. *Kimball v. Cady*, Kirby 41. *Anderson v. State*, 5 Har. & J. 114. *Marine Ins. Co. v. Hodgson*, 6 Cranch. 206. *Norwich Railroad v. Cahill*, 18 Conn. 484. *Marine Ins. Co. v. Young*, 5 Ib. 187. *Henderson v. Moore*, Ib. 11. *Clemson v. Krooper*, Breeze, 162. *Collins v. Claypole*, Ib. 164. *Street v. Blue*, Ib. 201. *Vernon v. May*, Ib. 229. *Aliter*, in Indiana and Missouri. *Goldsbey v. Robertson*, 1 Blackf. 21. *State v. Bird*, 1 Mis. 585. So the allowance or disallowance of an amendment in a particular case within the general power of the court, is not ground of error. *Merriam v. Langdon*, 10 Conn. 460. *Chirac v. Eimcker*, 11 Wheat. 280. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206. *Stearns v. Barrett*, 1 Mason, 153. So the disallowance of a motion to withdraw the general issue. *Beebe v. Steele*, 2 Verm. 314. Or a refusal to strike out a plea on motion. *Johnson v. Wren*, 3 Stew. 172. Or for its refusal to continue a cause. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206. *Owings v. Beall*, 1 Litt. 257. *Woods v. Young*, 4 Cranch, 236. Mis-statement of a fact by a judge in his charge to the jury, is not the subject of a writ of error. *Hamett v. Dundas*, 4 Barr, 178. Nor is a judge's expression of his opinion, of the weight or strength of evidence, unless he erroneously instruct the jury that particular evidence is *prima facie* or conclusive, words of technical and definite meaning. *Ib.* Nor is the time when a witness is allowed to be examined. *Levers v. Van Busskirk*, 4 Barr, 309. Nor is the admission of improper evidence, which has been afterwards withdrawn. *Miller v. Miller*, 4 Barr, 317. *Carrill v. Stout*, 10 Ala. 796. Nor is a refusal to stay proceedings, until the costs of a former suit have been paid. *Withers v. Haines*, 2 Barr, 435. Nor is a refusal to open a judgment, or grant an issue on the ground that the same point has been decided in a former suit, to which no ap-

on such examination to affirm or reverse the same, according to law.(b) This writ is grantable *ex debito justitiæ* in all cases, except in treason and felony.(c)[A] And it is said, that whenever a new jurisdiction is erected by act of parliament, and the court or judge that exercise this jurisdiction, act as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but when they act in a summary way, or in a new course different from the common law, their writ of error lies not, but a *certiorari*.(d)[B] To amend errors in a court not of record, a writ of *false judgment* is the proper remedy.(e)

The writ of error is usually brought by the party or parties against whom the judgment was given; or, it may be brought by a plaintiff to reverse his own judgment, if erroneous, in order to enable him to bring another action.(f) But the defendant is not allowed to bring it contrary to his own agreement, or that of his attorney:(g) Therefore, when the defendants have agreed, under a consolidation rule, not to bring a writ of error, they are not allowed to do so, though there be manifest error on the

(b) 2 Bac. Abr. 187. 1 Str. 607. 2 Ld. Raym. 1403, S. C. Cas. temp. Hardw. 346.

(c) 2 Salk. 504. 3 Durnf. & East, 78. 9 Price, 606.

(d) 1 Salk. 144, 263; and see 3 Salk. 148. 9 Moore, 655. 2 Bing. 346, S. C. 10 Moore, 32. Id. 171. 2 Bing. 463, S. C.

(e) Co. Lit. 288, b. Finch, L. 484. 3 Blac. Com. 406. Append. Chap. XLIV. § 151. Chap. XLV. § 101.

(f) 3 Bur. 1772.

(g) 2 Durnf. & East, 183; and see 8 Taunt. 434; but see 4 Dowl. & Ryl. 153.

peal was taken. *Id.* Nor is a refusal to permit the defendant to withdraw a plea of justification to an action of slander. *Rush v. Cavanaugh*, 2 Barr, 187. Nor the admission of immaterial evidence, the merits of the cause having been fully tried. *Van Vacler v. McKillip*, 7 Blackf. 578. Nor if the court charge the jury erroneously, but afterwards correct the mistake by giving a legal charge on the subject. *Gronour v. Daniels*, 7 Blackf. 108. Or for the manner in which a court below made up a feigned issue. *Neff v. Barr*, 14 S. & R. 166. Or on an order of a court below, discharging a juror. *Eichelberger v. Nicholson*, 1 S. & R. 430. Or the mere rejection of a juror, for insufficient cause. *Tatum v. Young*, 1 Port. 298. Or for a refusal by the court to give instruction upon an abstract point. *Caton v. Lemax*, 5 Rand. 31. *Hamilton v. Russell*, 1 Cranch, 309. *Brown v. Wilson*, 1 Litt. 229. Nor will it lie to a judgment granting a new trial, as it is not a final judgment; nor can the improper granting of a new trial be assigned for error. *Emerson v. Harriet*, 11 Mis. 413. *Emerson v. Scott*, *Id.* *Walker v. Hale*, 16 Ala. 26. Nor does it lie from an interlocutory judgment, or decree; there must be a final decision of the case, before either party can have it reviewed in the Supreme Court; such a decision, as settles the rights of the parties, respecting the subject matter of the suit, and which concludes them until it is reversed or set aside. *Hayes v. Caldwell*, 5 Gilman, 33. *Pickle v. Holland*, 24 Miss. 566. Nor will it lie to the Supreme Court for refusing to allow a *certiorari*. *The State v. Wood*, 1 N. Jersey, 682. Or granting or refusing rules resting in discretion. *Den v. Fen*, 1 N. Jersey, 700.

[A] A writ of error is a writ of right, grantable *ex debito justitiæ*. *Skipwith v. Hill*, 2 Mass. 35. *Drowne v. Stimpson*, *Id.* 441. *Pembroke v. Abbington*, *Id.* 142. *Yates v. The People*, 6 Johns. 337.

[B] A writ of error will lie, in New Jersey, upon proceedings not according to the course of the common law. *Evans v. Adams*, 3 Green, 373. In Kentucky, all judicial proceedings of inferior courts it seems, are subject to the revision of court of appeals, unless where it is otherwise provided by law. *Rice v. Turnpike Co.*, 7 Dana, 81. Proceedings of courts of record, although not after the manner of the common law, may be reviewed by writ of error, in Ohio. *Smith v. Pratt*, 13 Ohio, 548. But in Maryland, it has been held that a writ of error will not lie to a court vested with a special jurisdiction, and which does not proceed according to the forms of the common law. *Savage Manuf. Co. v. Owings*, 3 Gill, 497. The writ of error is an original writ, and its object is to review and correct an error of the law which is not amendable at common law, or cured by any of the statutes of jeofails. *Allen v. The Mayor &c., of Savannah*, 9 Geo. 286. It is considered a new writ, and it is less an action between the original parties than a question between the judgment and the law. *Id.* The inference to be drawn from the authorities is, that the judgment of an inferior court is considered at common law, a final judgment. *Id.* After judgment of severance, either party may sue out a writ of error without joining the other. *Hargraves v. Lewis*, 7 Geo. 10.

record.(h) So where executors, against whom a *scire facias* had been sued out, to recover damages assessed on an interlocutory judgment against their testator, brought a writ of error, after the testator's attorney had agreed for him that no writ of error should be brought, the court of King' Bench on motion ordered the attorney to *non pros* the writ of error; for the *scire facias* was merely a continuation of the proceedings in the *original action; and as the testator himself, if he had lived, [*1185] could not have brought a writ of error, in consequence of the agreement, so neither could his executors.(a) And where a defendant obtained time to plead, on the terms of giving judgment of the term, and afterwards brought a writ of error, the court quashed the writ.(bb) But a consent to confess judgment in a second action, with a stay of execution till a writ of error be determined on the original judgment, does not prevent the defendant from bringing a writ of error on the second judgment, after affirmance of the first, unless it be so expressed in the rule.(cc)

If an action be brought against a *feme covert* as a *feme sole*, and she plead to issue as a *feme sole*, and judgment be given against her, upon which she is taken in execution, she and her husband must join in bringing a writ of error; for otherwise the husband might be prejudiced by losing the society of his wife, and her care in his domestic concerns, and he hath no other means to help himself.(dd) So, if an action be brought against a *feme covert* and others, they may all join with the husband in bringing a writ of error.(ee)

It is a general rule, that no person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or prejudiced by the judgment, and therefore to receive advantage by the reversal of it.(ff)[A] Hence it has been determined, that if there be judgment against the *principal*, and also against the *bail*, the principal cannot have error on the judgment against the bail,(g) nor the bail on the judgment against the principal,(hh) nor can they join in a writ of error;(i) for these are distinct judgments, and affect different persons.

(h) 1 H. Blac. 21; and see 8 Taunt. 434. (a) 1 Durnf. & East, 388. *Ante*, 1096.

(bb) 3 Barn. & Cres. 735. 5 Dowl. & Ry. 624, S. C. (cc) 2 Blac. Rep. 780.

(dd) 1 Rol. Abr. 748. Sty. Rep. 254, 280. (ee) 1 Rol. Abr. 748.

(ff) 2 Bac. Abr. 195. 2 Wms. Saund. 5 Ed. 46, a, (6), 101, a.

(g) 2 Bac. Abr. 199. 1 Rol. Abr. 748, 9. Cro. Car. 408; and see Lil. Ent. 378; and the cases there cited.

(hh) 2 Leon. 101. Cro. Car. 408, 481, 561. 1 Ld. Raym. 328. Carth. 447, S. C.

(i) Palm. 567. Cro. Car. 300, 408, 574, 5.

[A] It is a general rule that no person can bring a writ of error, unless a party or privy to the record, or one prejudiced by the record. *Townsend v. Davis*, 1 Kelly, 495. Or one who has been injured by the judgment and will be benefited by its reversal. *Dupree v. Perry*, 18 Ala. 34. *Harrington v. Roberts*, 7 Geo. 510. *Huner v. Reeves*, 2 Green, (Iowa,) 190. *Bayard v. Lombard*, 9 How. (U. S.), 530. *Thomas v. Wyatt*, 9 Sm. & Marsh. 308. All persons interested in the judgment sought to be reviewed must be made parties to the writ of error, and in the order in which they stand in the record below. When, therefore, one of two or more defendants against whom a decree has been rendered, brings a writ of error to reverse it, it is necessary for him to join his co-defendants as plaintiffs in error; and upon the trial they may unite with him and assign error against the decree, or they may sever and be heard in defence of the decree. *Carrey v. Giles*, 10 Geo. 1. And if such plaintiff in error has failed to make his co-defendants parties plaintiff to the writ of error, they may be added by motion without delay or costs, with the same privilege of assigning error or severing. *Id.* Where on an appeal, judgment is rendered against the appellant and his sureties on the appeal, they should all be joined in a writ of error, or the writ will be dismissed. *Dill v. Jones*, 2 Kelly, 79. *Morris v. Wiley*, 2 Kelly, 287. *Long v. Strickland*, 2 Kelly, 348. *Carey v. Rice*, 2 Kelly, 408. *Coffee v. Newson*, 2 Kelly, 439; and see note [A], *post*, p. 1163.

On a judgment against *several* parties, the writ of error must be brought in all their names, *(k)* provided they are all living, and aggrieved by the judgment; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener: *(l)* And if the writ of error in such case be brought by one or more of the defendants only, it may be quashed; *(k)* or the courts will give the plaintiff

[*1186] *leave to take out execution. *(a)* But when judgment is given against several parties, and one or more of them die, the writ of error may be brought by the survivors. *(b)* And in *trespass* against three, if there be judgment by default against two of them, and the third plead to issue, and it be found for him, the two only may bring a writ of error; for the party in whose favour the judgment was given, cannot say that it was to his prejudice. *(c)* So, if a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they must be *summoned* and *severed*; after which the writ of error may be proceeded in by the rest alone. *(d)* And where a writ of error was brought in the names of two executors, and one would not join in assigning errors, the court of King's Bench gave the other time to assign them, till there could be summons and severance. *(e)*

On a writ of error brought against two executors, one only appeared, and sued out a *scire facias quare executionem non*, upon which the judgment was affirmed for both executors; and upon a second writ of error, the court held, that a *scire facias quare executionem non* is only to bring in the plaintiff in error to assign his errors; and as he came in upon it, and assigned his errors, he waived any objection, and admitted the one executor to be sufficient to call upon him to assign them, and the court are not to presume that the other executor is alive: And though a writ of error by one alone, upon a judgment against two, be not good, yet that is on account of the inconvenience that would arise from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason does not hold in this case, where the executors are defendants in error, and not plaintiffs. *(f)*

A writ of error lies for some error or defect in substance, [A] that is not aid-

(k) 6 Co. 25. Cro. Eliz. 648, 9, S. C. Yelv. 4. Cro. Eliz. 892, S. C. Carth. 7, 8. 3 Mod. 134, S. C. 1 Ld. Raym. 71, 151. 5 Mod. 16, 69. Carth. 367. Comb. 354. Holt, 54, S. C. 1 Ld. Raym. 244. Carth. 404. Comb. 441. 1 Salk. 319. 5 Mod. 338, S. C. 1 Ld. Raym. 328. 2 Ld. Raym. 870. 1 Salk. 312, 13, S. C. 6 Mod. 40. 1 Str. 234. 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 305, 316, S. C. 2 Ld. Raym. 1532. Cas. temp. Hardw. 135, 6. Barnes, 202. 1 Wils. 88. 3 Bur. 1789. 2 Durnf. & East, 737.

(l) Carth. 8; and see 3 Bur. 1789.

(a) Barnes, 202.

(b) Palm. 151. 1 Str. 234.

(c) 1 Lev. 210. Hob. 70. 1 Str. 683. 2 Str. 892, 1110. Cowp. 425. 2 Blac. Rep. 1067; but see Sty. Rep. 190. 3 Salk. 146, *semb. contra*.

(d) Yelv. 4. Cro. Eliz. 892, S. C. Cro. Jac. 117. Carth. 7, 8. 3 Mod. 134, S. C. 6 Mod. 40. 1 Str. 234. Cas. temp. Hardw. 135, 6.

(e) 2 Str. 783.

(f) 3 Bur. 1789.

[A] An error must be a manifest one which will reverse a judgment; probability that the judgment is erroneous is not sufficient. *Westcott v. Garrison*, 1 Halst. 132. *Lander v. Reynolds*, 3 Litt. 14. A judgment for a larger sum than the amount of the damages laid in the declaration is erroneous. *Smith v. Allen*, 5 Day, 337. *Tennant v. Gray*, 5 Munford, 494. *Davenport v. Bradley*, 4 Con. 309. *Hawk v. Anderson*, 4 Halsted, 319. *Hemmenway v. Hicks*, 4 Pick. 497. *Grosvener v. Danforth*, 16 Mass. 74. *Cloud v. Campbell*, 4 Munf. 214. *Evans v. Bridges*, 4 Port. 348. As a general rule, judgment on a writ of error will

ed, amendable, or cured at common law, or by some of the statutes of amendments or jeofails: (g) And it lies to the same court in which the judgment

(g) *Ante*, 918, &c.

follow success in the particular issue. It is proper, however, to examine the whole record, and to adjudge either for the plaintiff or defendant, according to the legal rights, as it may on the whole appear, without regard to the issue in law between the parties which may have been raised and decided. *Stephen v. The State*, 11 Geo. 225. When a writ of error is prosecuted in the Supreme Court, to reverse a judgment of the court of Common Pleas for error in overruling a motion for a new trial, on the ground that the verdict was against the evidence, all the evidence before the jury on the trial of the cause must be brought before the Supreme Court by a bill of exceptions. It must be made part of the record. It must be embodied in the bill, or so made a part of it that there can be no doubt that the Supreme Court has precisely the same evidence before it which was before the jury. *Hicks v. Person*, 19 Ohio, 426. *Henderson v. Tremble*, 8 Texas, 174. A party complaining of the finding of the court below, must preserve the evidence upon which the decree of the court was based, so as to show the matters of fact or law of which he complains; and if upon the final hearing, a decree is made and no objection is taken to the evidence, and the evidence is not preserved, nor a motion for a rehearing or a new trial made, the decree will be affirmed. *Knox v. Sikes*, 15 Miss. 235. When matters of fact are submitted to the decision of the court acting in the capacity of a jury, a writ of error does not lie to reverse or correct any error in its judgment upon the facts. *Flanagan v. Ernest*, 1 Chand. (Wis.) 149.

Where error is brought to, or an appeal taken from a judgment on a case stated, the upper court will not revise the decision of the court below on such facts. The statement of the case is considered as an agreement to abide by the decision on such facts. *Carroll v. Richardson*, 9 Mass. 329. *Wellington v. Stratton*, 11 Mass. 394. Where matter of fact is submitted to the decision of the court, neither party can sustain a writ of error on their decision. *Reynolds v. Rogers*, 5 Ham. 169. No writ of error lies to re-examine a question of fact depending upon evidence in the original suit, nor a mixed question of law and fact. *Campbell v. Patterson*, 7 Verm. 86. Nor will a writ of error lie for error in fact which contradicts the record; and which might have been put in issue and tried; more especially where it was actually put in issue and tried; even when, if the error were as alleged, the court that tried the case had no jurisdiction. *Riley v. Waugh*, 8 Cush. 220. A party cannot obtain redress, by motion in error, for a mistake of the jury in relation to a question which is properly before them. *Sheldon v. Hartford Fire Insurance Co.*, 22 Conn. 235. The action of the Circuit Court in permitting additional evidence to go to the jury to prove the venire, as laid, after the argument has been closed and the jury instructed, is purely discretionary, and not reversible on error. *Dave v. The State*, 22 Ala. 23.

Neither will it lie from a voluntary nonsuit. *Union Bank v. Carr*, 2 Humph. 345. *Ewing v. Glidwell*, 3 How. (Miss.) 332. *Trice v. Smith*, 6 Yerg. 319. *Howell v. Piman*, 5 Mis. 246. *Atkinson v. Lane*, 7 Mis. 403. *Kelsey v. Ross*, 6 Blackf. 536. *Vestal v. Burditt*, 6 Blackf. 555. *Kent v. Hunter*, 9 Geo. 207. A matter cannot be assigned for error in the court above, which was not excepted to in the court below. *Commercial and Railroad Bank v. Lum*, 7 How. (Miss.) 414. *Bowen v. Argall*, 24 Wend. 496. *Lewis v. Bank of Kentucky*, 12 Ohio, 132. *Milton v. Rowland*, 11 Ala. 732. And if no objection be made to an instruction to the jury, when it is given, it cannot be objected to on error. *Comparet v. Hedges*, 6 Blackf. 417. *Peck v. Bogers*, 1 Scam. 281. Judgment will not be reversed for an error which does no injury to the party complaining. *Unanget v. Kraemer*, 8 Watts & Serg. 391. *Ross v. Neal*, 7 Monr. 487. *Bunting v. Young*, 5 Watts & Serg. 188. *Union Bank v. Planters Bank*, 9 Gill & Johns. 439. *Ebb v. Pindall*, 5 Leigh, 109. *McClintock v. Chamberlin*, Wright, 547. *Button v. Thompson*, 6 Yerg. 325. *Brown v. Hill*, 5 Pike, 78. *Evans v. Bolling*, 8 Port. 546. *Clark v. Fox*, 9 Dana, 193. *Lynch v. Sanders*, 9 Dana, 59. *Schackelford v. Miller*, 9 Dana, 273. *Rankin v. Perry*, 5 Mis. 501. *Redpath v. Nottingham*, 5 Blackf. 267. *Harrison v. Clark*, 1 Scam. 131. *Burt v. Dodge*, 13 Ohio, 131. *Aliter*, if the judgment is without authority of law in respect to the error. *Wallace v. Henry*, 5 Pike, 105; or for an error in favour of the party applying. *Sterret v. Cried*, 2 Ham. 343. *Trabue v. McKerrick*, 4 Bibb, 180. *Hughes v. Stickney*, 13 Wend. 200. *Henry v. Smoot*, Minot, 18. *Covey v. The State*, 4 Port. 186. *Hammett v. Bullett*, 1 Call, 567. Nor will a judgment be reversed on a writ of error, where it appears that the plaintiff sustained no injury from the error. *Overley v. Paine*, 3 J. J. Marsh. 717. *Manchester v. Megee*, 4 Gilm. 571. So in Massachusetts, error does not lie upon a judgment rendered on a case stated and submitted by the parties to the opinion of the court. *Alfred v. Saco*, 7 Mass. 380. *Carroll v. Richardson*, 9 Mass. 329. *Gray v. Storer*, 10 Mass. 163. *Wellington v. Stratton*, 11 Mass. 394. So also, in Vermont. *Noble v. Jewitt*, 2 Chip. 36.

A judgment will not be reversed in a court of error for the admission of irrelevant evi-

was given, or to which the record is removed by writ of error, or to a superior court. If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court, by writ of error *coram nobis*, or *quæ coram nobis resident*; (h) so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not [*1137] the error of the judges, and reversing it is not *reversing their own judgment. (a) [A] So, upon a judgment in the King's Bench, if there be error in the process, or through the default of the clerks, it may be reversed in the same court, by writ of error *coram nobis*: (b) But if an erroneous judgment be given in the King's Bench, and the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment. (c) In the Common Pleas, the record and process being stated to remain before the king's justices, the writ is called

(h) Append. Chap. XLIV. § 2, 3, 4.

(a) 1 Rol. Abr. 747. Cro. Eliz. 105, 6. 1 Sid. 208. 3 Salk. 145, 6, 7; and see Steph. Pl. 139, 40.

(b) 1 Rol. Abr. 746. F. N. B. 21. Poph. 181.

(c) 1 Rol. Abr. 746.

dence, if it appear that no prejudice arose from it. *Postens v. Postens*, 3 Watts & Serg. 127. *Kercheval v. Amble*, 4 Dana, 166. Error does not lie for what is matter of discretion in the court below. *Emerson v. Paine*, 9 Verm. 271. *Jenkins v. Brown*, 21 Wend. 454. *Planters and Merchants Bank v. Willis*, 5 Ala. 770. A motion to strike out a plea is addressed to the discretion of the court, and is not revisable in error. *Townsend v. Moore*, 9 Port. 136. Matters of practice in the courts below, are not the subject of revision by writ of error. *Sisco v. Harmon*, 9 Verm. 121. The refusal to call a witness to re-state his testimony after a cause has been summed up and the jury charged, is matter of discretion in the court, with the exercise of which a court of review will not interfere. *The People v. Rector*, 19 Wend. 569. *Witherspoon v. Caine*, Walker, 407. A refusal to suppress a deposition regularly taken, is within the discretion of the court, and not revisable on error. *Cullum v. Smith*, 6 Ala. 625. A motion to amend is addressed to the sound discretion of the court, and a refusal to grant it cannot be assigned for error. *Warren v. M'Hatton*, 2 Scam. 32. *Long v. Overton*, 7 Mis. 567. *Probate Court v. Hall*, 14 Verm. 159. *Miller v. Schackelford*, 4 Dana, 264. *Helm v. Rogers*, 5 Humph. 105. *Davis v. Church*, 1 Watts & Serg. 240. *Phillips v. Dana*, 1 Scam. 498. *Craine v. Bailey*, *Id.* 321. The decision of the court upon an application to set aside a judgment by default, or grant a new trial, is within the discretion of the court, and not subject to revision. *Harrison v. Clark*, 1 Scam. 131. *Garner v. Grenshaw*, 1 Scam. 143. *Gillet v. Stone*, 1 Scam. 539. *Werkheiser v. Werkheiser*, 6 Watts & Serg. 184. *Martin v. Hayes*, 5 Miss. 62. *Chambers v. Campbell*, 15 Conn. 427. But see *Bisell v. Hobbs*, 6 Blackf. 479. *Hodges v. Springer*, 5 Blackford, 103.

[A] A writ of error, *coram nobis*, lies to correct an error in fact in the same court where the record is, but the same court cannot correct an error in law either by or without a writ of error; such error should be redressed by another court. *Hawkins v. Bowie*, 9 Gill & Johns. 428. So the rejection of a plea in abatement, if erroneous, is an error of law, and cannot be corrected by a writ of error *coram nobis*. *Id.* In North Carolina, a writ of error, *coram nobis*, is not a writ of right. Before it is allowed there must be an affidavit of some error in fact by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed; and it is a matter of discretion with the court before which the application is made, whether upon the affidavits to grant the writ or not, which cannot be revised by the court of appeals. *Tyler v. Morris*, 4 Dev. & Batt. 487. Where a judgment is improperly entered by a mistake of the clerk, and at the succeeding term amended *sine pro tunc*, before which term a writ of error *coram nobis* was sued out and the judgment superseded, it was held that although the writ of error, *coram nobis*, might be wholly irregular, it could not be assigned as error, because there was no final action of the court upon it, and its influence was spent on a void judgment. *Coffey v. Wilson*, 2 Ala. 701. The writ of error, *coram nobis*, is an available remedy to avoid judgment rendered against a party who had a valid defence existing in the facts of the case, but who, without negligence, has failed to make that defence. *Crawford v. Williams*, 1 Swan, (Tenn.) 341.

a writ of error *coram vobis*, or *qua coram vobis resident*.(d) A writ of error, in respect of *coverture*, may in general be brought in the same court in which the judgment was given, or in another court; except in the court of Exchequer Chamber, where there is no jury to try an issue in fact:(e) And it is said, that if judgment be given in the King's Bench in *civil* actions, a writ of error will not lie in the same court, but only for errors in fact triable by a jury; but upon a judgment in *criminal* cases, error will lie in the King's Bench, whether the error be in fact or law; though it lies also in parliament.(f)

If a writ of error returnable in the King's Bench *abate*, after removal of the record, by death or otherwise,(gg) or be *quashed* for any other fault than variance,(hh) error *coram nobis* lies in the same court to which the record is removed: But formerly, if there had been a *variance* between the record and the writ of error, the record not being removed, there must have been a new writ;(i) which is also necessary, and may be had after the *non pros* of a former writ of error, before the removal of the record.(k) And error *coram vobis* lies not in the King's Bench, after an *affirmance* in that court,(l) or in the Exchequer Chamber,(m) Neither does it lie, for error in *fact*, in the Exchequer Chamber,(n) or House of Lords; for the record is not removed thither, but only a transcript; and it is said to be beneath the dignity of the House of Lords, that being the supreme judicature, to examine matters of fact.(o)

For the error or mistake of the judges, in point of *law*, a writ of error lies to the King's Bench, from the Common Pleas at *Westminster*,(p) and from all inferior courts of record in *England*,(q) except in *London*,(r) and some other places; and after judgment given thereon, a second writ of error may be brought, returnable in the House of Lords: [*1138] but error lies not from an inferior court to the Common Pleas.(a)

In *London*, a writ of error lies from the sheriffs' courts, to the court of hustings of common pleas; and from the court of hustings, whether of common pleas or pleas of land, and also from the law side of the mayor's court, to a court of appeal held before commissioners appointed under the great seal, and thence immediately to the House of Lords.(b) It also seems, that the appeal against decrees made on the equity side of the mayor's court, is immediately to the House of Lords.(c)

On a judgment given in the *Cinque ports*, no writ of error lies in the King's Bench or Common Pleas; but by custom, such judgment is examinable by bill, in nature of a writ of error, before the lord keeper or warden of the *Cinque ports*, at his court of *Shepway*.(dd) So, if a judgment be given

(d) Append. Chap. XLIV. § 6, 7.

(e) 1 Chit. Rep. 372, per Bayley, J.

(f) 3 Salk. 147; and see *Cornhill's case*, 1 Lev. 149. 1 Sid. 208, S. C.

(gg) 1 Rol. Abr. 753. Yelv. 6. Cro. Eliz. 891, S. C. Godb. 375. Latch. 198, S. C. Cro. Car. 575.

(hh) 1 Ld. Raym. 151. Carth. 367. 5 Mod. 16, 69, S. C. 1 Str. 606. 2 Ld. Raym. 1403. 8 Mod. 305, 316, S. C.

(i) Godb. 375; but see stat. 5 Geo. I. c. 13.

(k) Bro. Abr. tit. *Error*, pl. 121. 10 Vin. Abr. 16, pl. 11. 3 Salk. 146.

(l) 2 Str. 949, 975. 1 Salk. 337, *semb. contra*.

(m) 2 Str. 690.

(n) 1 Rol. Abr. 755. Com. Rep. 597.

(o) 3 Salk. 145, 6.

(p) 4 Inst. 22.

(q) Append. Chap. XLIV. § 7.

(r) 2 Bar. 777.

(s) Finch, L. 480. Dyer, 250. Cro. Eliz. 26. 3 Blac. Com. 410.

(t) *Emerson*, on the City Courts, 27, 76, 97. 2 Bac. Abr. 215.

(u) *Emerson*, on the City Courts, 86.

(dd) 4 Inst. 224.

in the court of *Stannaries*, in the duchy of *Cornwall*, for any matters touching the stannaries,^(e) no writ of error lies upon this in the King's Bench or Common Pleas; but an appeal to the warden of the *Stannaries*, and from him to the prince of *Wales*, and when there is no prince, to the king in council.^(f)

A writ of error lies at common law in the King's Bench, upon a judgment in a *county palatine*; for though these are superior courts, and have *jura regalia*, yet their jurisdiction is derived from the crown.^(g) And, by the 34 & 35 Hen. VIII. c. 26, § 113, and 1 W. & M. c. 27, errors in judgments, in pleas real, mixed and personal, before the justices in their great sessions in *Wales*, shall be redressed by writ of error, in the King's Bench in *England*.

At common law, no writ of error lay on a judgment from the King's Bench, except in Parliament; by which means the subject was often disappointed of his writ of error, either by the not sitting of parliament, or by their being employed in public business, when they did sit.^(h) To remedy this, it was enacted, by the statute 27 Eliz. c. 8, that "where any judgment shall be given in the King's Bench, in any action of debt, detinue, covenant, account, action upon the case, ejectment, or trespass, *first commenced there*, other than such only where the queen shall be party, the plaintiff or defendant, against whom such judgment shall be given, may, at his *election*,⁽ⁱ⁾ sue out of the court of Chancery, a special writ of error, directed to the chief justice of the King's Bench, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices [*1139] of the Common bench, and barons of the *Exchequer, into the Exchequer chamber, there to be examined by the said justices and barons; which said justices, and such barons as are of the degree of the coif, or six of them, shall have full power and authority to examine all such errors as shall be assigned in or upon any such judgment, and thereupon to reverse or affirm the same, as the law shall require, other than for errors concerning the jurisdiction of the court of King's Bench, or for want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and after the said judgment shall be affirmed or reversed, the said record and all things concerning the same, shall be brought back into the King's Bench, that further proceedings may be had thereupon, as well for execution as otherwise: But such reversal or affirmation shall not be so final, but that the party grieved shall and may sue in the high court of Parliament, for the further and due examination of the said judgment, as was then usual upon erroneous judgments in the court of King's Bench."

This statute is confined to the particular actions enumerated therein; and does not extend to actions of replevin,^(a) rescous,^(b) or *scandalum magnatum*,^(c) or upon writs of ravishment of ward,^(d) *scire facias* against bail,^(ee) or prohibition,^(ff) &c.: In these actions therefore error will not lie

(e) 3 Bulst. 183.

(f) 1 Rol. Abr. 745; and see 4 Inst. 229, 30. 3 Blac. Com. 80. 1 Bac. Abr. tit. Courts of the *Stannaries*, and Jacob's Law Dictionary, tit. *Stannaries*.

(g) 1 Rol. Abr. 745. 4 Inst. 214, 218, 223. Append. Chap. XLIV. § 8.

(h) 2 Bac. Abr. 212.

(i) 3 Salk. 147.

(a) 2 Rol. Rep. 434.

(b) Moore, 694. Cro. Jac. 171.

(c) Cro. Car. 142. W. Jon. 194. Ley, 82, S. C. 1 Sid. 143. 1 Vent. 49. 2 Ld. Raym. 954.

(d) 2 Rol. Rep. 134.

(ee) Yelv. 157. Cro. Jac. 171. Cro. Car. 286, 300. W. Jon. 325. 1 Ld. Raym. 98; but see Cro. Eliz. 730, *contra*.

(ff) 5 Barn. & Cres. 765. 8 Dowl. & Ry. 587, S. Q.

in the Exchequer chamber, but must be brought in Parliament. In *scire facias* on a judgment against the party or his executors, it seems that error lies in the Exchequer chamber, *tam in redditione judicii, quam in adjudicatione executionis*:(g) but not upon an award of execution only.(h) Errors in fact, being examinable in the King's Bench, cannot legally be assigned in the Exchequer chamber:(i) yet if a release of errors be pleaded in that court, they may try it, and award a *venire*, under the seal of the court of Exchequer.(k)

We have already seen, that a writ of error does not lie in the Exchequer chamber, upon a judgment of the King's Bench, in an action commenced by *original writ*; because it is not *first* commenced in the King's Bench, but is founded upon the original writ issuing out of Chancery.(l) And, for a similar reason, a writ of error lies not in the Exchequer chamber, upon a judgment affirmed on error in the King's Bench, but must be brought in the House of Lords.(m) So, where a judgment of the King's Bench was affirmed in the Exchequer chamber, upon which the plaintiff sued out a *scire facias* in the King's Bench, and had an award of execution, and afterwards the defendant brought a writ of error in the *Ex- [*1140] chequer chamber, *tam in redditione judicii, quam in adjudicatione executionis*, the court held that this writ of error did not lie, and was no *supersedeas* of execution.(aa) But notwithstanding that part of the statute which excepts actions where the Queen shall be party, it has been holden that a writ of error lies in the Exchequer chamber, upon a judgment in an action of debt, *qui tam*, upon the statute of usury.(bb)

From proceedings on the *law* side of the Exchequer in *England*, a writ of error lies into the court of Exchequer chamber, before the lord chancellor, lord treasurer, and judges of the court of King's Bench and Common Pleas;(c) and thence it lies to the House of Lords:(d) but against decrees on the *equity* side of the Exchequer, the appeal is to the House of Lords in the first instance. The proceeding by writ of *extent*, however, and all proceedings thereon, interlocutory and final, seem to be proceedings at *law*: And therefore, an order made by the court of Exchequer, consequent upon a judgment of the barons, in the matter of an extent, upon facts reported by the deputy remembrancer to the court on a reference to him, is not the subject-matter of an appeal to the House of Lords:(e) But in order to found such an appeal, the party failing must put his defence upon the record, so as to obtain the judgment of the court at law, upon which he may bring a writ of error; and he may then appeal from the judgment of the court of error, to the House of Lords: Or he should file an English bill, (or bill in equity in the Exchequer,) to establish his right against the crown, when, if he do not obtain a decree in his favor, he may at once present a petition of appeal from the court of Equity to the House.(e)

(g) Cro. Car. 286, 464. 1 Ld. Raym. 98.

(h) 2 Str. 1102. Andr. 287, S. C.

(i) 2 Lev. 38. 1 Vent. 207. 2 Mod. 194. Com. Rep. 597.

(k) 2 Str. 821.

(l) Ante, 102; and see 1 Wms. Saund. 5 Ed. 346, f, (4).

(m) 2 Bulst. 162; and see 1 Rol. Rep. 264.

(aa) 1 Salk. 263. 1 Ld. Raym. 97. 5 Mod. 228, S. C.

(bb) Doug. 350. Lloyd v. Skutt, T. 23 Geo. III. K. B.

(c) Append. Chap. XLIV. § 18.

(d) 3 Blac. Com. 411. And see the statutes 31 Ed. III. stat. 1, c. 12. 31 Eliz. c. 1. 16 Car. II. c. 2, & 20 Car. II. c. 4. 2 Bac. Abr. tit. Error, I. 3 Man. Ex. Pr. 478, &c.

(e) 11 Price, 643.

Before the union with *Scotland*, a writ of error lay not in this country, upon any judgment in *Scotland*; because it was a distinct kingdom, and governed by distinct laws: (f) but it is since given by statute, (g) from the court of Exchequer in *Scotland*, returnable in parliament. (h) A writ of error formerly lay from the King's Bench in *Ireland*, to the King's Bench in *England*, and thence to the House of Lords; but now, by the statute 23 Geo. III. c. 28, § 2, "no writ of error or appeal shall be received or adjudged, or any other proceedings had, by or in any of his majesty's courts in this kingdom, in any action or suit at law, or in equity, instituted in any of his majesty's courts in the kingdom of *Ireland*; and all such writs, appeals, or proceedings shall be, and they are thereby declared null and void, to all intents and purposes." Since the union with *Ireland*, however, a writ of error lies from the superior courts in that country, to the House of Lords.

[*1141] *No writ of error can be brought but on a judgment, or an award in nature of a judgment; for the words of the writ are *si judicium redditum sit*, (a) &c. And hence it was formerly holden, that a writ of error could not be brought *before* judgment given; and if *tested* before, it was no *supersedeas*: (b) But it seems to be now agreed, that a writ of error, bearing *teste* before judgment, is good, so as the judgment be given before the return of it; and this is the usual course for preventing execution. (cc) And the allowance of it may be served before the return of the writ of inquiry and final judgment. (dd) [A] Still however, if the writ of error be returnable before judgment, it may be quashed. (ee) And

(f) Show. P. O. 33.

(g) 6 Ann. c. 26, § 12. And see the statute 48 Geo. III. c. 151, concerning appeals to the House of Lords, from the court of Session in *Scotland*.

(h) Append. Chap. XLIV. § 19.

(a) Co. Lit. 288, b. 6 East, 336.

(b) 2 Bac. Abr. 199. 1 Rol. Abr. 749. Moore, 461.

(cc) March, 140. 1 Vent. 96, 255. 1 Mod. 112. 3 Keb. 308, S. C. 1 Str. 632. 1 Durnf. & East, 279.

(dd) *Per Cur.* T. 25 Geo. III. K. B.

(ee) 2 Ld. Raym. 1179, 1531. 1 Str. 139. 2 Str. 834, 891. Barnes, 197. 3 Taunt. 384; but see 5 Barn. & Cres. 735, (a). *Post*, 1162.

[A] A writ of error lies only on final judgment. *Helm v. Bassett*, 9 Miss. 52. *Hor v. Knighton*, 9 Miss. 180. *Wallis v. Sparks*, 1 Morris, 20. And it lies only in cases of judgments after the course of the common law. *Baxter v. Columbia Township*, 16 Ohio, 56. *Dea v. Fen*, 1 Zab. (N. J.) 700. *Harris v. Kreps*, Minor, 184. *Drowne v. Simpson*, 2 Mass. 445. *M'Laren v. Allen*, Minor, 117. *Emerson v. Harriet*, 11 Miss. 413.

Errors in law cannot be assigned to a process in the nature of an execution; that, if irregular, must be set aside in a different way. *Bowen v. Lanier*, 2 Tayl. 241. *Post v. M'Garan*, 31 Wend. 667. *Rule v. Hayden*, 3 B. Monr. 319. *Bank of Lexington v. Taylor*, 2 Smedes & Marsh. 27. *The State v. Dillon*, 3 Hayw. 174. *Hedges v. Madison*, 1 Gilman, 306. Nor will a writ of error lie against a judgment in abatement until the final judgment is given. *Dunham v. Braimen*, 1 Root, 551. Nor against an interlocutory sentence or order, until a final trial is had in the cause. *Carpenter v. Childs*, 1 Root, 181. *Ray v. Fitch*, 1b. 290. *Haynes v. Caldwell*, 5 Gilm. 33. *Pickle v. Holland*, 24 Miss. 546. Error will not lie where the judgment is arrested for the insufficiency of the declaration, for there is no judgment to be affirmed or reversed in the case. *Horne v. Barney*, 19 Johns. 247. Nor will it lie from an order granting a writ of prohibition, that being but the commencement of the proceeding. *Lawless v. Reese*, 3 Bibb, 479. But any decision, order or decree of the Circuit Court, which puts an end to the proceedings between the parties to a cause in that court, may be reversed upon appeal or writ of error. *Hill v. Young*, 3 Miss. 337. If an inferior court overrule a motion to amend a former judgment of that court, and award costs against the moving party, the judgment is final, and will support a writ of error. *Wilkinson v. Goldthwaite*, 1 Stew. & Port. 159. So of the decision on motion to quash an execution. *Tombechee Bank v. Strong's creditors*, 1 Stew. & Port. 187. See also cases cited, *ante*, p. 1134, note [A].

a writ of error will not lie on a judgment of *respondeat ouster*, on a plea to the jurisdiction.(*ff*)

After judgment, *twenty years* are allowed for bringing a writ of error: And by the statute 10 & 11 W. III. c. 14, "no judgment in any real or personal action, shall be reversed or avoided, for any error or defect therein, unless the writ of error be brought, and prosecuted with effect, within *twenty years* after such judgment signed, or entered of record." This statute has the usual exceptions, in favour of infants, *femes covert*, persons *non compotes mentis*, imprisoned, or beyond the seas. And the court on motion would not quash a writ of error, though brought twenty-nine years after the judgment; for this would be to deprive the party of the benefit of replying the exceptions in the statute.(*g*)

A writ of error, like a *scire facias*, is considered as a new action: and therefore, upon bringing it, the defendant in the original action may change his attorney, without obtaining a judge's order for that purpose.(*h*) To obtain a writ of error, application must be made by the attorney, to the cursor of the county where the venue was laid in the original action; who will make out the writ in ordinary cases, as a matter of course, upon a *præcipe*(*i*) or note of instructions, containing the names of the parties, the nature of the judgment, the court wherein it was given, and the time when the writ is intended to be returnable. In Parliament, there must be a warrant for the writ of error from the crown, which is procured by the cursor;(*k*) and, when it is against the king, the *fiat* of the attorney general must be obtained, upon a petition, setting forth the errors intended to be assigned, accompanied with a certificate from counsel, that they are real errors. This practice was anciently used,(*l*) as a mark of decency and respect; and though it appears to have been laid aside in the time of the usurpation,(*m*) yet it has since been revived.

*The writ of error runs in the king's name; and, on a judg-[*1142] ment recovered in the King's Bench, whether the writ be returnable in the Exchequer chamber,(*a*) or in Parliament,(*b*) it is directed *to our right trusty and well beloved Charles Lord Tenterden, our chief justice assigned to hold pleas in our court before us*;(c) unless it be a writ of error *coram nobis*, and then it is directed *to our justices assigned to hold pleas before us*,(*d*) or, if a writ of error *coram vobis*, *to our justices of the bench*. On a judgment recovered in the Common Pleas, the writ of error is directed *to our right trusty and well beloved Sir William Draper Best, Knight, our chief justice of the bench*;(e) unless it be to reverse a fine levied in that court; in which case the writ of error is directed to the Chirographer, for the transcript of the *note* of the fine, and *writ* of covenant;(f) or the *custos brevium*, for the transcript of the *foot* of the fine.(*gg*) On a judgment in the Exchequer of Pleas, the writ of error is directed to *our treasurer, and*

(*ff*) *Hodgson v. Milles*, E. 26 Geo. III. K. B. *per Buller*, J.

(*g*) 2 Str. 837.

(*h*) 7 Durnf. & East, 337. *Ante*, 94; but see 4 Barn. & Cres. 116. 6 Dowl. & Ry. 174, S. O.

(*i*) Append. Chap. XLIV: § 1, 9, 12, 15.

(*k*) Imp. K. B. 10 Ed. 758.

(*l*) Sav. 131.

(*m*) 1 Salk. 264.

(*a*) Append. Chap. XLIV. § 13.

(*b*) Lil. Ent. 334. Append. Chap. XLIV. § 15, 16, 17.

(*c*) L. P. E. 167. Lil. Ent. 213. Append. Chap. XLIV. § 13.

(*d*) Lil. Ent. 220, 231, 2. Append. Chap. XLIV. § 2, 3, 4.

(*e*) L. P. E. 67, 8; 78, 9. Lil. Ent. 222, 268. Append. Chap. XLIV. § 6, 10, 11.

(*f*) Lil. Ent. 280.

(*gg*) *Id.* 282.

barons of our *Exchequer*; (*hh*) for though the barons only are judges, yet the treasurer, together with them, hath the custody of the records of the court. (*i*) On a judgment in the county palatine of *Lancaster*, the writ of error is directed to the Chancellor, or his deputy, commanding him that he give in charge to the justices at *Lancaster*, that they send to him in his Chancery, the record, &c., and the writ which came to them thereupon, and that he transmit the record, (*k*) &c. And, on judgments in inferior courts, the writ of error should be directed to the judges before whom the judgment was given. (*l*)

In point of *form*, the body of the writ of error, when returnable in the King's Bench, on a judgment of the Common Pleas, runs thus; "Because in the record and process, and also in the giving of judgment, in a plaint which was in our court, before you and your companions, our justices of the Bench, by our writ, between A. B. and C. D. late of, &c., of a plea of, &c., (*describing the nature of the action*), manifest error hath intervened, to the great damage of the said C. D. as from his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you do distinctly and openly send to us, under your seal, the record and process aforesaid, with all things touching the same, and this writ, so that we may have them on, &c., (*a general return day*), wheresoever we shall then be in *England*, that the record and process aforesaid being inspected, we may cause to be further done thereupon, for

[*1143] *correcting that error, what of right and according to the law and custom of *England*, ought to be done." (*a*) This writ consists of two parts; first, a *certiorari* to remove the record, and secondly, a *commission* to examine it. (*b*) But in a writ of error *coram nobis* or *vobis*, the *certiorari* part being unnecessary, is omitted, and the writ contains only a commission to examine errors. (*c*) On a judgment in an inferior court, the writ of error begins by reciting, that in the record and process, &c., in a plaint which was before you, in the court of, &c., without our writ, between, &c., manifest error hath intervened, &c.; and it is made returnable on a *general return day*, wheresoever, &c. (*d*)

When the writ of error is returnable in the Exchequer chamber, it begins by reciting the statute 27 *Eliz.* c. 8, and brings the case within that statute, by stating that the error in no wise concerns the king, or the jurisdiction of the court of King's Bench, or any want of form in any writ, &c. (*e*) In the House of Lords, the writ of error differs in point of form, accordingly as it is brought on a judgment originally given in the court of King's Bench, (*f*) or on a judgment affirmed there, (*g*) or in the Exchequer chamber. (*h*) And when the error is supposed to be as well in giving the judgment, as in awarding execution thereon, the writ of error is said to be *tam quàm*, or, in the words of the writ, *tam in redditione judicii, quàm in adjudicatione executionis*. (*ii*)

(*hh*) Append. Chap. XLIV. § 18.

(*i*) 4 Inst. 105. Sav. 35, 6. Bac. Abr. tit. *Error*, I. 3.

(*k*) 2 Crompt. 3 Ed. 330. Append. Chap. XLIV. § 8.

(*l*) Godb. 44. Append. Chap. XLIV. § 7.

(*a*) Append. Chap. XLIV. § 10, 11.

(*c*) Append. Chap. XLIV. § 2, 3, 4, 6, 7.

(*e*) *Id.* § 13.

(*g*) *Id.* § 16.

(*h*) *Id.* § 17.

(*ii*) 2 Str. 1055.

(*b*) 1 Str. 607.

(*d*) *Id.* § 7.

(*f*) *Id.* § 15.

Cas. temp. Hardw. 345, S. C.

The writ of error should regularly agree with the record, in the names and description of the parties, and nature of the cause of action; [A] and therefore, if the parties be mis-named in the writ of error, (kk) or it be sued out by one of several parties only, (l) or the party suing in the Exchequer be described as the "*king's debtor*," when in fact he had proceeded on a *capias* of privilege, (m) it will not operate as a *supersedeas*, or stay of execution. So, if a writ of error be sued out and allowed on a judgment in an action of *covenant*, describing it as a plea of *trespass on the case*, whereupon the record is transcribed, that it seems is no *supersedeas*; although the plaintiff, after notice of the allowance of the writ of error, give a rule to transcribe, and sue out two writs of *scire facias quare executionem non*. (n)

The *teste* of the writ of error is the day of suing it out; and need not be on a seal day. (o) In the King's Bench, it is returnable *ubicunque*, &c. on the first or last *general* return of the term: (p) And it is not necessary that there should be *fifteen* days between the *teste* and return of a writ of error. (q) In the Exchequer chamber, it is returnable before the justices *of the Common bench, and barons of the Exchequer of [*1144] the degree of the coif, in the Exchequer chamber, on a *particular* return day: (a) In the House of Lords, when the parliament is sitting,

(kk) 2 Smith, R. 259.

(l) *Ante*, 1135, 6.

(m) 5 Taunt. 82.

(n) L. P. E. 33.

(o) 4 Barn. & Cres. 116. 6 Dowl. & Ry. 174, S. C.

(a) L. P. E. 167. Lill. Ent. 213.

(m) 1 Price, 312.

(o) 1 New Rep. C. P. 298.

[A] Where a plaintiff has two baptismal names, and a mistake is made in the second or middle name, it was held a fatal error in Virginia, even on judgment by default. *Ming v. Gwatkin*, 6 Rand, 551. A declaration in a suit against one Rowell, alleged that the said Blood on the 18th October, 1829, promised to pay the plaintiff twenty dollars in goods at B.'s store, and that *postea*, *scilicet* on the 15th July, 1829, the plaintiff demanded payment at B.'s store. On error, it was held, that Blood must be considered as inserted by mistake for Rowell; that the *scilicet* was repugnant to the *postea*, but might be rejected as surplusage; and that the want of an allegation of the day when the demand was made was only a defect in form; and the judgment was affirmed. *Rowell v. Bruce*, 5 N. H. 381. Writ against Joseph and Phineas: Declaration alleges a promise by said "John and Phineas." Held to be error after a judgment on default. *Id. Hemmenway v. Picks*, 4 Pick. 496. That the declaration names as one of the defendants a person whose name is not in the writ, and on whom process was not served, is only matter of abatement, and not error. *Morgan v. Morgan*, 2 Bibb, 388. The omission to insert the plaintiff's christian names in the writ, declaration, or record, cannot be assigned for error. *Brown v. King*, 1 Bibb, 462. A variance between the original petition and summons, and the copy served on the defendant, as to the date of the note declared on, is cause for a reversal of judgment. *Bridges v. Corn*, 4 Bibb, 32. A writ dated December 5th, 1791, to be answered on the 13th day of December next, is to be answered December 13th, 1792; and if the judgment is rendered on the 13th of the same December, it is erroneous. *Way v. Clark*, 1 Root, 439. A writ dated October 30th, 1789, to be returned on the 30th of October next, is returnable to October twelve-month, and a judgment rendered on the 30th of same October, is erroneous. *Austin v. Nichols*, 1 Root, 179. A writ dated June 12th, 1833, required the defendant "to appear on the fourth Tuesday of June next." It was held, that the time of appearance was the fourth Tuesday of June, 1834, and consequently, that a default in June, 1833, was erroneous. *Todd v. Hale*, 10 Conn. 544. A clerical mistake in the Anno Domini of summons or petition is not error, if the year of the commonwealth stated in the summons, and the indorsement made by the clerk of the time when the petition was filed are correct, so as to amend by them. *Bridges v. Ridgley*, 2 Litt. 395. A judgment will not be reversed for mere clerical errors, or mere matters of form, but the court will either disregard them, or where amendments can be made, will suspend judgment until application for amendment can regularly be made. *Moore v. Tracy*, 7 Wend. 229.

the writ of error is made returnable before the king in his present parliament, *immediate*, or without delay; because that court, during the session of it, is supposed to sit continually, and has no vacation, and it is for the honour of that high tribunal to be immediately attended, that they may do the speedier justice: (b) After a prorogation, the writ of error is returnable before the king in his parliament, at the next *session*; (c) or, after a dissolution, at the next *parliament*, specifying the day when it is to be holden. (d)

The writ of error being made out, is *sealed* in Chancery, either on a general seal day, or, which is somewhat more expensive, at a private seal; and after being obtained from the cursitor, it should be taken to the clerk of the errors of the court in which the judgment was given, (e) or, in the Exchequer of Pleas, to one of the clerks of the chief baron, (f) who will *allow* the same, on being paid his fees, and make out a certificate or note of the allowance; (g) a copy of which should be served on the attorney for the defendant in error: This is usually done at the time of taxing costs; and at the same time, the original certificate should be shown him. The officer of the court is in general bound to allow the writ of error; and the court of Common Pleas would not interfere with the allowance of it, or grant a rule *nisi* to set aside the same, upon an affidavit showing that the writ of error had been sued out for delay. (h) The writ of error *coram nobis* is allowed by the master, in open court; (i) and if it be brought on the ground of *coverture*, or of the defendant's going beyond sea, &c. there should be an *affidavit* of the fact on which it is founded. (k) The rule of allowance (l) being drawn up by the clerk of the rules, a copy of it is served on the attorney for the defendant in error.

A writ of error, sued out *before* final judgment, continues in force during the whole term in which it is returnable: (m) and if final judgment be signed at any time during that term, it is a *supersedeas* or stay of execution, from the time of signing it; (n) provided bail, when requisite, be put in thereon, within *four* clear days after final judgment is signed. (o) [A] It even seems, that a writ of error may operate as a stay of proceedings, though sued out before *interlocutory* judgment: (p) And the court of King's

(b) Lil. Ent. 248, 254.

(c) *Id.* 292.

(d) 1 Vent. 31, 266. 1 Mod. 106.

(e) R. E. 36 Car. II. K. B.; and see R. T. 20 Car. I. K. B.

(f) R. T. 26 & 27 Geo. II. § 2, in *Seac.* Man. Ex. Append. 209.

(g) Append. Chap. XLIV. § 20.

(h) 3 Bing. 125.

(i) L. P. E. 77; but see 2 Orompt. 3 Ed. 377, where it is said, that this writ may be allowed in *vacation*, by the secondary.

(k) Append. Chap. XLIV. § 24.

(l) *Id.* § 22.

(m) Barnes, 196, 7, 8. 5 East, 145. 1 New Rep. C. P. 298.

(n) 1 Str. 632; and see 2 Bos. & Pul. 137.

(o) 2 Str. 781. 1 Durnf. & East, 279. 4 Durnf. & East, 121. 4 Price, 289.

(p) 2 Maule & Sel. 334.

[A] The writ will not of itself operate as a stay of proceedings: to render it such, an order of the court is necessary. And in general, a stay will be ordered, only on putting in and justifying bail. *Ferris v. Douglass*, 20 Wend. 626. A second writ of error is not a *supersedeas* of execution, though bail has been given, if the first abated by the act of the party. *Sheerer v. Greir*, 3 Whart. 14. A writ of error *supersedes* two executions issued on the same day on which the sheriff has not levied. *Adams v. Hindman*, 2 Miles, 484. The service of an order for staying the proceedings upon an execution, granted by a commissioner upon the allowance of a writ of error, does not operate as a *supersedeas* to discharge from custody a defendant who was arrested and committed to jail before the service of the order. *Sherrill v. Campbell*, 21 Wend. 287.

Bench have gone so far, that if a writ of error be sued out, and the *plaintiff do not sign final judgment till a subsequent term [*1145] after the return of the writ, in order to avoid the effect of it, and then take out execution, they will set it aside.(a) In the Common Pleas, if a writ of error be returnable on the essoyn-day of the term, the judgment will be removed thereby, provided it be signed at any time afterwards, during the same term:(b) And where the plaintiff's attorney, after writ of error brought, artfully delayed signing final judgment till the writ of error was spent, and then brought an action of *debt* upon the judgment, that court ordered the proceedings in the action upon the judgment to be stayed, and a new writ of error to be brought at the plaintiff's attorney's expense.(c) But if a writ of error be sued out before final judgment, and the allowance not served until after the writ of error is spent, the plaintiff in that court may afterwards regularly sign final judgment.(d)

After final judgment, and before execution executed, a writ of error is, generally speaking, a *supersedeas* of execution from the time of its allowance,(e) provided bail, when necessary, be put in and perfected in due time;(f) and the allowance is notice of itself:(g) Or if the plaintiff, before the allowance, have notice of the writ of error being sued out, and delivered to the clerk of the errors, it is from the time of that notice a *supersedeas*.(h) But a writ of error is no *supersedeas* of execution, unless bail in error, when necessary, be put in, and notice thereof given, within the time limited by the rules of the court.(i) And in order to bring the attorney into contempt, for proceeding after the allowance, he must have had actual notice.(k) Where the defendant, however, had wilfully concealed the issuing of the writ of error from the plaintiff, the court of King's Bench set aside an execution afterwards issued, without costs, and made the defendant undertake that no action should be brought.(l) And where the defendant had applied to a judge in vacation, to set aside the plaintiff's execution for irregularity, on a ground which the judge over-ruled, and afterwards applied to the court to set aside the execution, on the ground that he had before brought a writ of error, the court held, that this fact not having been communicated to the judge on the former *application, the defendant was now [*1146] too late to take advantage of the irregularity.(aa) And a writ of error is, generally speaking, so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed

(a) *Howston v. Howston*, T. 25 Geo. III. K. B. 1 Durnf. & East, 280; but see 1 Chit. Rep. 124.

(b) Barnes, 198.

(c) *Id.* 250.

(d) 3 Taunt. 384.

(e) 1 Vent. 31. 1 Salk. 321. Willes, 271. Barnes, 205, S. C. *Id.* 209, 376. 1 Bur. 340. 1 Durnf. & East, 280. 1 Bos. & Pul. 478. 2 Bos. & Pul. 370. 2 East, 439. *Hague Gent. one, &c. v. —*, E. 45 Geo. III. K. B. 5 Taunt. 204. 4 Price, 289. 3 Moore, 83. Gow, 66, S. C. 1 Chit. Rep. 238, 241. And for the evidence of the allowance of the writ of error, see 3 Moore, 85, 88, 9.

(f) 2 Str. 781. 1 Durnf. & East, 279. *Ante*, 530; and see R. E. 36 Car. II. K. B. R. M. 28 Car. II. C. P. 4 Price, 289. 2 Chit. Rep. 106.

(g) 1 Salk. 321. 1 Durnf. & East, 280. 1 Chit. Rep. 238, 241. 3 Moore, 83. Gow, 66, S. C.

(h) 1 Salk. 321. 6 Mod. 130. 2 Ld. Raym. 1260, S. C. Say, Rep. 51; and see R. E. 36 Car. II. K. B. R. M. 28 Car. II. C. P. Barnes, 205, 209.

(i) 2 Dowl. & Ry. 85.

(k) 1 Salk. 321. 1 Durnf. & East, 280. 1 Bur. 340. Barnes, 376. 1 Gow, 68, n.

(l) 1 Chit. Rep. 238.

(aa) 2 Barn. & Ald. 373. 1 Chit. Rep. 124, S. C.

against the bail ;(b) nor, if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it, after the allowance of a writ of error,(c) even though it has previously lain *four* days in the office :(d) but in such case, the *capias ad satisfaciendum* may be returned, so as to fix the bail, after the writ of error is determined.(e) In the Exchequer of Pleas, a writ of error is a *supersedeas* of execution, from the time of giving notice of the allowance, to the plaintiff in the action, or his attorney or clerk in court.(f) But that court would not interfere to set aside a *feri facias*, which had been issued and executed by a levy having been made, on a summary application by motion, on the ground of the allowance of a writ of error having been served ; because the party, if injured by the proceeding, had an effectual remedy by bringing *trespass*, which he might have maintained, if the levy were wrongful.(g)

If the defendant bring a writ of error, after which the plaintiff, as he may, bring an action of *debt* on the judgment, and recover, he cannot sue out execution on the second judgment, in the King's Bench, till the writ of error be determined :(h) But where, several years having elapsed after judgment obtained, the plaintiff brought an action upon the judgment, and after judgment signed in that action, the defendant sued out a writ of error upon the first judgment, the court of King's Bench held, that the plaintiff might notwithstanding take out execution on the second judgment.(i) So, in the Common Pleas, the plaintiff may take out execution on the second judgment, notwithstanding the writ of error, unless the defendant move to stay the proceedings :(k) And, in that court, the allowance of a writ of error, on a judgment by *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, that if it be sued out and returned pending a writ of error, all proceedings thereon against the bail may be set aside upon motion.(l) In the House of Lords, it has been determined, that taking out execution against the bail below, pending a writ of error in parliament, is a contempt, and breach of privilege.(m) But when it is apparent to the court, that a writ of error is brought against good faith,(n) or the [*1147] defendant or his attorney, has declared that it was *brought for the mere purpose of delay,(aa) or it is returnable of a term previous to the signing of final judgment,(bb) or bail when requisite is not put in and perfected in due time,(cc) it is not a *supersedeas*.

It has been already seen, in a preceding chapter,(dd) in what cases the proceedings may be stayed, pending a writ of error. On the other hand, an application is sometimes made to the court, on an *affidavit* of the cir-

(b) 3 Str. 867. Fitzgib. 175. 1 Barnard, K. B. 334. 2 Ld. Raym. 1567, S. C.; and see Barnes, 83. 2 New Rep. O. P. 458.

(c) 2 Str. 1186. 1 Wils. 16, S. O. 1 East, 662; and see 1 Barn. & Ald. 676. *Ante*, 350.

(d) 3 Durnf. & East, 390.

(e) 1 Wils. 269; but see Barnes, 83, *contra*.

(f) R. T. 26 & 27 Geo. II. § 2, in *Scac.* Man. Ex. Append. 209, 10. 4 Price. 289

(g) 9 Price, 606.

(h) 3 Durnf. & East, 643. 4 Bur. 2454. S. P. *Ante*, 532.

(i) 3 Barn. & Ald. 275; and see 1 Str. 526, *accord*.

(k) Barnes, 202, 3. Willes, 183, 4. *Ante*, 532.

(l) 2 Blac. Rep. 1183.

(m) 1 P. Wms. 685.

(n) 2 Durnf. & East, 183; and see 8 Taunt. 434. 3 Bing. 169; but see 4 Dowl. & Ry. 153.

(aa) 4 Durnf. & East, 436. 2 H. Blac. 30. *Per Cur. E.* 44 Geo. III. K. B. 2 Maule & Sel. 474, 476. 1 Barn. & Cres. 287. 9 Price, 606. *Ante*, 530, 31.

(bb) Barnes, 197, 8.

(cc) 2 Durnf. & East, 44.

(dd) Chap. XX. p. 530, &c.

cumstances, for leave to take out execution, notwithstanding the allowance of the writ of error. This *affidavit* may be sworn before judgment signed: (e) And in a late case, where it appeared, that after action brought, the defendant threatened to bring a writ of error, and ruin the plaintiff by law proceedings, unless he complied with certain terms, the court of King's Bench allowed the plaintiff to take out execution, unless the defendant could show that there was real ground of error. (f) But that court would not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ of error was brought for delay, merely because the defendant had suffered the judgment to be affirmed in the Exchequer chamber, without any objection: (g) nor in a case, where it did not appear but that the declaration of the defendant, that he would sue out a writ of error and delay the plaintiff, was made before any action pending. (h) And, in the Common Pleas, the court held that the plaintiff could not take out execution, without some express declaration, either by the defendant or his attorney, that the writ of error was brought for delay; although the defendant had acknowledged the debt to be due, before and since the commencement of the action. (i) The court of King's Bench, we have seen, (k) ordered the proceedings to be stayed in one case, pending a writ of error, on a judgment of *nonsuit*; although there was no declaration of the defendant or his attorney, that it was brought for delay: (l) And there was a similar decision in the Common Pleas. (m) But it is now settled, in both courts, that execution may be taken out, pending a writ of error on such judgment, unless some real error be pointed out. (n) And the court of King's Bench cannot quash a writ of error, upon a judgment of the Common Pleas at *Durham*, nor award execution upon the judgment, though the writ of error may have been brought against good faith. (o)

*Where the defendant or his attorney, has declared that the [*1148] writ of error was brought only for delay, or used expressions tantamount to such a declaration, (a) it is usual for the plaintiff to take out execution at his peril, notwithstanding the allowance of the writ of error, without applying to the court; leaving the defendant to apply, if he think proper, to set aside the execution, and that the money laid under it may be restored to him. But the declaration of an attorney's clerk, (bb) or of one of several defendants, (c) or the *belief* of the plaintiff or his attorney, (d) that the writ of error is brought for delay, is not, we have seen, (ee) sufficient to entitle the plaintiff to sue out execution: And the court will not

(e) 4 Maule & Sel. 331.

(f) 6 Dowl. & Ryl. 509; and see 2 Chit. Rep. 191, 2. 1 Barn. & Cres. 287. 3 Bing. 169.

(g) 6 Durnf. & East, 400; but see 2 Durnf. & East, 78.

(h) 4 Maule & Sel. 331.

(i) 6 Moore, 45; and see 2 Chit. Rep. 291. *Ante*, 531.

(k) *Ante*, 531.

(l) 5 Durnf. & East, 669.

(m) *Bishop v. Fry*, T. 2 Geo. IV. C. P.

(n) 4 Durnf. & East, 436. 2 Dowl. & Ryl. 208, K. B. 1 H. Blac. 432. 9 Moore, 609. 2 Bing. 326, C. P.

(o) 4 Dowl. & Ryl. 153.

(a) 3 Durnf. & East, 79. 5 Durnf. & East, 714. 2 H. Blac. 30. 2 Bos. & Pul. 329. Forrest, 26, 7. 2 Chit. Rep. 191. 2 Maule & Sel. 474, 476. 1 Barn. & Cres. 287. 6 Dowl. & Ryl. 509. 3 Bing. 169. *Ante*, 530, 31.

(bb) *Per Cur. M.* 45. Geo. III. K. B. 2 Smith, R. 60, S. C. 2 Chit. Rep. 193.

(c) 2 Bing. 304.

(d) 3 Durnf. & East, 78. *Cleghorn v. Ireland*, E. 28 Geo. III. K. B. 2 Price, 299. 3 Dowl. & Ryl. 233, 4.

(ee) *Ante*, 531.

infer that a writ of error was brought for delay, because it was sued out before final judgment signed ;(*f*) nor is it sufficient to warrant an execution, that the defendant had said to the plaintiff, that when he could put off the matter no longer, he would go to gaol ;(*g*) or that the defendant's attorney had declared, that the debt would be settled, and that time was all the defendant wanted.(*h*) And a mere threat of bringing a writ of error for delay, uttered *six* months before the writ of error sued out, was not deemed sufficient to entitle the plaintiff to execution, pending a writ of error.(*i*)

An execution being an *entire* thing, cannot be superseded after it is once begun : Therefore, if a writ of execution be executed before a writ of error allowed or notice, it may be returned afterwards ; and the utmost length of time the law allows for executing a writ, is the day whereon it is returnable ; and it is not executable any longer that day than the court sits : So long as it is executable, but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards.(*k*) And in *prohibition*, a writ of error allowed after a writ of consultation has been delivered to the court below, is not a *supersedeas*.(*l*) Judgment in a cause was signed on the 30th of *April*, and the plaintiff on that day sued out a writ of *per facias* : afterwards a writ of error was allowed, and served on the agent in town on the 3d of *May*, and on the plaintiff's attorney in the country and under-sheriff on the 5th of *May* ; the sheriff entered on the same day, but after notice of the allowance of the writ of error : No bail in [*1149] *error was put in ; and the court of King's Bench upon that ground held, that the writ of error became an absolute nullity, and was no *supersedeas* or stay of execution : But they said, that if the writ of error had been followed up immediately, by the plaintiff in error regularly putting in bail, it would have operated as a *supersedeas*. The party therefore taking out execution, after the allowance of a writ of error, and before bail put in, does it at his peril, for if the writ of error be regularly followed up by bail, the execution will be set aside.(*a*)

I shall next proceed to inquire, in what cases *bail* is requisite on a writ of error ; and when, where, and how it should be put in, excepted to, and justified. No bail in error was required at common law ; so that the defendant, by bringing a writ of error, might have delayed the plaintiff of his execution, without giving any security, either for the prosecution of such writ, or for the payment of the debt or damages recovered by the former judgment, in case it should be affirmed, or the writ of error should be discontinued, or the plaintiff in error nonsuited therein. The inconvenience of this was very early felt ; and in order to guard against it, the court of King's Bench, so long ago as in the reign of *Henry* the seventh,(*b*)

(*f*) 5 East, 145.

(*h*) 1 New Rep. C. P. 307 ; and see 9 Price, 606.

(*i*) 7 Taunt. 537. 1 Moore, 253, S. C. ; but see 2 Chit. Rep. 191, 2. 1 Barn. & Cres. 287. 6 Dowl. & Ryl. 509. 3 Bing. 169. *Ante*, 531.

(*k*) 1 Salk. 321 ; and see 1 Vent. 255. Willes, 271. Barnes, 205, S. C. 3 Moore, 83. Gow, 66, S. C. 1 Younge & J. 579. *Ante*, 1055, 6.

(*l*) 6 Barn. & Cres. 27. 9 Dowl. & Ryl. 14, S. C.

(*b*) 1 Hen. VII. 19. 1 Vent. 266.

(*g*) *Per Cur. M.* 41 Geo. III. K. B.

(*a*) 2 Durnf. & East, 45.

would not allow a writ of error in parliament, until some error was shown to them in the record, lest it should be brought on purpose to delay execution: And, with a like view, it was ordered by the justices of the Common Pleas, in the reign of Queen *Elizabeth*, that "the clerk of the treasury for the time being should not make a *supersedeas* upon any writ of error, to reverse or affirm any judgment given in that court, upon any verdict, demurrer in law or confession, until some manifest or pregnant error therein should be notified by the party that sued the writ of error, or some of his counsel, unto the justices of the bench, or to one of them at the least." (c)

And, still further to avoid unnecessary delays of execution, it was enacted by the statute 3 *Jac.* I. c. 8, (made perpetual by 3 *Car.* I. c. 4, § 4,) that "no execution should be stayed or delayed, upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment in any action or bill of *debt*, upon any *single bond* for debt, or upon any obligation with condition for the *payment of money only*, or upon any action or bill of *debt* for *rent*, or upon any *contract*, sued in any of the courts of record at *Westminster*, or in the counties palatine of *Chester*, *Lancaster* or *Durham*, or the courts of great sessions in *Wales*; nor (by the 19 *Geo.* III. c. 70, § 5,) for the reversing of any judgment given in any *inferior* court of record, where the *damages* were under *ten* pounds, (since extended to *twenty* pounds, by the statute 7 & 8 *Geo.* IV. c. 71, § 6;)(d) unless the person or persons in whose *name or names such writ [*1150] of error should be brought, with two sufficient sureties, such as the court wherein the judgment was given should allow of, should first be bound unto the party for whom the judgment was given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay if the said judgment should be affirmed or the writ of error nonprossed, all and singular the debts, damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution."

This statute was confined to the particular actions enumerated therein; and did not extend to actions on the *case* upon bills of exchange, (a) &c.; but it extended, in the actions specified, to all manner of judgments, whether by default, upon demurrer, or *nul tiel record*, as well as after verdict. In actions of *debt* on bond, conditioned for the payment of *money only*, the statute was construed to extend, not only to cases where the sum was originally certain, and payable absolutely by the condition, without referring to any other instrument, but also to cases where the sum was originally uncertain, but afterwards reduced to a certainty; as *debt* on bond, conditioned for the payment of so much money as J. S. should declare to be due on an

(c) R. E. 23 *Eliz.* C. P.; and see R. M. 6 & 7 *Eliz.* § 5, C. P. 2 *Wils.* 144; but see 3 *Durnf. & East*, 78. 3 *Dowl. & Ryl.* 233, 4.

(d) These are the only statutes which require bail in error, on a judgment given in an inferior court of record: and therefore, where the damages exceed *twenty* pounds, bail is not required, on bringing a writ of error on such judgment. It has been doubted, whether the damages referred to in the former of these statutes are the damages laid in the declaration, or the damages recovered; and if the latter, whether they are with or without costs? though it seems, from the uniform definition of the term *damages*, that the legislature intended the sum actually recovered, exclusive of the costs. And see 4 *Dowl. & Ryl.* 350, 362. 2 *Barn. & Cres.* 802, S. C. *Ante*, 406.

(a) 2 *Keb.* 234.

account; (b) or on a bottomree bond, by which the money was payable upon a contingency, which had happened; (c) or where the bond was conditioned for the payment of a sum of money mentioned in certain indentures, (d) &c. And in *debt* for the non-payment of mortgage money, it was holden that the mortgage deed, containing a covenant for re-payment of the money, was a *contract*, upon which bail in error was necessary, within the meaning of the statute. (e)

But the statute did not extend to actions of *debt* on bond, conditioned for the performance of *covenants*, (f) or of an *award*, &c., even though one of the covenants was for the payment of money, and the action was brought for the non-performance of that covenant. (g) And bail in error was not necessary in *debt* on bond, conditioned for the payment of money, and also for performing the covenants in a mortgage deed; (h) or for re-investing stock, and paying the dividends in the mean time. (i) So, a bond [*1151] *conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages and costs, which should be brought against him, or that he might sustain by reason of the non-payment thereof, was holden not to be a bond for the payment of money only, within the meaning of the above statute; and consequently, upon error brought to reverse a judgment obtained in an action on such bond, bail in error was not required. (a) In an action of *debt* on bond conditioned for the performance of covenants, if the defendant had let judgment go by default, without craving *oyer* of the condition, and after brought a writ of error, it was said that, in the King's Bench, he must put in bail thereon; because it did not appear to the court upon the record, that the condition was for performance of covenants. (bb) But, in the Common Pleas, the matter of bail was examinable by the court; and they would inspect the condition of the bond, in order to see whether or not it was for the payment of money. (cc) In *debt* on a general bond of indemnity, bail was not required, on bringing a writ of error after judgment by default: But where a man having entered into a bond as surety for another, to pay a sum of money to a third person, took a counter-bond for payment of the money, by way of indemnity, the court of Common Pleas held this to be a case within the statute, and consequently that bail in error was necessary. (dd)

The condition of a bond was to pay for so much beer as the obligee should deliver to J. S. not exceeding a 100l.; and after judgment upon demurrer, the court of King's Bench held that no bail was requisite: (ee) But, in a subsequent case, (ff) where a bond was given by a third person, as collateral security for a debtor's paying his creditors *fifteen* shillings in the pound, upon the liquidated amount of his debts, the court held this to be a bond with condition for the payment of money only; and that its

(b) 1 Lev. 117. 1 Keb. 613, S. C.

(c) 1 Str. 476; and see 6 Mod. 38; but see 1 Show. 14. Comb. 105, S. C. 7 Durnf. & East, 450.

(d) 2 Str. 959. 2 Barnard, K. B., 389. Kelynge, 181, S. C. Barnes, 78, 98.

(e) 3 Taunt. 383.

(f) 2 Bulst. 54.

(g) Carth. 28. 1 Show. 14, S. C. 2 Keb. 131. S. P.

(h) 10 East, 407.

(i) 1 M'Clel. & Y. 147.

(a) 1 Barn. & Cres. 316. 2 Dowl. & Ry. 549, S. C.

(bb) 2 Crompt. 3 Ed. 347, 8.

(cc) Barnes, 72. Pr. Reg. 184; and see Cas. Pr. O. P. 7.

(dd) Com. Rep. 321, 2. 10 Mod. 281, K. B., *contra*.

(ee) 2 Str. 1190. 1 Wils. 19, S. C.

(ff) 2 Bur. 746. 2 Ken. 437, S. C.

being paid by instalments made no difference. In the former case, the court seem to have considered the statute as introductive of a new law, in restraint of the remedy by writ of error; and therefore, that it should be construed strictly, and not extended by equity to cases out of the letter of it: But in the latter case, they appear to have holden, that the statute was of a remedial nature, and ought to receive a liberal construction, for the benefit of the party whose execution would otherwise have been stayed by the writ of error, and particularly as writs of error were frequently brought for the mere purpose of delay.

In actions upon *contracts*, the statute was confined to cases where there was originally a specific contract for a sum certain: and it did not extend to actions of *debt* on a promissory note, *(g)* or against the acceptor of a bill of exchange, *(h)* or on the common counts for work and labour, and goods *sold and delivered, *(a)* &c., or upon an account [*1152] stated; *(b)* nor to an action of *debt* upon an award, where the arbitrators had directed several controversies to be settled by the payment of one sum. *(b)* Neither, for a similar reason, was bail in error required in an action of *debt* on judgment; *(c)* nor in an action of *debt* upon a bail-bond, *(d)* or recognizance of bail; *(e)* nor upon an award of execution, on a recognizance of bail in error, *(f)* or for subsequent arrears of an annuity, on the statute 8 & 9 W. III. c. 11, § 8. *(gg)* And it seems, that where there was one count in the declaration, on which judgment was entered, on a cause of action for which *debt* would not lie at the time of the statute of *James*, no bail in error was required. *(hh)* But if judgment were affirmed on a writ of error in the King's Bench, *(i)* or Exchequer chamber, *(k)* new bail must have been given on bringing a writ of error in parliament: for the first recognizance did not include the costs to be assessed in the House of Lords, and therefore a new recognizance must have been given, within the intent of the statute; and it was not the business of the court where the judgment was affirmed, to examine whether bail was put in upon the first writ, for the want of that did not hinder the prosecution of the writ of error, but only made it no *supersedeas*. *(l)*

The statute 3 *Jac.* I. c. 8, was extended to other actions, by the 13 *Car.* II. stat. 2, c. 2, § 9, by which it was enacted, that "no execution should be stayed, in any of the courts mentioned in the former statute, by any writ or writs of error, or *supersedeas* thereupon, *after verdict and judgment*, in any action of debt grounded upon the statute 2 & 3 *Edw.* VI. c. 13, § 1, for not setting forth tithes, nor in any action upon the case, upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner, as by the former act was directed, should be first acknowledged in the court where the judgment was given."

(g) 2 *East*, 359.

(h) 1 *Taunt.* 540.

(a) 1 *Bos. & Pul.* 249. 1 *Taunt.* 540.

(b) *Yelv.* 227. 2 *Bulst.* 53, *S. C.* 1 *Lev.* 117. 1 *Show.* 15, *S. C.* cited. 3 *Salk.* 147. 7 *Durnf. & East*, 449. 2 *East*, 359. 1 *Taunt.* 540, 41.

(c) 3 *Bur.* 1548. 1 *Blac. Rep.* 506, *S. C.* 9 *Price*, 1, *S. P.*, on a judgment recovered after verdict, in *Ireland*.

(d) *Cas. Pr. C. P.* 7.

(e) 3 *Bur.* 1566. 8 *East*, 240; but see 2 *Blac. Rep.* 1227.

(f) *Barnes*, 194, 5.

(gg) 1 *Taunt.* 168.

(hh) 2 *East*, 359. 1 *Taunt.* 540.

(i) 1 *Salk.* 97. 2 *Ld. Raym.* 840. 7 *Mod.* 120, *S. C.*

(k) 1 *Str.* 527.

(l) 1 *Salk.* 97.

And, by the 16 & 17 Car. II. c. 8, § 3, (made perpetual by the 22 & 23 Car. II. c. 4,) "no execution shall be stayed, in any of the last-mentioned courts, by writ of error or *supersedeas* thereupon, after verdict and judgment, in any action personal whatsoever, unless a recognizance with condition according to the statute 3 Jac. I. shall be first acknowledged in the court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict, in any writ of *dower*, or in any action of *ejectione firmæ*, no execution shall be stayed [*1153] unless the plaintiff or plaintiffs in such writ of error *shall be bound unto the plaintiff in such writ of *dower*, or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed, shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued, in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit."

And, to the end that the same sum and sums and damages may be ascertained it is further enacted, that "the court wherein such execution ought to be granted, upon such affirmation, discontinuance or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in *dower* or in *ejectione firmæ*; and upon the return thereof, judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit."(a)

The statutes 13 Car. II. stat. 2, c. 2, § 9, and 16 & 17 Car. II. c. 8, § 3, were confined to judgments after verdict; and did not extend, like the 3 Jac. I. c. 8, to judgments by default, upon demurrer, or *nul tiel record*: Therefore, upon these latter judgments, a writ of error was a *supersedeas* without bail, in such actions as were not enumerated in 3 Jac. I. c. 8. But it has been determined, that a *scire facias* against bail is a *personal* action, within the 16 & 17 Car. II. c. 8.(b) In this latter statute there is a *proviso*, that "it shall not extend to any writ of error to be brought by any executor or administrator; nor unto any action popular, or other action brought upon any penal law or statute, except actions of *debt* for not setting forth tithes; nor to any indictment, presentment, inquisition, information, or appeal." It has however been determined, that if judgment be given against an executor or administrator *de bonis propriis*, he shall put in bail, in cases where it would be required of other persons:(c) and though an executor or administrator be not compellable to give bail in error, yet if he do, the court may take it, and the recognizance will be binding.(d)

At length, by the statute 6 Geo. IV. c. 96, § 1, for preventing the delays occasioned to creditors by frivolous writs of error, brought on judgments given in his majesty's courts of record at *Westminster*, and in the counties palatine and in the courts of great session in *Wales*, it was enacted, that "upon any judgment hereafter to be given, in any of the said courts, in any *personal* action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the

(a) § 4.

(b) 2 Blac. Rep. 1227.

(c) 1 Lev. 245. 1 Sid. 368. 2 Keb. 295, 371, S. C.

(d) 2 Str. 745. 2 Ld. Raym. 1459, S. C. And see further as to the cases in which bail in error was, or was not required, previous to the statute 6 Geo. IV. c. 96. Petersd. Part II. Chap. I.

court, or some judge thereof, unless a recognizance, with condition *according to the statute made in the third year of the reign [*1154] of his majesty king James the first, intituled, *An act to avoid unnecessary delays of execution*, be first acknowledged in the same court." By this statute, bail in error is now required in all cases, after judgment for the plaintiff, in any *personal* action, whether after verdict or by default, &c., unless it be otherwise ordered by the court or a judge.

The statutes requiring bail in error seem to be confined to cases where judgment has been given for the original *plaintiff*; and not to apply to judgments given for the *defendant* below: (a) it being holden that a person who is *plaintiff* both below and above, need not give bail in error. (b) It has also been determined, that they do not extend to the writ of error *coram nobis*, (c) or *vobis*; which is or is not a *supersedeas* of execution, according to circumstances. (d) In general, when a writ of error *abates* by the act of God, as by the death of the parties, (e) or chief-justice, (f) or by the act of law, a second writ of error is a *supersedeas* of itself, without motion or leave of the court: And it is said, that if a writ of error be brought in the same court, after abatement or discontinuance of a writ of error *coram nobis* or *vobis*, no bail is requisite; because none was required on the former writ of error. (g) But this must be understood, where the second writ of error is brought after an abatement by the act of God, or of the law; for when a writ of error is quashed in the King's Bench for insufficiency, a writ of error *coram nobis* is not a *supersedeas* of itself. (h) [A] In such case, however, the court on motion will order, that upon the plaintiff in error putting in and justifying bail within *four* days, further proceedings shall be stayed on the judgment in the original action, until the writ of error be determined; (h) which is also the course upon a writ of error *coram nobis*, for error in fact: And a like order was made, where a second writ of error was quashed for insufficiency; for such second writ being void, was as if there had been none before. (i) But when a writ of error *abates* by the act or default of the party, a second writ of error, brought in the same court, is not a *supersedeas* of execution, as the first is; (k) as where the plaintiff in error marries, (l) or nonprosses his own writ of error; (m) and execution may be sued out in these cases, without leave of the court; (n) but it seems, that on a writ of error *coram nobis* or *vobis*, execution taken out without leave of the court is irregular. (o)

When bail is required upon a writ of error, it should be put in within

(a) 4 Mod. 7, 8. 5 East, 545. 10 East, 2. (b) 1 Dowl. & Ry. 184.

(c) 2 Crompt. 3 Ed. 377.

(d) 8 East, 415.

(e) Latch, 57, 8. 1 Vent. 353.

(f) 1 Keb. 658, 686; but see Barnes, 201. Prac. Reg. 195, S. C.

(g) 2 Crompt. 3 Ed. 379.

(h) Carth. 368, 9. 1 Ld. Raym. 151, S. C. 2 Ld. Raym. 1404. 1 Str. 607, S. C.; and see 2 Str. 949. 8 East, 412.

(i) Carth. 370.

(k) Latch, 57, 8. 1 Vent. 353. 1 Mod. 285. 1 Salk. 263. 8 East, 412.

(l) 2 Str. 880, 1015. 8 East, 414.

(m) 1 Crompt. 3 Ed. 343. 8 East, 412.

(n) 8 East, 412.

(o) Say, Rep. 166. 8 East, 415, 16. Barnes, 201. 2 Blac. Rep. 1067. Ante, 996.

[A] To entitle a party to a writ of *supersedeas*, as a principal remedy, such facts must be established as show that the inferior tribunal had no jurisdiction at the time of pronouncing judgment. *Caldwell, Ex parte*, 5 Pike, 390. *Davis, Ex parte*, 5 Pike, 405.

four days after the delivery of the writ to the clerk of the errors, [*1155] if it be *sued out *after* final judgment; (aa) or, if it be sued out *before*, the bail shall be put in within *four* days after final judgment is signed; (bb) otherwise the party succeeding in the original action may take out execution, notwithstanding the writ or error. (cc) And, after the allowance of a writ or error, if bail be not put in thereon in due time, it will be a nullity; though the defendant in error has previously sued out execution. (d) The *four* days in this case are to be reckoned from the time when the taxation is completed, by the insertion of the amount of the costs: (e) And, in the Common Pleas, there is no occasion for a certificate from the clerk of the errors, that no bail is put in. (f) The bail is put in with the clerk of the errors; who, on being furnished with a note in writing of the names and additions of the bail, (g) attends to take their acknowledgment, in the court wherein the judgment was given, or before a judge of that court: and it seems that they cannot be put in before a commissioner in the country. (h) In the King's Bench, the same persons who were bail in the original action, may become bail in error, if they are able to justify: (i) And, in the Common Pleas, a recognizance entered into by the bail in error, without the principal, is good. (k) If a defendant bring a writ of error, and put in hired bail, who are insolvent, the plaintiff may, without entering an exception, treat them as a nullity, and issue execution. (l) And where it appeared, on opposing a bail in error, that he did not know the plaintiff in error; that he had become bail, at the request of the plaintiff in error's attorney, with whom his son had had a conversation, in which the attorney said that if his father became bail, he should come to no harm, which the bail said he believed, though he had determined to become bail before he was requested to do so; the court held that, under these circumstances, the bail must be rejected, and they refused to allow further time. (m)

In *personal* actions, it is a rule, founded upon the statute 3 Jac. I. c. 8, that the recognizance should be acknowledged in *double* the sum adjudged to be recovered by the former judgment: (n) And a recognizance of bail in error, for less than double the sum recovered by the judgment, does not operate as a *supersedeas*, or stay of execution. (o) But upon error in *debt* on bond, though the bail are to be bound in double the penalty recovered, yet by the course of the court of King's Bench, it is sufficient if they justify in double what is really due: (p) And, in the Common Pleas, if [*1156] the *bail are bound in double the sum secured by the condition, it is sufficient: though a further sum be due for interest and costs, and nominal damages have been recovered. (a) In the Exchequer, it is a

(aa) R. E. 36 Car. II. K. B. R. T. & M. 28 Car. II. C. P. 1 Bos. & Pul. 478. By a former rule of E. 16 Car. II. K. B. the plaintiff in error, in the King's Bench, had *four* days to put in bail, after the *allowance* of the writ of error.

(bb) 2 Str. 781. 1 Durnf. & East, 279. 4 Durnf. & East, 121. 1 Bos. & Pul. 478.

(cc) 2 Durnf. & East, 44.

(d) 2 Chit. Rep. 106.

(e) 5 Taunt. 672. 1 Marsh. 278, S. C.; and see 1 Bing. 233.

(f) Barnes, 212.

(g) Append. Chap. XLIV. § 25.

(h) Barnes, 78.

(i) 8 Durnf. & East, 639.

(k) 2 Bos. & Pul. 443.

(l) 1 Barn. & Cres. 268. 2 Dowl. & Ryl. 421, S. C. 4 Bing. 38.

(m) 1 Bing. 423. 8 Moore, 516, S. C.

(n) 2 Chit. Rep. 105.

(o) 5 Taunt. 320.

(p) 2 Str. 821. The rule, as laid down by the court of King's Bench, in H. 25 Geo. III., was, that the bail should justify in the penalty, and not in double the sum due: and this agrees with what is laid down in 1 Wils. 213; and see 2 Chit. Rep. 105.

(a) 2 Bos. & Pul. 443.

rule,(b) that "in all cases where special bail is required on writs of error, if the bail are obliged to justify, each of them shall justify himself in double the sum recovered by the judgment on which the writ of error is brought; except where the penalty of a bond or other specialty is recovered by such judgment; in which case, each of the bail shall justify in such penalty only; and also except in cases of *ejectment*, where, if bail shall be put in upon the writ of error, each of such bail shall justify in double the improved annual rent or value of the premises recovered."

The condition of the recognizance in the Common Pleas, on a writ of error returnable in the King's Bench, is, according to the direction of the statute 3 Jac. I. c. 8, that the plaintiff shall prosecute his writ of error with effect; and, if judgment be affirmed, shall satisfy and pay the debt, damages and costs recovered, together with such costs and damages as shall be awarded by reason of the delay of execution, or else that they (the bail,) shall do it for him.(c) On a writ of error returnable in the Exchequer chamber, the form of the recognizance is somewhat different; the bail engaging to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money, as shall be awarded for delay of execution.(d) And as the engagement of the bail is absolute, it has been determined, that they cannot surrender the plaintiff in error;(e) So, they are not discharged by the plaintiff's taking their principal in execution;(f) nor are they entitled to relief, when he becomes bankrupt whilst the writ of error is pending.(g) So, before the late bankrupt act,(h) if the bail had become bankrupt, pending the writ of error and before affirmation, they were not discharged from their recognizance; for till then the debt was contingent, and not proveable under the commission:(i) But now, by the above act,(k) contingent debts are proveable under the commission.

When bail is put in, notice thereof should be given without delay to the defendant in error, or his attorney;(l) which notice should be entitled with the names of the plaintiff and defendant, as in the original action:(m) And *in general, if the defendant in error do not [*1157] except to the bail for insufficiency, within *twenty* days next after such notice, the recognizance shall be allowed.(a) But if the defendant, bring a writ of error, and put in hired bail, who are insolvent, the plaintiff, we have seen,(bb) may, without entering an exception, treat the bail as a nullity, and issue execution. If the bail be not approved of, the defendant in error may, at any time within the *twenty* days, obtain a rule from the

(b) R. E. 33 Geo. II. in *Scac. Man. Ex. Append.* 217; and for the time and manner of putting in, excepting to, and justifying bail in error, in the Exchequer of Pleas, see R. T. 26 & 27 Geo. II. § 2, in *Scac. Man. Ex. Append.* 209, 10. And as to the amount of the recognizance of bail in error, see *Petersd. Part II. Chap. II.*

(c) *Append. Chap. XLIV. § 34.* And for a recognizance of bail, on error, *coram nobis* or *vobis*, see *id.* § 26, 7.

(d) *Append. Chap. XLIV. § 35.* 2 Durnf. & East, 59. And for the form of an entry of recognizance of bail, on error from the court of Exchequer, see *Append. Chap. XLIV. § 36, 7.*

(e) R. M. 5 W. & M. (b), K. B.

(f) 2 Bos. & Pul. 440.

(g) 1 Durnf. & East, 624.

(h) 6 Geo. IV. c. 16.

(i) 2 Str. 1043. *Cas. temp. Hardw.* 262, S. C.

(k) § 56.

(l) 2 Dowl. & Ry. 85. *Ante*, 1145. *Append. Chap. XLIV. § 27.*

(m) *Post*, 1161.

(a) R. M. 5 W. & M. K. B. R. M. 6 Geo. II. *reg.* 6 C. P.; and see R. T. 26 & 27 Geo. II. § 2, in *Scac. Man. Ex. Append.* 210, *accord.* For the form of the rule of allowance, see *Chap. XLIV. § 33.*

(bb) *Ante*, 1155.

clerk of the errors, for better bail ;(*cc*) a copy of which should be served on the attorney for the plaintiff in error : And if the bail do not justify, or other bail be not put in and justified, within *four* days after notice of the rule in *term* time, they are considered as a nullity ;(*dd*) and the party succeeding in the original action may take out execution.(*ee*) In the King's Bench, we have seen,(*ff*) time is not allowed to justify bail in error ;(*gg*) except in case of unavoidable accident, such as the unexpected illness of the bail ;(*hh*) or where they are prevented from coming up, by any misconduct of the opposite party :(*ii*) and the same practice has prevailed in the Common Pleas, unless some real error be shown.(*kk*) But the writ of error still remains, and may be proceeded in : the *supersedeas* to the execution only being taken away.(*l*) In the King's Bench, if a rule for better bail be served in *vacation*, there is, it seems, no occasion to justify until the next term : but the plaintiff in error must either give notice of justifying the *same* bail, or put in such other bail as he will abide by, within the four days allowed by the rule ; it having been determined that he cannot give notice of fresh bail after the four days, unless indeed the bail already put in are prevented from justifying by special circumstances, which must be disclosed to the court by affidavit, at the time appointed for justifying.(*m*) In the Common Pleas, when the rule is served in vacation, the plaintiff in error has not time of course to perfect his bail until the next term ; but ought to justify before a judge : and if the defendant in error be not satisfied with that, then the plaintiff in error, having done everything in his power, is entitled to time for justifying until the next term, but not otherwise.(*n*) In the Exchequer of Pleas, it is a rule,(*o*) that "if bail in error shall be excepted to, and notice of exception given in writing to the attorney or clerk in court for the plaintiff in error in *term* time, such [*1158] bail shall be perfected *and justified within *four* days after notice so given, or the defendant in error may, in default thereof, proceed to execution, notwithstanding such writ of error ; but where notice of exception shall be given in *vacation* time, then such bail shall be perfected and justified upon the *first* day of the subsequent term, unless the defendant in error, his attorney or clerk in court, shall consent to a justification before one of the barons ; in which case, such bail shall justify themselves before a baron, within *four* days after notice of such exception given in writing to the plaintiff in error, his attorney or clerk in court : and in default of such justification, the defendant in error may proceed to execution, notwithstanding such writ of error."

The mode of adding and justifying bail in error, is the same as in the original action :(*a*) And if a person excepted to as bail in error do not justify, his name may be struck out of the recognizance.(*b*) But where

[(*cc*) Append. Chap. XLIV. § 29.

(*dd*) 7 East, 580.

(*ee*) R. M. 5 W. & M. (b), K. B. R. M. 6 Geo. II. reg. 6, C. P.

(*ff*) *Ante*, 273.

(*gg*) *Per Bayley*, J. E. 55 Geo. III. K. B. 1 Chit. Rep. 76, (a) ; but see 8 Taunt. 126. 1 Dowl. & Ry. 9. *Ante*, 273.

(*hh*) 1 Chit. Rep. 76, (a).

(*ii*) 1 Dowl. & Ry. 9. *Ante*, 273.

(*kk*) 2 Wils. 144.

(*l*) 1 Salk. 97. 2 Ld. Raym. 840. 7 Mod. 120, S. C.

(*m*) 1 Maule & Sel. 366. *Ostreich & another v. Wilson*, *id.* 367, (a), *accord.* *Hinckley v. Hutton*, H. 27 Geo. III. K. B., *id.* 368, (a), *contra* ; and see 2 Chit. Rep. 84, 5.

(*n*) Barnes, 211. 2 Blac. Rep. 1064. Imp. C. P. 7 Ed. 765, 6.

(*o*) R. T. 26 & 27 Geo. II. § 2, *in Scac.* Man. Ex. Append. 210.

(*a*) For the form of notice of justification, and of adding and justifying bail in error, see Append. Chap. XLIV. § 30, &c.

(*b*) Say. Rep. 58. 1 Wils. 337, S. C.

bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of the next term, and before that day *non proessed* his own writ of error, and the bail did not justify; the court held, that they were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an *exoneretur* entered on the bail-piece.(c)

Bail in error, when necessary, being complete, the next step to be taken by the plaintiff in error, except on a writ of error *coram nobis* or *vobis*, is to *certify* or transcribe the record; in order to which, a transcript should be made, and sent with the writ of error and return, into the court above. When no bail is required, this is the first step that is taken, after the service of the allowance of the writ of error. And the plaintiff in error should regularly cause the transcript to be made, (for the *defendant* in error cannot transcribe the record,)(d) by the time the writ of error is returnable. If the record be not certified by that time, the defendant in error may give the plaintiff a *rule* to certify it;(e) which is an *eight* day rule, obtained from the clerk of the errors in the Common Pleas, on a writ of error from that court returnable in the King's Bench; or from the clerk of the errors in the King's Bench, on a writ of error returnable in the Exchequer chamber, or House of Lords: This rule may be had on the *essoin* day, when the writ of error is returnable in the Exchequer chamber, the first return of the term:(f) And when the rule is obtained, a copy of it should be forthwith made, and served on the attorney for the plaintiff in error.(g) In the Common Pleas, the rule to transcribe may *be [*1159] served on the plaintiff in error; these rules being excepted out of the general practice, which requires service on his attorney.(a) In the Exchequer of Pleas, there is no rule given to transcribe;(b) and it is not the practice for the defendant in error to enter up the judgment fully on the roll, unless the record be carried to the House of Lords, or he be specially required to do so by the plaintiff in error.(b) In the House of Lords, there is said to be an order, that "upon writs of error, all persons shall bring in their writs, within *fourteen* days after the first day of the session in which such writs shall be returnable, otherwise they shall not be received; unless upon judgments given during the session, upon which the writs shall be brought in within *fourteen* days after judgment given:(cc) And till the expiration of the time limited for bringing in the writ of error, the defendant in error cannot have execution.(dd)

On a writ of error brought on a judgment in the Common Pleas, or any inferior court, in an adverse suit, the record itself is supposed to be removed,

(c) 2 Maule & Sel. 210; and see 6 Barn. & Cres. 237.

(d) 1 Wils. 35.

(e) Cas. temp. Hardw. 352. Append. Chap. XLIV. § 39, 40.

(f) Barnes, 410.

(g) L. P. E. 33.

(a) Barnes, 410.

(b) 9 Price, 593, 4.

(cc) Com. Rep. 420, 21. *Sed quare*; as there does not appear to be any such order, applicable to writs of error, in the House of Lords; though there is an order to that effect, for bringing in petitions of *Appeal* from courts of Equity. *Ordo Dom. Proc. die Sab.* 13 Jul. 1678. The practice is, for the defendant in error to give the plaintiff in error a rule to transcribe; which is obtained from the clerk of the errors in the King's Bench, and expires i *eight* days.

(dd) Com. Rep. 420, 21. Bunb. 64, 69.

that it may remain as a precedent and evidence of the law in similar cases.^(ee) But in the case of a fine, the transcript only is removed from the Common Pleas; for a fine is but a more solemn acknowledgment or contract of the parties, and is therefore no memorial of the law, and need only be affirmed or vacated: If it be affirmed, the contract stands as it was; if vacated, the justices of the King's Bench may send for the fine itself, and reverse it; or they may send a writ to the treasurer and chamberlain to take it off the file.^(ff) Besides, should the record itself be removed, and the fine affirmed, it could not be engrossed, for want of a Chirographer, in the King's Bench.^(gg) This distinction, however, is not attended to in practice; for on all writs of error returnable in the King's Bench,^(h) as well as in the Exchequer chamber,⁽ⁱ⁾ or House of Lords,^(k) it is usual to send only a transcript of the record, and not the record itself. And on a writ of error from the Common Pleas, the chief justice certifies only the body of the record, which is all that remains in his custody; for original and judicial writs remain with the *custos brevium*, and other officers, and are never certified, but when error is assigned for want of them.^(l)

In an *inferior* court, on a writ of error returnable in the King's Bench, the plaintiff in error, upon service of the rule to certify the record, should bespeak the transcript of the proper officer below, and carry the [*1160] same *into the office of the signer of the writs of the King's Bench, (a part of whose business it is to receive and deliver out writs of error, and *certiorari*, &c.,) and there file it, before the second seal; otherwise the defendant in error may apply, and get a certificate from the office, that the writ of error is not returned, and the transcript brought in; and may thereupon apply to the cursitor, for a writ *de executione judicii*, directed to the judges of the court below, commanding them that they proceed to execution on the judgment, notwithstanding the writ of error.^(a)

In the King's Bench and Common Pleas, the transcript is made by the clerk of the errors, who acts as clerk to the chief justice; and in order to enable him to make it, the defendant in error should leave with him the record, or copy of the proceedings; upon which he sends for the transcript money, or a part of it to the plaintiff in error; and if paid, he proceeds to make the transcript, which is examined with the record by the attorney for the defendant in error.^(b) In the King's Bench, on a writ of error to the Exchequer Chamber, if the writ be returnable on the first return day of the term, the clerk of the errors takes the whole of that term to make the transcript; if on the last return day, he takes all the vacation following.^(c) In the Common Pleas, it is usual for the chief justice to sign the return;^(d) but this does not seem to be absolutely necessary: At least, the court of King's Bench will not stay the proceedings, for want of his signature.

(ee) 2 Bac. Abr. 202. F. N. B. 20. 1 Hen. VII. 20. 2 Salk. 565.

(ff) 1 Salk. 337, 8, 341.

(gg) 2 Bac. Abr. 203.

(h) R. M. 29 Car. II. C. P. Harris, Prac. C. P. 434. 2 Salk. 565. 5 Taunt. 85.

(i) 2 Str. 837.

(k) 1 Hen. VII. 19, 20. Dyer, 375. Cro. Jac. 341, 2. 2 Bulst. 163, 4, S. C. T. Raym. 5.

(l) Cro. Eliz. 84.

(a) 2 Crompt. 3 Ed. 331. 3 Salk. 146.

(b) L. P. E. 34, 5.

(c) Id. 35.

(d) 1 Sid. 268. Barnes, 201.

And though the writ of error requires the record to be sent *sub sigillo*, yet this is never practised.(e)

The transcript being made, examined and paid for, is delivered over with the writ of error and return,(f) by the clerk of the errors in the Common Pleas, to the signer of the writs in the King's Bench: or by the clerk of the errors of the King's Bench, to the clerk of the errors in the Exchequer Chamber, or his deputy.(g) If a writ of error be brought in parliament, on a judgment in the King's Bench, the chief justice goes in person, attended by the clerk of the errors, to the House of Lords, with the record itself, and a transcript, which is examined and left there; and then the record is brought back again into the King's Bench: and if the judgment be affirmed, that court may proceed on the record to grant execution: for if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could not be any proceedings thereupon to have execution.(h)

If the record be not certified in due time, the defendant in error may sign a *nonpros*:(i) but no costs are allowed thereon:(k) Or the plaintiff may *nonpros* his own writ, without carrying over the transcript to the court of error; and by that means avoid the payment of costs.(l) And, in the *Exchequer chamber, it is no objection to a motion to [*1161] *nonpros* a writ of error from the court of Exchequer, that the judgment roll has been perfected by the defendant in error, so that the plaintiff in error might transcribe the record; because it was in the power of the plaintiff in error, by an application to the court below, to have compelled the defendant in error to complete the record.(a) In the Common Pleas, the defendant in error cannot take out execution, without a certificate in writing from the clerk of the errors, that the plaintiff in error has made default in transcribing the record into the King's Bench.(b) And, in the former court, the bail being bound to prosecute the writ of error with effect, will be liable, though the record should not be transcribed.(c)

All the proceedings which have been hitherto mentioned, are in the court below, where the judgment was given; but henceforth they are in the court above, to which they are removed: And accordingly, after a writ of error is brought and allowed, the names of the plaintiff and defendant in the original action are continued in the notices of bail and exception, the rule for better bail, and the rule to certify, until the transcript of the record is carried over and filed in the King's Bench, or Exchequer chamber; and then the names of the parties are reversed, and they are called "C. D. against A. B. in *Error*."(d)

When the transcript of the record is returned and filed, but not be-

(e) 2 Str. 1963, 4. Cas. temp. Hardw. 344, S. C.

(f) L. P. E. 35.

(g) Append. Chap. XLIV. § 111, &c.

(h) 2 Durnf. & East, 17. L. P. E. 31. 7 East, 111.

(i) 1 Maule & Sel. 104. 2 Maule & Sel. 210.

(k) 9 Price, 592.

(l) R. T. & M. 28 Car. II. C. P.

(c) Barnes, 499.

(d) 4 Barn. & Cres. 862. 7 Dowl. & Ryl. 259. S. C. Moore, 579, (a). Append. Chap. XLIV. § 28.

(f) Append. Chap. XLIV. § 41, 2.

(h) 2 Bac. Abr. 203.

fore,(e) the plaintiff in error may move to *amend* the writ of error, or the defendant in error to *quash* it; or it may *abate*, or be *discontinued*. Of these things therefore I shall treat in their order; and afterwards, of the mode of compelling the plaintiff in error to proceed, and assign errors.

Great certainty was formerly required, in making the writ of error agree with the record: for as the writ was the sole authority by which the judges were empowered to act, they could proceed only on that record which the writ or commission authorized them to examine; nor could any defects therein be *amended*, before the 5 Geo. I. c. 13, because, by the former statutes of amendment, the judges were only enabled to amend in *affirmance* of the judgment.(f) But now, by the above statute, "all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error shall be made returnable, &c." Upon this statute, it has become the practice to amend the writ of error, as

a matter of course, without costs;(g) and it has been amended, by [*1162] striking out the name of one of the plaintiffs in error.(h) *But if a writ of error be brought by a *feme covert*, without joining her husband, the court will not allow an amendment of the writ, unless it appear by affidavit that the husband concurs:(aa) And where it is amended, by striking out the name of one of the plaintiffs, in error, the recognizance of bail in error must also be amended.(b) In suing out the writ of error, a mistake had been made in the name of the defendant in error, who thereupon issued execution, and the court of King's Bench granted a rule to show cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule, in order to allow the plaintiff in error to amend his writ.(c) And where a writ of error was sued out on a judgment of the Common Pleas, in an action of *covenant*, describing it as a plea of *trespass on the case*, the court of King's Bench, in which it was returnable, upon application made to them, permitted the writ of error to be amended, by substituting the words "in a plea of covenant broken," instead of the words, "in a plea of trespass on the case," without imposing any terms whatever.(d)[A] But this statute does not extend to any appeal of felony or murder; nor to any process upon any indictment, presentment or information, of or for any offence or misdemeanour whatsoever.(ee) And where a writ of error was returnable before the giving of the judgment on which it was brought, the court, on consideration, held this to be such a fault as was not amendable by the statute.(ff)

The general ground of *quashing* a writ of error(gg) is some fault or defect therein, that is not amendable by the above statute: and the application to quash it ought to be made, either to the court of Chancery, from whence it issues, or to the court wherein it is returnable.(hh) If the writ of error be

(e) 1 Ld. Laym. 329. 2 Smith, R. 259.

(f) 2 Bac. Abr. 200. Carth. 368.

(g) 2 Str. 863, 902. 2 Ld. Raym. 1587, S. C.

(h) 1 Str. 683. 2 Str. 892. Fitzgib. 201. 1 Barnard, K. B., 405, 421. S. C. Cowp. 425. 2 Blac. Rep. 1067.

(aa) 1 Chit. Rep. 369.

(b) 2 Blac. Rep. 1067.

(c) 2 Smith, R. 259.

(d) 5 Taunt. 86.

(ee) See the statute § 2. But see 1 Ken. 470, where a writ of error was amended, on an information in nature of a *quo warranto*.

(ff) 2 Str. 807. 2 Ld. Raym. 1531, S. C. 2 Str. 891, S. P.

(gg) Append. Chap. XLIV. § 33.

(hh) Doug. 350. 4 Barn. & Cres. 116.

[A] See *ante*, Vol. I. p. 161, note [A].

returnable before judgment is given, it may be quashed on motion.⁽ⁱ⁾ But where the writ of error, on a judgment in the Common Pleas, was returnable in *Easter* term, and the costs were not taxed and final judgment signed until *Trinity* term, after which the defendants, in *Michaelmas* term, served the plaintiff with a rule to assign errors; and the plaintiff having assigned them, the defendants, in the same term, joined in error, and the case being afterwards argued, the judgment of the court of Common Pleas was reversed; the court of King's Bench, under these circumstances, refused to quash the writ of error, on the ground that it was returnable before costs were taxed in the court below, and consequently before any judgment was given in that court; as the defendant ought to have applied to quash it, in an earlier stage of the proceedings.^(k)

When there are several parties who are aggrieved by a judgment, and the writ of error is brought by some or one of them only, the courts will quash *it.^(a)[A] But when one of several parties to a judg- [*1163]

(i) 2 Ld. Raym. 1179, 1531. 1 Str. 139. 2 Str. 834, 891. Barnes, 197. 3 Taunt. 384. *Ante*, 1141.

(k) 5 Barn. & Cres. 735, (a); and see 1 Man. & Ryl. 170. 7 Barn. & Cres. 404, S. C.

(a) *Ante*, 1135.

[A] Where a writ of error omits the name of one of the defendants to the judgment below, it is sufficient ground to quash the writ, and the defect cannot be amended. *Gasquett v. Berry*, 1 Eng. 246.

No person can bring a writ of error to reverse a judgment, who is not a party or privy to the record, or who is not injured by the judgment. *House v. Judson*, 1 Branch, 133. *Alling v. Shelton*, 16 Conn. 436. In Massachusetts, if a writ against two is served only on one of them, and judgment is rendered against both, both must join in a writ of error to reverse such judgment. *Gay v. Richardson*, 18 Pick. 47. In bringing a writ of error to the Supreme Court of New York, all the proper parties must join, and no one must unite, who has not been prejudiced by the judgment. *Jaqueth v. Jackson*, 17 Wend. 434. A stranger to a judgment, cannot sue out a writ of error thereon. *Steele v. Bridenbach*, 7 Watts & Serg. 150. Where recognizors are bound in several sums in the same recognizance, and several judgments are rendered against them, they cannot join in a writ of error. *Farr v. The State*, 7 Ala. 794. Describing a party as defendant in error, naming him, is sufficient to show that he wasthe successful party in the court below, although not stated in so many words. *Graf-fenried v. Pearsall*, 1 Ala. 526. In a writ of error by defendants, all the defendants must join, and if a part only wish to prosecute it, and the others refuse to assign errors, a summons and severance will be allowed. *Flournoy v. Burke*, 4 How. (Miss.) 337. Where one only, of several defendants, sues out a writ of error, without procuring a writ of summons and severance, the writ of error will be quashed on motion, and the case stricken from the docket. *Henderson v. Wilson*, 4 Smedes & Marsh. 732.

And it makes no difference that the defendant not joined, died before the judgment of dismissal, and after writ of error brought. *Pecira v. Silver*, 4 Smedes & Marsh. 735. If the parties named in the record sent up are not the same as those named in the writ of error, the proceedings are irregular, and the writ will be dismissed. *Hudspeth v. The State*, 1 Pike, 28. Where two parties to a suit apply for a *supersedeas*, which is granted, the writ of error issues in the name of all the parties to the suit, unless there is a summons and severance. *Patterson v. Butterworth*, 4 Yerg. 158. See also cases cited *ante*, p. 1135, note [A]; and p. 1143, note [A].

All the parties, plaintiffs or defendants, must join in a writ of error, and it is competent for one to join the others without their consent. *Jameson v. Colburn*, 1 Stew. & Port. 253. *Ballinalea v. Abercrombie*, 2 Stew. & Port. 24. *Tombebee Bank v. Freeman*, Minor, 285. *Callar v. Brittain*, Minor, 27. *Cook v. Conway*, 3 Dana, 454. *Watson v. Whaley*, 2 Bibb, 392. *Denall v. Stamp*, 8 Pet. 526. And persons not parties to the judgment below, cannot be joined in the writ. *Adams v. Robinson*, Minor, 285. *Davidson v. Burke*, Hardin, 201. Every person to be directly affected in his interest or rights by the judgment of a court of record, is entitled to be named or described in the suit, to have notice of it, and an opportunity of being heard and asserting his rights. *Porter v. Rummery*, 10 Mass. 64, 69. All the plaintiffs or defendants in an original suit, who are alive, must join in a writ of error, and this must be done even if some of them should choose to abide an erroneous judgment; and a summons and severance will take place in the event of such as choose not to prosecute the suit. *Shirley v. Lunnenburg*, 11 Mass. 379. But where there are several persons privy to a judgment, each

ment, who is not aggrieved thereby, joins in bringing a writ of error, we have just seen, it may be amended, by striking out his name, and stand good for the other parties: And it may be quashed as to one judgment, upon which it does not lie, and stand good for another, upon which it is properly brought.(bb) Costs are payable in all cases, on quashing a writ of error, even though none were recoverable in the original action;(c) it being declared by statute,(d) that "upon the quashing any writ of error, for variance from the original record, or other defect, the defendant in error shall recover against the plaintiff his costs, as he should have had if the judgment had been affirmed, and to be recovered in the same manner;" which costs include those of quashing the writ of error.(e) But when the defendant in error enters continuances on the original judgment, to defeat the writ of error, the plaintiff is not liable to costs on quashing it.(f)

A writ of error may *abate* by the act of God, the act of law, or the act of the party. If the *plaintiff* in error die before errors assigned, the writ abates;[A] and the defendant in error may thereupon sue out a *scire facias quare executionem non*, to revive the judgment against the executors or administrators of the plaintiff in error.(g) But if the plaintiff in error die after errors assigned, it does not abate the writ:(g) In such case the defendant having joined in error, may proceed to get the judgment affirmed, if not erroneous; but must then revive it against the executors or administrators of the plaintiff in error.(g) And a writ of error does in no case abate by the death of the *defendant* in error, whether it happen before or after errors assigned: If it happen before, and the plaintiff will not assign errors, the executors or administrators of the defendant in error may have a *scire facias quare executionem non*, in order to compel him;(h) or if it happen

(bb) 1 Ld. Raym. 328. 1 Salk. 89, 404. 7 Mod. 3. 5 Mod. 397. Carth. 447. Lil. Ent. 225, 290, S. C.

(c) 1 Str. 262. 8 Durnf. & East, 302.

(d) 4 Ann. c. 16, § 25; and see 2 Str. 834. Cas. temp. Hardw. 137.

(e) 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 316, S. C.

(f) 1 Str. 139. 2 Str. 834. Barnes, 250.

(g) 2 Cromp. 3 Ed. 384, 5; and see Barnes, 206. 7 East, 296.

(h) Yelv. 112, 13. 1 Vent. 34. 1 Salk. 264. 1 Ld. Raym. 439, S. C. Barnes, 432. L. R. E. 114.

having a distinct and several interest, each is distinctly entitled to a writ of error and to maintain it by himself, and this notwithstanding a release by any other, having a like privity in the same judgment by a distinct title. *Porter v. Rumery*, 10 Mass. 64. *Shirley v. Lunenburg*, 11 Mass. 379. Where judgment is rendered against two defendants, one of them cannot prosecute a writ of error in his name alone. *Swift v. Hill*, 1 Port. 277. Upon a judgment in *trespass* against several defendants, one alone cannot maintain a writ of error. *Fotterill v. Floyd*, 6 S. & R. 315. Where some of the defendants below do not join in bringing the writ of error, they ought to be summoned and severed. *Bradshaw v. Callaghan*, 8 Johns. 558. *Watson v. Whaley*, 2 Bibb, 392. If there be a joint judgment against several, and part of them alone bring a writ of error to reverse the judgment, without alleging the death of the others, the court will quash the writ on motion. *Andrews v. Bosworth*, 3 Mass. 223.

[A] A writ of error abates by the death of the plaintiff before the return, and can be revived only by his representatives filing the writ and transcript in the appellate court. *Ex parte Norris*, 2 Ala. 385. *Walpole v. Smith*, 4 Blackf. 151. *Greg v. Banner*, 2 Har. 407. *Herdon v. Turner*, 6 Ala. 66. And if the writ is not so revived, the bond may be put in suit. *Id.* If one of several plaintiffs in error dies before errors assigned, the suit does not abate. The suggestion of the death is all that is required, and the case may proceed in the name of the survivors. *Greg v. Bethia*, 6 Port. 9. In Alabama, where the suggestion of the death of a part of the persons affected by a judgment requires no new parties to be made, a writ of error may be issued in the name of the survivors, without application to the Supreme Court. *Perine v. Babcock*, 6 Port. 391.

after, they must proceed as if the defendant in error were living till judgment be affirmed, and then revive by *scire facias*, but cannot take out execution pending the writ of error: *(i)* And in order to compel the executors or administrators to join in error, the plaintiff may sue out a *scire facias ad audiendum errores*, *(k)* either generally or naming them. *(l)* Before the statute 8 & 9 W. III. c. 11, § 7, if there had been several *plaintiffs* in error, the death of one of them before errors assigned, would, it seems, have abated the writ; *(m)* but now, by the above statute, which has been holden to apply to writs of error, the writ does not abate by the death of one of several *plaintiffs* in error, if the cause of [*1164] action survive; *(a)* and therefore, in such case, the defendant in error should enter a suggestion of the death on the roll, and give a rule for the surviving plaintiff to assign errors. *(b)* So, if there be several *defendants* in error, and one of them die, it is no abatement; for they are not named in the writ: *(cc)* In the latter case, the death being suggested on the roll, *(dd)* the writ of error proceeds against the survivors. By the *death* of the chief justice, before he has made or signed his return, the writ of error becomes *ineffectual*; *(ee)* and the defendant in error, by leave of the court, may take out execution; *(ff)* but if the return be signed in his life-time, it may be made afterwards; *(gg)* and though it be neither made nor signed, yet if the defendant in error take out execution without leave of the court, it is *irregular*. *(h)*

It was formerly holden, that a writ of error, in the House of Lords, abated by the *dissolution* of parliament, *(ii)* or even by the *prorogation* of it; *(kk)* but afterwards the lords declared, that a writ of error should not determine by the prorogation of parliament: *(ll)* and at length it was ordered, that upon a dissolution all appeals and writs of error should continue, and be proceeded on *in statu quo*, as they stood at the dissolution of the last parliament. *(mm)* If a writ of error be brought in the Exchequer chamber, and that being discontinued, another being brought in parliament, the second writ is a *supersedeas* of execution: but if a writ of error be brought in parliament and abate, and the plaintiff bring a second, this is no *supersedeas*, because it is in the same court. *(n)*

Bankruptcy is no abatement of a writ of error: Therefore, where the defendant in error becomes bankrupt, his assignees cannot sue out a *scire facias* in their own names, to compel an assignment of errors; but should proceed in the bankrupt's name till judgment. *(o)* But the writ of error

(i) L. P. E. 114.

(k) Yelv. 112, 13. 1 Sid. 419. 2 Vent. 34. 1 Salk. 264. 1 Ld. Raym. 439, S. C. *Id.* 71. 2 Ld. Raym. 1295. S. P.

(l) 2 Bulst. 230, 31.

(m) Yelv. 208, 9. 1 Salk. 261. Carth. 236, S. C. 1 Ld. Raym. 244. 1 Salk. 319, S. C.

(a) 1 Barn. & Ald. 586; and see Man. Ex. Pr. 488, *(a)*.

(b) 1 Barn. & Ald. 587.

(cc) Godb. 66, 68. 1 Ld. Raym. 244. 1 Salk. 319, S. C. 1 Ld. Raym. 439. 1 Salk. 264, S. C.

(dd) Lil. Ent. 217.

(ee) 1 Keb. 658, 686.

(ff) Barnes, 201. Prac. Reg. C. P. 195, S. C.

(gg) 1 Sid. 268.

(h) Barnes, 201. Prac. Reg. C. P. 195, S. C.

(ii) Cro. Jac. 342. 2 Bulst. 163, S. C. T. Raym. 5.

(kk) 1 Vent. 31. 1 Sid. 413, S. C. 1 Vent. 266.

(ll) 1 Lev. 165. 2 Lev. 93. 1 Mod. 106, S. C. 1 Vent. 266, S. P.

(mm) T. Raym. 383. Com. Dig. tit. *Parliament*, P. 2; but see 1 Vent. 266. 2 Crompt. 3 Ed. 375.

(n) 1 Vent. 100. 1 Mod. 285.

(o) 1 Durnf. & East, 463.

abates by the marriage of a *feme plaintiff* in error.(p) And, where, to a *scire facias quare executionem non*, the plaintiff in error pleaded in abatement, that the *defendant* in error was married since the judgment, and before the issuing of the *scire facias*, the defendant moved to quash her own writ, which was granted without costs.(q)

If the writ of error be not quashed or abated, the plaintiff in error may, after the record is certified, forthwith proceed to assign his errors. And it was formerly holden, that after the record was certified, the plain- [*1165] tiff in *error must have assigned his errors, and sued out a *scire facias ad audiendum errores* to bring in the defendant in error, the same term, or the term next after the record was certified; otherwise the whole matter was *discontinued*:(a) But it has been since determined, that if the plaintiff in error lie still after a writ of error brought, and do not assign errors, this is no discountenance of the writ of error;(b) though it is otherwise if he make default after joinder in error.

If the plaintiff in error will not proceed after the record is certified, the defendant, in order to compel him, should sue out a writ of *scire facias quare executionem non* in the court of King's Bench, or Common Pleas, wherein the writ of error was returnable, except on a writ of error *coram nobis* or *vobis*, or by the plaintiff to reverse his own judgment, or in *quare impedit*, where the judgment for the defendant is, that the plaintiff take nothing by his writ, but be in mercy for his false claim, and in all cases of the same nature, where there is no adjudication to the defendant of damages or costs; and, in the Exchequer chamber, he should give a rule for the plaintiff to allege *diminution*, or that the record is not duly certified or transcribed.[A]

In the King's Bench, we may remember,(c) as the parties have no day in court given to either of them, on the removal of the record by writ of error, the defendant in error hath no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*:(d) &c.; and if, upon such writ, the plaintiff in error do not assign errors, but suffer judgment to pass by default upon *scire feci*, or two *nilis*, no errors afterwards assigned shall prevent execution.(e)

The *scire facias quare executionem non* is a judicial writ, issuing out of the court of King's Bench, where the record is supposed to be; and the intent of it is to bring in the plaintiff in error to assign his errors: Therefore, where a *scire facias* was prayed by one of several defendants in error, the fault was holden to be cured by the plaintiff's coming in upon it, and assigning his errors.(f) This writ may be sued out after the expiration of the rule to certify or transcribe the record, though before the transcript is actually brought into court and filed:(g) and it may issue immediately after the record is certified, though before the rule for certifying it is expired;(h) and should be directed to the sheriff of the county in which the action was laid. In point of form, it pursues the judgment of the Common Pleas: the record and proceedings whereof are stated to have been

(p) 2 Str. 880, 1015.

(a) F. N. B. 20.

(c) *Ante*, 1107.

(e) Carth. 40, 41.

(g) 15 East, 646.

(q) 1 Str. 638.

(b) 3 Salk. 145.

(d) Godb. 68. 2 Leon. 107.

(f) 3 Bur. 1791, 2.

(h) 2 Durnf. & East, 17.

[A] See *Cheetham v. Tillotson*, 4 Johns. 499.

brought, for certain causes of error, into the King's Bench: (i) This writ may be *tested* before the return of the writ of error; (k) and it should be made returnable on a general return day or day certain, according to the nature of the *proceedings, if by *original* writ, on a [*1166] general return day, *ubicunque*, (a) &c., but if by *bill*, or attachment of privilege, on a day certain at *Westminster*. (b) If the transcript be brought in by the *essoin* day of the term, the *scire facias* may bear *teste* on the last day of the preceding term; or if brought in within the term, on the first day of that term: (c) And if there be only one writ, there should be *fifteen* days between the *teste* and return, by *original*; (dd) or, if there be two writs, between the *teste* of the first and return of the second. (ee) The *alias* in such case cannot issue before the return of the former writ; and ought to be tested by *original*, on the *quarto die post* of the return of that writ, or by *bill*, on the very return day. (ff) A *scire facias* in error, need not lie *four* days in the office, as a *scire facias* against bail must. (gg)

On the return day of the *scire facias*, if *scire feci* be returned, or of the *alias* writ, if there be two *nihils*, by *bill*, or on the *quarto die post* of the return by *original*, (hh) the defendant in error must give a *rule to appear*, (ii) with the clerk of the rules, which expires in *four* days exclusive: (kk) and *Sunday* is not one of the *four days* in this rule, although it be not the last. (l) Within that time, the plaintiff in error might formerly have appeared, and pleaded to the *scire facias*, in this as in other cases; (m) and there was an old rule, that if the party pleaded to the *scire facias*, and it went against him, execution might be sued out, but that the writ of error should go on notwithstanding. (n) Afterwards the court, in consideration of the delay arising from this practice, established it as a standing rule for the future, that "if upon the return of the *scire facias*, the plaintiff assigned his errors, then all further proceedings should be stayed upon it; but where he chose to stand out upon pleadings to the *scire facias*, execution should go, if it were adjudged against him." (n) From this time, the court appear to have discountenanced pleadings upon the *scire facias*; and in some instances to have set them aside. (o) At present, the *scire facias* is considered merely as a means of compelling an assignment of errors; (p) and it seems to be the practice now, to admit of no plea thereto, by the plaintiff in error. (q) If errors are assigned, before the expiration of the rule to appear to the *scire facias*, all further proceedings upon it are stayed of course; but if the plaintiff do not assign his errors, and give a copy of them to the defendant's attorney in *error, before the [*1167] time allowed by the rule on the *scire facias* is expired, the attorney for the defendant in error may enter judgment on the *scire facias*,

(i) Append. Chap. XLIII. § 76, 7.

(k) 2 Chit. Rep. 193.

(a) 2 Leon. 107; and see 6 Mod. 86. 3 Salk. 320.

(b) 1 Str. 694. 2 Ld. Raym. 1417, S. C.

(c) 2 Crompt. 3 Ed. 331, 2. Imp. K. B. 10 Ed. 737. L. P. E. 38. (dd) 1 Ken. 373.

(ee) 2 Crompt. 3 Ed. 332, n. Imp. K. B. 10 Ed. 737; and see 13 East, 391.

(ff) 2 Salk. 699. Imp. K. B. 10 Ed. 737. (gg) 3 Bur. 1723. 4 Bur. 2439.

(hh) 13 East, 391.

(ii) Append. Chap. XLIV. § 44.

(kk) 2 Crompt. 3 Ed. 333.

(l) 2 Chit. Rep. 192; and see 11 East, 271. 1 Barn. & Ald. 528.

(m) Yelv. 6, 7. Carth. 40, 41. 3 Salk. 145. 1 Str. 638.

(n) 1 Str. 391.

(o) *Id.* 679. 2 Ld. Raym. 1414, S. C.; and see 3 Bur. 1792. 1 Durnf. & East, 463.

(p) *Ante*, 1165.

(q) 2 Crompt. 3 Ed. 334.

and take out execution thereon: and this he may do, though he has previously given a rule to assign errors, which has not expired.(a) But the writ of error still remains in force; and the defendant in error can have no costs, unless he give a rule for the plaintiff to assign errors.(b)

Diminution is either of the body of the record, or of its out-branches, as of the original writ, warrant of attorney, &c. If the judges of the Common Pleas, or other judges, upon a writ of error, do not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices who certified the record before, to certify the whole of it.(c) But it is a rule, that a man cannot allege diminution, contrary to the record which is certified; as if, on a writ of error, it be certified that the judgment was that the defendant should be *in misericordid*, the defendant in error cannot allege for diminution, that the record is *quod capiatur*, because this is contrary to the record certified.(d) And, except in *Wales* and the counties palatine,(e) diminution cannot be alleged, upon a writ of error brought on a judgment in any inferior court.(f)

The rule to allege diminution is an *eight* day rule, given by the clerk of the errors in the Exchequer chamber;(g) and if the writ of error be returnable the first day of term, the plaintiff in error is to transcribe the same term, allege diminution the term following, assign errors the next term, and argue them the fourth term: but if the defendant in error, instead of serving the rule to transcribe at the return of the writ, neglect it for a term or two, the plaintiff must transcribe in that term in which the rule is served, allege diminution the same term, assign errors the term following, and argue them the third term.(h) A copy of the rule to allege diminution being made, and served on the attorney for the plaintiff in error, it is incumbent on him to allege diminution within the *eight* days allowed by the rule; and if he neglect to do so, the clerk of the errors on being applied to, with an affidavit of the service of a copy of the rule, will sign a *nonpros*,(i) and tax the defendant in error his costs; but unless an affidavit be made, he usually sends to the attorney for the plaintiff [*1168] in error, and if diminution be not alleged by the next morning, he will then sign the *nonpros* of course, and tax the costs.(aa)

When the plaintiff in error has alleged diminution, the next step to be taken by the defendant in error, is to give a rule for the plaintiff to assign errors; which, on a writ of error *coram nobis* or *vobis*, is the first proceeding, and may be given immediately after the allowance and notice of the writ of error:(bb) It is also the first proceeding, after the transcript is

(a) 15 East, 204.

(b) 2 Bac. Abr. 216; and see 2 Crompt. 3 Ed. 333.

(c) 2 Bac. Abr. 204. F. N. B. 25, a; and see Cro. Eliz. 155, 281. 1 Nels. Abr. 658.

(d) 1 Rol. Abr. 764. Godb. 267. 2 Ld. Raym. 1122. 1 Salk. 269, S. O. And in a modern case, where a writ of error was brought in parliament, on a judgment of the court of Exchequer in *Ireland*, affirmed in the Exchequer chamber there, the House of Lords held, that diminution could not be alleged in the body of the record, contrary to the transcript: and refused to issue a *certiorari* for verifying it. *Rowe v. Power, ex dim Boyse & another*, in Error, *Dom. Proc. die Mart. 8 Mar. 1803*; but see 1 Bulst. 181; 2 Lil. Abr. 422; 1 Salk. 49. Lil. Ent. 226, 245, 556, 559, 565.

(e) 1 Sid. 147, 364. 1 Salk. 266, *in marg.* Id. 270. Lil. Ent. 226, 245.

(f) 1 Sid. 40. 1 Salk. 266.

(g) L. P. E. 92.

(g) Append. Chap. XLIV. § 45.

(aa) Imp. K. B. 10 Ed. 724.

(i) Append. Chap. XLIV. § 111, &c.

(bb) 2 Crompt. 3 Ed. 377. Imp. K. B. 10 Ed. 757. L. P. E. 78.

brought in, on a writ of error by the plaintiff to reverse his own judgment; (e) or when there is no adjudication to the defendant of damages or costs. (d) In the King's Bench, this is a *four* day rule, given by the master, (e) on the expiration of the rule to appear to the *scire facias*; (f) and after being entered with the clerk of the rules, a copy of it should be made, and served on the attorney for the plaintiff in error.

In the Exchequer chamber, if the plaintiff in error allege diminution, the rule to assign errors is given the next term, with the clerk of the errors, in like manner as the rule to allege diminution, and expires in *eight* days after service: (g) And in that court, a plaintiff in error is not confined to taking out one rule in each term, but may proceed as quickly as he pleases. (hh) On a writ of error returnable in parliament when the transcript is brought in, the defendant in error may petition (ii) the house, for a day to be given to the plaintiff in error, to assign his errors; or a peer, it is said, (k) may move the house for that purpose, without any previous proceeding; upon which they will make an order, (l) that unless the plaintiff assigns errors, on or before a day therein specified, being usually *eight* days from the date of the order, (m) the transcript shall be remitted to the court below. This order should be drawn up, and served on the plaintiff's attorney; and if the errors are not assigned within the time limited by the rule or order for assigning them, the defendant in error may sign a *non-pros*, (n) and is entitled to costs. (o)

An *assignment* of errors is in nature of a *declaration*; (p) and is either of errors in *fact*, or errors in *law*. [A] The former consists of matters

(c) 3 Bur. 1772.

(d) *Ante*, 1165.

(e) Append. Chap. XLIV. § 46.

(f) 6 Durnf. & East, 367; and see 2 Str. 917. In the case of *Sambidge v. Housley*, in Error, 2 Durnf. & East, 17, it was holden, that the rule to assign errors might be given at the same time as the rule to appear to the *scire facias*; but, according to this determination, the rule to assign errors, which expires in four days *inclusive*, would have expired before the rule to appear to the *scire facias*, which, we have seen, does not expire till four days *exclusive*; *ante*, 1166, and therefore the practice was altered as above.

(g) Append. Chap. XLIV. § 47.

(hh) 1 Brod. & Bing. 514.

(ii) For the form of the petition, see Append. Chap. XLIV. § 48.

(k) Imp. K. B. 10 Ed. 760.

(l) Append. Chap. XLIV. § 51.

(m) *Ordo Dom. Proc. die Ven.* 13 Dec. 1861.

(n) *Id.* Append. Chap. XLIV. § 111, &c.

(o) L. P. E. 31. 7 East, 111.

(p) 2 Bac. Abr. 216.

[A] Error in fact and error in law cannot be joined in one assignment. If they are so joined, it may be taken advantage of by demurrer. *Freeborn v. Denman*, 2 Halst. 190. *Fitch v. Lothrop*, 3 Root, 524. *Clarke v. Bell*, 2 Litt. 162. *Moody v. Vreeland*, 7 Wend. 55. *Brents v. Barnett*, 3 Bibb, 251. Errors in fact and in law may be joined in a motion to quash an execution, or on a rule to show cause why an execution shall not be quashed, but not in a writ of error *coram nobis*. *Logan v. Steele*, 7 J. J. Marsh. 41. But after joinder in error, nothing but the obvious justice of the case will induce the court to grant leave to file additional assignments of error. *Myrick v. Chamblin*, Minor, 357. A court for the correction of errors will not take notice of any other errors than those assigned. *Ripley v. Coolidge*, Minor, 11. Nothing can be assigned for error in fact, of which the party might have taken advantage in the court below; nor can anything be assigned for error, which contradicts the record. *Welmores v. Plant*, 5 Conn. 541. *Hill v. West*, 4 Yeates, 385. Therefore, where a suit was brought on a probate bond, and judgment recovered in the name of D. P. as judge of probate, it was held, that the fact that D. P. ceased to be judge of probate before the rendition of such judgment, could not be assigned for error. *Id.* Error cannot be assigned on a matter collateral to the action in the court below. *Irwin v. Gallagher*, 8 S. & R. 528. Where the plaintiff in error makes the general assignment, and then assigns particular causes of

[*1169] of fact, *not appearing on the face of the record, which, if true, prove the judgment to have been erroneous; as that the defendant in the original action, being under age, appeared by attorney; (a) that a *feme* plaintiff or defendant was under coverture, at the time of commencing the action; (b) or that a sole plaintiff or defendant died before verdict, or interlocutory judgment. (c) But where judgment of nonsuit has been given in an action brought against an *infant*, it is no ground of error, that he appeared by attorney. (d) And the defendant in *ejectment* is not allowed to assign for error, the death of the nominal plaintiff. (e) An assignment of errors in fact should conclude with a verification; (f) and in assigning the death of the defendant in error, the assignment ought not to conclude in the common way, but by praying a *scire facias ad audiendum errores*, against the executor or administrator of the defendant in error; and if the sheriff return that he is alive, then he may come in and plead *in nullo est erratum*; or his attorney may appear for him, and say that he is alive; (g) but if the sheriff return that he has warned the executor or administrator, that will be a sufficient ground for the court to proceed and examine the errors. (h)

Errors in *law* are common or special. The *common* errors are, that the declaration is insufficient in law to maintain the action; and that the judgment was given for the plaintiff instead of the defendant, (i) or *vice versa*: *Special* errors are the want of an original writ, (k) bill, or warrant of attorney; (l) or other matter appearing on the face of the record, which shows the judgment to have been erroneous. The plaintiff may assign several errors in law, but only one error in fact: (m) and he cannot assign error in fact and in law together, for these are distinct things, and require different trials. (n) It is also settled, that nothing can be assigned for error which contradicts the record, (o) or was for the advantage of the party as-

(a) Append. Chap. XLIV. § 52, 3.

(c) *Id.* § 56, &c.

(e) 2 Str. 899; but see 1 Sid. 93. T. Raym. 59, S. C., where it was assigned for error.

(f) 1 Bur. 410. Carth. 367; but see Yelv. 58, *contra*.

(g) 1 Sid. 93. T. Raym. 59, S. C.

(i) Append. Chap. XLIV. § 63, 86, 7; 95, 6, 7.

(l) *Id.* § 69, 75, 88.

(n) 2 Bac. Abr. 217. 2 Ld. Raym. 883. 1 Str. 439. *Davie v. Franklin*, H. 26 Geo. III

K. B.

(o) 2 Bac. Abr. 218. 1 Str. 684. 2 Ld. Raym. 1414, S. C. 1 Wils. 85, S. P.

(b) *Id.* § 54, 5.

(d) 5 Barn. & Ald. 418.

(h) Carth. 339.

(k) *Id.* § 64, 75.

(m) F. N. B. 20.

error, he will not be allowed to insist upon other particular causes under the general assignment. If, however, the court on inspection of the record, discover a fatal defect, not specifically assigned, it will be their duty to reverse the judgment. *Crandall v. State*, 10 Conn. 339. Every assignment of error should make out a particular case or point, to which the defendant can answer. *Landsdale v. Finley*, Hardin, 151. A plaintiff in error having failed to prove the error on which he relied, cannot re-assign another error, nor have one which has been struck out restored. *Hathaway v. Clark*, 7 Pick. 165. If there be error in the record, the court will correct it, though not pointed out in the assignment of errors. *Marringale v. Jones*, 3 Hayw. 36. If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record. *The State v. Quinners*, 1 Tayl. 33. It is erroneous to unite errors of fact and errors of law in the same writ of error *coram nobis*. *Lightfoot v. The Commonwealth*, 4 Dana, 492. *Connelly v. Mogowan*, 3 Monr. 152. No errors will be noticed but those embraced in the assignment of errors. *Lillard v. Lillard*, 5 B. Monr. 340. And the particular errors complained of should be shown by the assignment. *Harvey v. Cammack*, 6 Dana, 342. *Adams v. Munson*, 3 How. (Miss.) 77. And a party cannot complain of an error by which he is not prejudiced. *The Commonwealth v. Shanks*, 10 B. Monr. 301. *The Governor v. Campbell*, 17 Ala. 566. *Carey v. Callan*, 6 Monr. 44. *Jackson v. Bank of United States*, 10 Barr, 61.

signing it; (p) or that it is aided by appearance, or not being taken advantage of in due time. (q) When there are several plaintiffs in error, they must join in assigning errors, (r) unless some of them have been summoned and severed. And where the assignment has been merely calculated for delay, the courts have in some instances set it aside. (s) The assignment of errors need not be signed by counsel: In the King's Bench, it is *delivered* *to the defendant's attorney; in the Exchequer [*1170] chamber, and House of Lords, it is *filed* with the clerk of the errors, or clerk in parliament.

If the plaintiff assign for error the want of an original writ, bill or warrant of attorney, &c. or that it is bad in point of law, he should regularly take out a *certiorari*, to verify his errors: for it is a rule that judgment cannot be reversed for want of an original writ, bill, or warrant of attorney, nor for any supposed error or defect therein, without a *certiorari*. (a) The error in such case, unless confessed, is not considered to be completely assigned, until it appear, by the return to the *certiorari*, that it is well founded: (b) And it is said, that the plaintiff in error cannot till then bring in the defendant, to plead to the errors. (c) Also, by the course of the King's Bench, if diminution be alleged, errors cannot be entered, till the *certiorari* be returned, and the rules to plead are expired. (d)

A *certiorari* is a judicial writ, (e) issuing out of the court where the writ of error is depending, on a proper *præcipe*; (f) [A] and directed to the judge or officer who has the custody of the writ, or other matter to be certified; as to the *custos brevium*, for certifying an original writ, (g) or to the chief justice in the King's Bench, for certifying a bill, (h) or warrant of attorney, (i) &c. This writ is *tested* in the name of the chief justice of the King's Bench, when it issues out of that court; or when it issues out of the Exchequer chamber, in the name of the chief justice of the court of Common Pleas; (k) and ought not to bear teste before the assignment of errors. (l) The writ of *certiorari* being signed and sealed, should be delivered to the judge or officer to whom it is directed; and is made returnable *immediate*, or without delay. (m) It has been doubted, whether the court have power to *amend* this writ. (n)

When a *certiorari* is prayed, the defendant in error may come in *gratis*, and confess the want of an original, &c. by pleading *in nulla est erratum*, (o)

(p) 2 Bac. Abr. 220. 1 Str. 382; but see 2 Wms. Saund. 5 Ed. 46, b, (8.)

(q) 2 Bac. Abr. 221. 2 Ken. 286. 2 H. Blac. 267, 299.

(r) 2 Bac. Abr. 217. Imp. K. B. 10 Ed. 726.

(s) 1 Str. 141, 545. 2 Str. 899. Lil. Ent. 228, *in marg.*

(a) 9 Edw. IV. 34, b. 1 Rol. Abr. 764. 2 Ld. Raym. 1398, 1441. Cas. temp. Hardw. 118, 19.

(b) Com. Rep. 115.

(c) 2 Ld. Raym. 1047.

(d) 1 Keb. 211.

(e) Barnes, 12.

(f) Append. Chap. XLIV. § 65, 70.

(g) *Id.* § 66.

(h) *Id.* § 90, 92.

(i) *Id.* § 71, 92. For certifying bail in the original action, the admission of an infant to sue by *prochein ami*, an imparlance or other continuance, or a writ of inquiry, the *certiorari* is directed to the chief-justice of K. B.; but for certifying warrants of attorney, or a writ of inquiry, in C. P., it is directed to the *custos brevium*. Lil. Ent. 555, &c. 2 Ld. Raym. 1476. 1 Wils. 85.

(k) 2 Str. 819. 2 Ld. Raym. 1554, S. C.

(l) *Id. ibid.*; but see 1 Str. 440.

(m) Lil. Ent. 555, &c.

(n) Barnes, 12.

(o) 1 Saik. 267. 2 Ld. Raym. 1156, S. C. 2 Str. 907, S. P.

or a release, (p) which renders it unnecessary for the plaintiff in error to sue out a *certiorari*; or, if there be an original, &c. he may go to the master of the office in the King's Bench, and get a rule for the plaintiff in error to return his *certiorari*. (q) This is a *four day rule*, given by the [*1171] master, *on the back of the draft of the *scire facias quare executionem non*; and after being entered with the clerk of the rules, a copy of it is served on the plaintiff's attorney. In the House of Lords, it is a rule, that "if the plaintiff in error allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly; (aa) of which he is required to give a certificate, upon request: (bb) and the plaintiff may, before *in nullo est erratum* pleaded, sue forth the writ of *certiorari* in ordinary course, without special petition, or motion to the House, for the same; and if he do not prosecute such writ, and procure it to be returned, within *ten* days next after his plea of diminution put in, then, unless he shall show good cause to the House, for enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant in error may proceed, as if no such writ of *certiorari* were awarded." (aa) This is the common course of proceeding: but if the House be soon about to rise, they will, upon petition, of which there must be *two days'* previous notice, order the plaintiff in error to return the writ of *certiorari* by a short day.

Within the time allowed to the plaintiff in error, for the return of the *certiorari*, he either gets it returned, or not: If it be not returned, the assignment of the want of an original, &c. is of no effect; and the defendant in error, having entered on record a *non misit breve*, (c) may, notwithstanding such assignment, plead *in nullo est erratum*, and proceed to affirm the judgment. (d) If a return be made to the writ of *certiorari*, it is either that there is, or is not an original writ, bill, or warrant of attorney, (e) &c.: And as diminution cannot be alleged, so it is a rule, that matter cannot be returned to the *certiorari*, contrary to the record. (f) The return being made, is filed in the treasury of the court, where the defendant's attorney should search for it.

We have already seen, (g) that the want of an original writ or bill is aided after verdict, by the statute 18 Eliz. c. 14; but not after judgment by default or confession, or upon demurrer, or *nul tiel record*. Therefore, if the want of an original after verdict be assigned for error, the defendant in error may confess it, by pleading *in nullo est erratum*. But if a writ of error be brought after a judgment by default, &c. it is usual for the defendant in error, if there be no original already sued out, to present a *petition* (h) to the Master of the Rolls, praying that the cursitor of the county where the venue is laid, may be directed to issue an original, with a proper return. (i) This petition must be presented, before the defendant in error takes out a rule for the plaintiff to return the *certiorari*: And an

(p) 1 Salk. 268. 3 Salk. 399. 2 Ld. Raym. 1005. 6 Mod. 113, 206, S. C. 2 Ld. Raym. 1047. 3 Salk. 214. 6 Mod. 235. Holt, 563, S. C.

(q) Com. Rep. 115. 1 Salk. 267. 2 Ld. Raym. 1156, S. C. Append. Chap. XLIV. § 67, 90.

(aa) *Ordo Dom. Proc. die Ven.* 13 Dec. 1661.

(bb) *Id. die Ven.* 21 Feb. 1717.

(c) Append. Chap. XLIV. § 82.

(d) 1 Salk. 267. 2 Ld. Raym. 1156, S. C. 2 Crompt. 3 Ed. 359.

(e) Append. Chap. XLIV. § 68, 72, 91, 93.

(f) 2 Ld. Raym. 1123, 4.

(g) *Ante*, 108, 923.

(h) Append. Chap. V. § 33.

(i) *Ante*, 108; and see 6 Durnf. & East, 544.

order(*k*) being obtained thereon, a copy of the petition and order should be forthwith served on the adverse attorney; and if *he [*1172] do not in two or three days make his election, either to accept the costs in error, or prosecute his writ, the costs in error must be tendered him; and if he accept thereof, the defendant in error may immediately sign a *non pros*, and, after entering a *remittitur*, take out execution on the judgment;(*a*) but if he refuse to accept the costs, choosing rather to prosecute his writ of error, the petition and order should be delivered to the cursitor, who will make out the original writ, which must be returned by the sheriff, and then filed with the *custos brevium*.(*b*) The same course is observed after an *amendment* of the proceedings in the original action, pending a writ of error; upon which the plaintiff in error may make his election, either to accept the costs, or prosecute his writ.(*cc*) And a bill may be filed to warrant a judgment, after the want of it has been assigned for error.(*dd*)

The plaintiff in error can have but one writ of *certiorari*:(*ee*) Therefore, where he took out a *certiorari* of a wrong term, which did not verify his error, and afterwards moved for a second *certiorari*, it was denied him: the court saying, it may be granted to affirm, but not to reverse a judgment.(*ff*) But if it be certified on the plaintiff's writ, that there is no original,(*gg*) or warrant of attorney,(*h*) or one that is bad, or warrants not the declaration,(*i*) the defendant in error may, at any time before *in nullo est erratum* pleaded, make a suggestion that there is an original or warrant of attorney, or a good one of a different term, or even of the same term with the *placita*,(*kk*) and pray a *certiorari* for certifying it; and if a good original be returned, the court will not inquire when it was filed; or if a bad original was before certified, they will disregard it, and apply the record to that which is good, and will support the judgment. But it is a rule,(*l*) that "no *certiorari* upon a writ of error, shall be sued out or made by any attorney, after a *certiorari* in the same cause hath been already sued out and returned without motion in court by counsel."

In the King's Bench, as the parties have no day in court after the record is removed, the plaintiff in error may, after he has assigned his errors, have a *scire facias ad audiendum errores*,(*m*) against the defendant, who thereupon may appear and plead *in nullo est erratum*, or a release,(*n*) &c. But in practice it is usual for the defendant in error, by consent, to take notice voluntarily of the assignment of errors; which consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*.(*o*) When a *scire facias* is sued out, and the defendant does not appear and join in error, the plaintiff *may move to reverse the judgment, upon producing the [*1173] record of the *scire facias*, with the sheriff's return of *scire feci*, and an entry of the defendant's default, without taking out a rule to join

(*k*) Append. Chap. V. § 35.

(*a*) L. P. E. 30.

(*cc*) Ante, 715.

(*ee*) Cro. Jac. 597.

(*ff*) 2 Str. 765; and see *id.* 819, S. P.

(*g*) Cro. Jac. 277. 1 Salk. 266. 6 Mod. 174, S. C.

(*i*) 1 Rol. Abr. 765. Cro. Jac. 130, 597. Cro. Car. 410.

(*kk*) Com. Rep. 118. 1 Salk. 267. 2 Ld. Raym. 1476.

(*l*) R. E. 11 Car. I K. B.

(*n*) 2 Bac. Abr. 207. F. N. B. 44.

(*b*) *Id.* 31, 2.

(*dd*) 1 Taunt. 126.

(*gg*) Cro. Car. 91.

(*m*) Append. Chap. XLIV. § 76, &c.

(*o*) Carth. 41.

in error,(a) and even without moving for a *conclitum*, or putting the cause in the paper.(b)

The Exchequer chamber not having the record before them, but only a transcript, do not award a *scire facias ad audiendum errores*; but notice is given to the parties concerned:(c) And, in the House of Lords, the plaintiff must get a peer to move the House, that on assigning errors, the defendant may appear and make his defence. In error to reverse a common recovery, there ought to be a *scire facias* against the *tertenants*, *ad audiendum processum et recordum*:(d) but to this they can only plead a release of errors.(e)

To an assignment of errors, the defendant may plead or demur. Pleas in error are common or special: The *common* plea, or *joinder*, as it is more frequently called, is *in nullo est erratum*;(f) or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court.

If the plaintiff in error assign an error in fact, and the defendant in error would put in issue the truth of it, he ought to traverse or deny the fact, and so join issue thereupon, and not say *in nullo est erratum*; for by so doing, he would acknowledge the fact alleged to be true:(g) But when an error in fact is assigned, if the defendant would acknowledge the fact to be as alleged, and yet insist that by law it is not error, he ought to rejoin *in nullo est erratum*. Hence it appears, that if an error in fact be well assigned, *in nullo est erratum* is a confession of it; for the defendant ought to have joined issue thereon, so as to have it tried by the country: But if an error in fact be assigned that is not assignable, or be ill assigned, *in nulla est erratum* is no confession of it, but shall be taken only for a demurrer.(h)[A]

If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder; for this shall put the matter in the judgment of the court, the record being agreed to be as stated.(i) So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as that there is no record of re-summons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in error do not allege diminution, and thereupon procure a certificate from the inferior court, that there is not any re-summons, before the rejoinder entered, the assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered: and though the de-
[*1174] fendant confessed the error, yet the court ought not to reverse the *judgment, till they are satisfied it is erroneous by the record itself.(aa) If the plaintiff in error assign error in fact and error in law,

(a) 1 Str. 144.

(b) 2 Str. 1210.

(c) 1 Vent. 34.

(d) 1 Leon. 290. 1 Lev. 72. Carth. 111. Append. Chap. XLIV. § 80.

(e) 1 Bur. 380. 2 Ken. 19, S. C. *Ante*, 1121.

(f) Append. Chap. XLIV. § 81, 2, 94, 98.

(g) 1 Rol. Abr. 763. 1 Ken. 350.

(h) 2 Bac. Abr. 218; but see Carth. 338. *Davie v. Franklin*, H. 26 Geo. III. K. B.

(i) 1 Rol. Abr. 763.

(aa) 1 Rol. Abr. 764. 9 Edw. VI. 32, b.

[A] A court of errors cannot adjudicate upon a question which was not raised in the court below, and not presented by the record. *Talbert v. Melton*, 9 S. & M. 9. Nor will it decide a question not presented by the record of the case under consideration. *Matlock v. Lurington*, 9 S. & M. 489. *Wilson v. King*, 1 Morris, 106. *Brazleton v. Jenkins*, 1 Morris, 15. And *ante*, p. 1168, note [A].

which we have seen cannot be assigned together, and the defendant in error plead *in nullo est erratum*, this is a confession of the error in fact, and the judgment must be reversed; (b) for he should have demurred for the duplicity, upon which the judgment would have been affirmed. (c)

By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect; the effect of his plea being that the record in its present state is without error: (d) and therefore, after *in nullo est erratum* pleaded, neither party can allege diminution, or pray a *certiorari*. (e) But though the parties are bound by their own admission, and that equally so as to every part of the record, yet no admission of the parties can or ought to restrain the courts from looking into the record before them. (f) Hence it is a general rule, that at any time pending a writ of error, whether before (g) or after errors assigned, or even after *in nullo est erratum* pleaded, (hh) the courts *ex officio* may award a *certiorari*; and they may do this to supply a defect in the body of the record, (ii) as well as in its out-branches.

When the plaintiff assigns for error the want of an original or warrant of attorney, and the defendant comes in *gratis*, and confesses the matter assigned for error, by pleading *in nullo est erratum*, (k) or a release, (l) without putting the plaintiff to the necessity of suing out a *certiorari* to verify his errors, the court, for their own information, may award this writ, in order if possible to support the judgment. And so, if error be assigned in the original writ, and upon a *certiorari* granted, an erroneous original be returned, upon which *in nullo est erratum* is pleaded, and after the court grant a second *certiorari* for another original, and upon this a good original is certified, the court will intend this to be the original on which the judgment was given, in favour of judgments, which ought to be intended good, till the contrary is manifest. (m) But though the court *ex officio* will award a *certiorari* to affirm a judgment, yet they will never award one to reverse it, or make error. (n)

Special pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors, (o) or the statute of limitations, (p) &c. to which the plaintiff in error may reply or demur, and proceed to trial or argument. A release of errors contained in a warrant of attorney to *confess a judgment is good, though given before judgment, [*1175] provided it be dated in the term of which the judgment is entered up: (a) But where there are several plaintiffs in error, the release of one of them shall not bar the others. (bb) In pleading a release, the defendant must lay a venue; but though it be ill pleaded, yet if there are no errors,

(b) 2 Bac. Abr. 218. Oarth. 338, 9. Comb. 320, S. C.

(c) 2 Ld. Raym. 883. 1 Str. 439.

(e) *Id.* 269. 2 Crompt. 3 Ed. 362.

(g) 1 Str. 440.

(hh) 1 Rol. Abr. 764, 5. 1 Salk. 269. 2 Ld. Raym. 1005, S. C. Cas. temp. Hardw. 118, 19.

(ii) 1 Salk. 270.

(d) 1 Salk. 270.

(f) 1 Salk. 270.

(k) 2 Str. 907.

(l) 1 Salk. 268. 2 Ld. Raym. 1005, S. C.

(m) 1 Rol. Abr. 765. *Ante*, 108.

(n) 1 Salk. 269. 2 Str. 765, 819, 907. Cas. temp. Hardw. 118, 19; but see 2 Bac. Abr. 205, and the cases there cited; by which it appears, that formerly the court would have granted a *certiorari* to reverse the judgment, as well as to affirm it.

(o) 2 Bac. Abr. 225. Append. Chap. XLIV. § 84, 5.

(p) Stat. 10 & 11 W. III. c. 14.

(a) 2 Str. 1215; and see 8 Taunt. 434.

(bb) Cro. Eliz. 648, 9. Cro. Jac. 116, 17. 3 Mod. 135.

the court will affirm the judgment.(c) When error is brought on a judgment that the *parol* shall demur, the nonage cannot be pleaded again, for that would be *exceptio ejusdem rei, cujus petitur dissolutio*.(d)

The plea or joinder in error, &c., if common, need not be signed by counsel. In the King's Bench, it is *delivered* to the plaintiff's attorney.(e) In the Exchequer Chamber, or House of Lords, it is filed with the clerk of the errors, or clerk in parliament.

Issue being joined in error, the proceedings are *entered* of record: And on a writ of error *coram nobis*, they must be entered on the *same* roll as the original judgment, or former writ of error.(f) On a writ of error from an inferior court, or from the common Pleas, to the King's Bench, the entries are usually made by the attorney for the *defendant* in error.(g) though they may it seems be made by the attorney for the *plaintiff* in error, on *different* rolls, entitled of the term the writ of error is returnable; and begin with the writ of error and return, after which the proceedings in the inferior court or Common Pleas are entered, to the end of the final judgment: then follows the judgment of *nonpross* for not assigning errors, or, if they are assigned, the assignment of them; and if it be of errors in *fact*, the plea and replication, &c. are next entered, with an award of the *venire facias*.(h) or if it be of errors in *law*, there is an entry of the joinder, with a continuance by *curia advisari vult*;(i) after which, when the issue has been tried or determined, the roll proceeds with the finding of the jury, or determination of the court, and judgment of affirmance or reversal. And a mistake of the clerk, in entering the assignment of errors and joinder of a wrong term may be amended.(k)

On an issue in *fact*, a record of *nisi prius*.(l) is made up, and the parties proceed to trial, as in common cases; and, after verdict, the party for whom it is found must move to put the cause in the paper for argument;(m) and then, on producing the *postea*, the court will give judgment according to the finding. In this case the defendant, as well the plaintiff, may carry down the cause to trial, without a rule for trying it by *proviso*.

[*1176] *On an issue in *law* in the King's Bench, either party may move for a *concilium*.(a) draw up and serve the rule, enter the cause with the clerk of the papers, and proceed to argument, as on demurrer.(b) Previous to the day of argument, copies of the books, or proceedings in error should be delivered (as on demurrer,) by the plaintiff or his attorney, to the chief justice and *senior* judge, and by the defendant or his attorney, to the two other judges;(cc) in which should be inserted the names of the counsel who signed the pleadings:(dd) and the exceptions

(c) 1 Salk. 268. 3 Salk. 399. 2 Ld. Raym. 1005. 6 Mod. 113, 206.

(d) 2 Str. 861. 2 Ld. Raym. 1433, S. C. (e) *Ante*, 672.

(f) Cro. *Eliz.* 155, 281. 1 Ld. Raym. 151. Carth. 369, S. C.

(g) *Ante*, 717.

(h) Append. Chap. XLIV. § 99.

(i) *Id.* § 100, &c.

(k) 3 Maule & Sel. 591.

(l) Append. Chap. XLIV. § 110.

(m) 1 Str. 127.

(a) Append. Chap. XLIV. § 108.

(b) *Ante*, 738, &c.

(cc) R. M. 17 Car. I. K. B.; and see R. E. 2 Jac. II. (a). R. T. 40 Geo. III. K. B. 1 East, 131. *Ante*, 338.

(dd) R. E. 18 Car. II. K. B. *Ante*, 738.

intended to be insisted upon in argument, should be marked in the margin.(e) If either party neglect to deliver the books, they ought to be delivered by the other;(f) and in that case the party neglecting cannot be heard, but judgment will of course be given against him.(g)

In the Exchequer chamber, there are no more than *two* return days in every term: one is called the general *affirmance* day, being appointed by the judges of the Common Pleas and barons of the Exchequer, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments; the other is called the *adjournment* day, which is usually held a day or two before the end of every term. On the first of these days, judgments are affirmed or reversed, or writs of error *non-prossed*; the intent of the latter is to finish such matters as were left undone at the former: on which last-mentioned day also, as well as on the first, judgments may be affirmed or reversed, or writs of error *nonprossed*, on paying an additional fee to the clerk of the errors, and setting down the cause *two* days before the adjournment day.(h)

The proceedings in this court are entered by the clerk of the errors, who sets down the cause, at the instance of either party, without a motion for a *concilium*: In making the entry, after setting forth the writ of error and return, and the proceedings in the court of King's Bench, a day is given to the plaintiff to assign errors; after which the assignment of errors, and other subsequent proceedings, are entered on the return days they are put in, with a separate *placita* for each day.(i) It is a rule in the Exchequer chamber, that "no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff in error shall have given *ten* days' notice to the clerk of the errors in the Exchequer chamber, that the error assigned in the record is to be argued before the said justices and barons, for both parties; and that the attorney for the plaintiff shall deliver *four* copies to the justices of the Common Pleas, and the attorney for the defendant shall deliver *four* other copies to the barons of the *Exchequer *four* days before the hearing of [*1177] the cause."(aa) To enable the parties to deliver these copies, a transcript of the proceedings is made for them, by the clerk of the errors.

In the House of Lords, when the defendant hath joined in error, the cause is set down, on the motion of a peer, to be heard in turn; after which, if the house is likely to be soon up, either party may on petition,(b) of which *two* days' previous notice should be given to the other, have the cause appointed for a short day: And when a day is appointed for hearing the cause, the same cannot be altered but upon petition; and no petition can in such case be received, unless *two* days' notice thereof be given to the adverse party, of which notice oath is to be made at the bar of the house.(c) Previous to the argument, the *cases* for both parties must be drawn up, and signed by one or more of the counsel who attended at the

(e) R. E. 2 Jac. II. revived by R. H. 38 Geo. III. K. B.; and see R. H. 48 Geo. III. C. P. 1 Taunt. 203. *Ante*, 505, 738. (f) 4 Taunt. 147.

(g) R. M. 17 Car. I. K. B. Imp. K. B. 10 Ed. 741. R. E. 27 Car. II. R. M. 6 Geo. II. reg. 3. C. P. *Sed quare*; and see 6 Durnf. & East, 477. 1 Bos. & Pul. 292. *Ante*, 726, 7, 739. (A) L. P. E. 181, 2.

(i) L. P. E. 175, &c. Append. Chap. XLIV. § 109.

(aa) R. E. 33 Car. II. Imp. K. B. 10 Ed. 729, 30.

(b) Append. Chap. XLIV. § 132.

(c) *Ordo Dom. Proc. die Merc.* 22 Dec. 1703.

hearing of the cause in the court below, or shall be of counsel at the hearing in the House of Lords ;(d) which cases should contain a copy of so much of the proofs taken in the court below, as the parties intend to rely on at the hearing of the cause before the House, together with references to the documents, where the same may be found.(e) And it is usual for each party to deliver two hundred and fifty printed copies of them at the parliament office, some of which are given to the lords, and others to the judges. It was formerly required, that the plaintiffs and defendants, or their respective agents or solicitors, should deliver the printed cases upon writs of error, at least *four* days before the hearing of the same.(f) But, by a later order,(g) "when any writ of error shall be brought into the House during the sitting of parliament, the plaintiff and defendant shall severally lay their printed cases upon the table of the House, or deliver the same to the clerk of parliament for that purpose, within a *fortnight* after the time limited by the House for the plaintiff to assign errors, unless an earlier day be specially appointed for that purpose, in respect of such writ of error being brought merely for delay."

On the day appointed for argument, the counsel for the parties are heard, being previously instructed, and furnished with copies of the paper books, or printed cases ; and if there be no argument, one of them moves for judgment of affirmance or reversal. If the errors be argued, one counsel only is heard on each side, in the King's Bench ; the counsel for the plaintiff in error begins, the counsel for the defendant is then heard, and the plaintiff's counsel replies :(h) In the House of Lords, it is a rule,(i) that "at the hearing of causes, one of the counsel for the appellants shall open the cause, and then the evidence on their side [*1178] shall be *read ; which done, the other counsel for the appellants may make observations on the evidence : Then one of the counsel for the respondents shall be heard, and the evidence on their side be read ; after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply."

The judgment in error, unless the court are equally divided in opinion, is to *affirm*, or to *recall* or *reverse* the former judgment ; that the plaintiff be *barred* of his writ of error ; or, that there be a *venire facias de novo*. The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is that the former judgment be *affirmed* ;(a) So, on a demurrer to an assignment of error, in fact and in law, for duplicity, the judgment is *quod affirmetur*.(b) For error in *fact*, the judgment is *recalled revocatur* ;(c) and for error in *law*, it is *reversed*.(dd) On a plea of release of errors,(ee) or the statute of limitations,(ff) found for the defendant, the judgment is, that the plaintiff be *barred* of his writ of error. It has already been shown, in what cases a *venire facias* is grantable *de novo*.(gg)

(d) *Ordo Dom. Proc. die Mart.* 19. Apr. 1698.

(e) *Ordo Dom. Proc. die Merc.* 24 Feb. 1813 ; and see *Ordo Dom. Proc. die Merc.* 8. Dec. 1813.

(f) *Ordo Dom. Proc. die Mart.* 12 Jan. 1724.

(g) *Ordo Dom. Proc. die Ven.* 12 Jul. 1811. (h) *Ante*, 507, 8.

(i) *Ordo Dom. Proc. die Sab.* 2 Mart. 1727 ; and see 2 *Crompt.* 3 Ed. 373.

(a) *Append. Chap. XLV.* § 119, 123, 131, 133.

(b) *Yelv.* 58. 2 *Ld. Raym.* 883. 1 *Str.* 439.

(c) 2 *Bac. Abr.* 230.

(dd) *Append. Chap. XLIV.* § 120, 21, 2 ; 124, 129, 136.

(ee) 1 *Show.* 50. 1 *Str.* 127, 683 ; but see *Ast. Ent.* 399. 1 *Str.* 382, *semb. contra*.

(ff) 2 *Str.* 1055. *Cas. temp. Hardw.* 345, S. C.

(gg) *Ante*, 922, 3.

When the court of King's Bench are equally divided in opinion upon a writ of error, it seems there can be no rule for affirming or reversing the judgment, without consent; and therefore, in the case of *Thornby v. Fleetwood*,^(h) the court being divided in opinion, a rule was made, with the assent and at the instance of the lessor of the plaintiff, to expedite the determination of the cause in the House of Lords; whereby it was ordered, that the judgment should be affirmed.⁽ⁱ⁾ But in the Exchequer chamber, it is the practice, upon a division, to affirm the judgment, as was done in the case of *Deighton v. Greenville*;^(k) And so is the practice in the House of Lords; which depends on their mode of putting the question to reverse the judgment, a majority being required to reverse it.^(l)

A judgment, when entire, cannot, it is said, regularly be reversed in part, and affirmed for the residue.^(m) [A] Therefore, where A. brought an action on the case for damages against B. for words spoken of him, and *for causing him to be indicted, &c. and the jury found [*1179] a verdict for the plaintiff as to both, with entire damages, yet it being afterwards holden that the words were not actionable, the judgment was reversed *in toto*:^(aa) But if part of the words laid be not actionable, and several damages are given, it seems that judgment shall be reversed in part only.^(bb) And where judgment is given for the plaintiff in debt on two counts, one of which is bad, the court may reverse it as to that count, and also as to the damages and costs, which, being given generally, apply to the whole declaration, and cannot be separated, and affirm it as to the other count.^(cc)

When there are several dependent judgments, and the principal one is reversed, the other cannot be supported: As if a man recover in debt upon a judgment, if the first judgment be reversed, the second falls to the

(h) 1 Str. 379; and see 1 Salk. 17.

(i) Lil. Ent. 524. By the statute 14 Edw. III. stat. 1, c. 5, it is provided, "that whereas causes have been delayed for difficulty and division in opinions; therefore, to remedy the delays occasioned thereby, there shall in every parliament be chosen a prelate, two earls, and two barons, who by good advice of others, are to give judgment; or if they cannot determine it, that then the record shall be brought into parliament, who shall make a final accord: and the judges before whom the cause is depending shall proceed to give judgment, pursuant to their directions. But there appear to be no footsteps for centuries, of any such appointment of a prelate, two earls, and two barons; and the court of King's Bench, in the above case, thought it would be improper, on a writ of error from the Common Pleas, to adjourn the cause for difficulty into the Exchequer chamber, or House of Lords. 1 Str. 383.

(k) 1 Show. 36. Cruise on *Fines*, 222.

(l) 1 Str. 383.

(m) 2 Bac. Abr. 227. 1 Ld. Raym. 255, 6. 2 Ld. Raym. 825.

(aa) 2 Bac. Abr. 228.

(bb) 1 Str. 188.

(cc) 6 Taunt. 645. 2 Marsh. 304, 308, 9, S. C.; and see 2 Chit. Rep. 30, (a).

[A] Where judgment is erroneous in part, and can be set right without a reversal of the whole, it will be reversed for that part, and remain good for the rest. *Nelson v. Andrews*, 2 Mass. 164. *Drowne v. Simpson*, 2 Mass. 441. *Glover v. Heath*, 3 Mass. 252. *Waile v. Garland*, 7 Mass. 453. *Whiting v. Cochran*, 9 Mass. 532. *Cummings v. Pruden*, 11 Mass. 206. *Smith v. Jansen*, 8 Johns. 111. *Bradshaw v. Callagan*, 8 Johns. 558. Thus, on a writ of error, a judgment may be reversed as to the damages, and affirmed as to the costs. *Cummings v. Pruden*, 11 Mass. 206. *Welles v. Fowler*, Kirby, 236. *Dixon v. Peirce*, 1 Root, 138. An entire judgment against several defendants, cannot be reversed as to one, and affirmed as to the others. *Arnold v. Sanford*, 14 Johns. 417. But where an erroneous judgment is entire, it must be reversed *in toto*. *Gaylord v. Payne*, 4 Conn. 190. On a writ of error, a judgment which is entire cannot be divided, and affirmed in part and reversed in part; but if bad in part, it is bad in the whole. *Seward v. Jackson*, 8 Cow. 406, *per Spencer, Senator*. Where principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all, although the judgment might have been good against the principal if he had been sued alone. *Munford v. Overseers*, 2 Rand. 313.

ground.(*dd*) But the reversal of the last judgment will not affect the first: As if a judgment be given against *executors* in an action of *debt*, and after a *scire facias*, judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first shall stand.(*e*)

So, if there be several distinct and independent judgments, the reversal of the one shall not affect the other: As in an action of *account*, if judgment be given *quod computet*, and after auditors are assigned, and upon the account judgment is given against the defendant also, with damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment, but that shall stand in force; for these are two distinct and perfect judgments, the first judgment being *ideo consideratum est quod, computet et defendens in misericordia*.(*f*) So, if the judgment consist of several distinct and independent parts, it may be reversed as to one part only; as for costs alone,(*g*) or damages in *scire facias*,(*h*) or for damages and costs in a *quidam* action.(*i*)

If judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment, it is said, shall only be *quod judicium reverteretur*; for the writ of error is brought only to be eased and discharged from that judgment. But if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, if erroneous, but the court shall also give such judgment as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein an erroneous judgment was given.(*k*) The former part of this distinction, however, does not appear to be well [*1180] founded: for *in a late case,(*a*) where judgment has been given in the Common Pleas for the plaintiffs, upon a special verdict in *assumpsit*, which was reversed upon a writ of error in the King's Bench, the defendant was holden to be entitled, in the latter court, not only to judgment of acquittal, but also for the costs of his defence in the Common Pleas, being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs, by the statute 23 Hen. VIII. c. 15, § 1. But there must be a rule *nisi* for reversing a judgment given for the plaintiff in an inferior court, and that it be referred to the master to tax the plaintiff in error his costs, where the defendant has not joined in error.(*b*) If judgment should be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.(*c*)

(*dd*) 2 Bac. Abr. 229.

(*e*) 2 Bac. Abr. 229; and see 2 Str. 1055. Cas. temp. Hardw. 345, S. C.

(*f*) 2 Bac. Abr. 228, 9.

(*g*) Lil. Ent. 233. 1 Str. 188.

(*h*) 2 Str. 808. 2 Ld. Raym. 1532, S. C.

(*i*) 4 Bur. 2018.

(*k*) 2 Bac. Abr. tit. Error, M. 2. 1 Salk. 262, 401. 4 Mod. 76, S. C. 4 Bur. 2156. 12 East, 669.

(*a*) 12 East, 668.

(*b*) 1 Dowl. & Ry. 183.

(*c*) 6 Durnf. & East, 200.

When a judgment against the plaintiff is reversed on a writ of error brought in the King's Bench, that court, having the record before them, may in all cases give such judgment as the court below should have given; and if necessary, may award a writ of inquiry to assess the damages. And so, when judgment is given against the plaintiff in the King's Bench on a *special verdict*, by which the damages are assessed, the Exchequer chamber, or House of Lords may, in case of reversal, give a new and complete judgment, for the plaintiff to recover those damages.(d) But when the damages are not assessed, as where judgment is given on *demurrer*, the Exchequer chamber or House of Lords, not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory judgment *quod recuperet*; and the transcript being remitted, the court of King's Bench will award a writ of inquiry,(e) and give final judgment.(f)

When the judgment is affirmed, or the writ of error nonprossed, the defendant in error is entitled to *costs* and *damages*, by 3 Hen. VII. c. 10 & 19 Hen. VII. c. 20. By the former of these statutes, reciting that writs of error were often brought for delay, it is enacted, that "if any defendant or tenant, against whom judgment is given, or any other that shall be bound by the said judgment, sue, before execution had,(g) any writ of error to reverse any such judgment, in delay of execution, that then, if the same judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuited therein, the person or persons against whom the writ of error is sued, shall recover his costs and damages, for his delay and wrongful vexation in the same, by discretion of the *justice*(h) before whom the writ of error *is [*1181] "sued." The latter of the above statutes recites the former, and that it had not been put in force, and enacts, that "it shall be thenceforth duly put in execution." Upon these statutes it has been holden, that costs and damages are recoverable in error, for the delay of execution, although none were recoverable in the original action:(a) And executors and administrators are liable to costs in error, in cases where they would be liable in the original action.(b) But these statutes are confined to judgments recovered by the original plaintiffs below, and affirmed in error, and do not extend to judgments recovered by the defendants below: Therefore, an avowant in *replevin* for rent in arrear, for whom judgment was given below, which was affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered by the judgment.(c)

By the 13 Car. II. stat. 2, c. 2, § 10, "If the judgment be affirmed *after verdict*, the plaintiff shall pay to the defendant in error his *double costs*:" which statute is confined to cases where the judgment so affirmed is for the plaintiff below; and does not apply, where the defendant below obtains judgment upon a special verdict.(dd) And by the 8 & 9 W. III.

(d) 1 Salk. 403. 1 Ld. Raym. 9, 10. Carth. 319. Skin. 514, S. C. 1 Bos. & Pul. 30.

(e) Append. Chap. XLIV. § 130, 137.

(f) Cro. Jac. 207. Yelv. 75, S. C.

(g) Cro. Jac. 636. Gilb. C. P. 275.

(h) The word *justice*, in the singular number, is here made use of, instead of the *court*, there being no court of error consisting of only one judge. Doug. 561, n. 5.

(a) Dyer, 77. Cro. Eliz. 617, 659. 5 Co. 101, S. C. Cro. Car. 145. 1 Str. 262. 2 Str. 1084; but see Cro. Car. 425. 1 Lev. 146. 1 Vent. 38, 166. 4 Mod. 245. Carth. 261, S. C. *semb. contra*.

(b) 1 H. Blac. 566; and see 2 Str. 977. Ante, 881.

(c) 10 East, 2.

(dd) 5 East, 455.

c. 11, § 2, "if at any time after judgment given for the *defendant*, in any action, plaint or suit, in any court of record, the plaintiff or demandant shall sue any writ or writs of error, to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit therein, the defendant in error shall have judgment to recover his costs, against the plaintiff or demandant, and have execution for the same, by *capias ad satisfaciendum, fieri facias, or elegit*." (e) This statute, however, only relates to judgments given on *demurrer* for defendants below, to whom remedy was intended to be given for their costs, both below and above, on affirmance of such judgments, which they had not before. (f) And none of the before-mentioned statutes give costs in error, upon the *reversal* of a judgment: (g) therefore, when a judgment is reversed, each party must pay his own costs: and accordingly where the plaintiff in *case* recovered a verdict at the trial, and had judgment in the Common Pleas, and upon a bill of exceptions returned into the King's Bench, judgment was reversed, and the plaintiff took nothing by his writ, it was holden that the defendant could not have costs. (h) A judgment for the plaintiff was reversed on a writ of error in fact, brought by the defendant: and the court held, that the plaintiff in error was entitled to his costs of the defence of the original action, though not to the costs in error. (i)

[*1182] *On a writ of error returnable in the King's Bench, that court, on motion, will, after affirmance, or *nonpros* for not assigning errors, order the master to compute *interest* on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance or *nonpros*, and that the same be added to the costs taxed for the plaintiff in the original action. (a) In the Exchequer chamber, though the court, it seems, are bound to allow double *costs* to the defendant in error, on the affirmance of a judgment after verdict in the King's Bench, yet it is entirely a matter in their discretion, whether or not *interest* shall be allowed on such affirmance: (b) And the course is said to be, for the officer to settle the costs, unless any particular direction be given by the court; and in taxing them, he allows double the money out of pocket, or thereabouts, but adds no interest as a matter of course. (c) Interest, however, has been allowed in the Exchequer chamber, on the affirmance of a judgment in *assumpsit*, for the balance of a merchant's account, and for interest on that balance. (d) So, it has been allowed, on a letter promising payment of an admitted balance, by a bill at two months. (ee) And though interest is not allowed upon the affirmance of a judgment for money lent merely, yet it is recoverable upon the affirmance of a judgment for the balance of an account for money lent, and for interest upon advances, where the plaintiffs, as bankers, have been in the habit of charging it. (ff) In such case, however, the affidavit must state, that it was the custom of the bankers to charge interest on their advances, and at what rate. (gg) So, on a judgment recovered against bankers, for a balance

(e) And see the statute 8 & 9 W. III. c. 27, § 3. 2 H. Blac. 287.

(f) 10 East, 5.

(h) 5 East, 49.

(a) Doug. 752, n. 3; and see 2 Str. 931. 2 Bur. 1096, 7. 1 Blac. Rep. 267, 8, S. C. 2 Durnf. & East, 79. 1 Maule & Sel. 171, 173.

(c) 2 Bur. 1096; and see 2 H. Blac. 284.

(d) 4 Taunt. 298; and see 3 Price, 251. 7 Taunt. 245, S. C.

(ff) 4 Taunt. 346.

(g) 1 Str. 617; and see 5 East, 49.

(i) *Per Cur.* H. 40. Geo. III. K. B.

(b) 2 H. Blac. 284.

(ee) 5 Taunt. 758.

(gg) 8 Price, 516.

due from them, on account of money deposited in their bank by a customer, the court, on affirmance, ordered interest to be added to the damages, on proof that it was the usage of the bank to allow it. *(hh)* Interest is allowed on affirming a judgment, in an action on a bill of exchange or promissory note: *(ii)* And it has been allowed, in an action for not giving a bill of exchange in payment for goods sold, from the time when the bill, if given, would have become due; *(ii)* or for not discounting bills, delivered to the defendant for that purpose, but converting them to his own use. *(k)* So, it has been allowed, in an action on a promise to give a bond or mortgage, which would have carried interest: *(l)* or to make good to the acceptor of a bill, so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill. *(m)* And, in an action of *covenant* for nonpayment of purchase-money, interest was allowed on the whole sum recovered, although such *money was payable by instal- [*1183] ments, and there was an express engagement between the parties, that interest should be payable on the first instalment only. *(a)*

In *trover* for bills of exchange, the court of Exchequer chamber allowed interest from the time of the first judgment, upon all such bills as had been received before the judgment, and upon all such as were received afterwards, from the receipt of them. *(b)* And interest was allowed in one case, on the affirmance in error of a judgment for the proceeds of stock, fraudulently sold out by a person holding a power of attorney to sell; *(c)* and in another, on the affirmance of a judgment, in an action on an attorney's undertaking to pay the debt and taxed costs, on or before a day certain. *(d)* But it seems to be now the practice of the Exchequer chamber to give interest only in cases where it was recoverable below; *(e)* unless it be distinctly proved or admitted, that the writ of error was brought for delay: *(f)* and therefore, though they once allowed interest in an action of *tort*; *(g)* and on an attorney's bill, *(h)* yet these decisions were afterwards disapproved of, and interest has been refused in the latter action: *(i)* And it is said to be contrary to the practice of the court, to give interest in an action for mere unliquidated damages. *(kk)* So, if judgment be entered generally upon a declaration in *assumpsit* or *covenant*, *(ll)* and some of the counts or breaches are for unliquidated damages, no interest can be allowed on affirmance of the judgment: *(mm)* And it is not, it seems, allowed on a count in *assumpsit*, for not accounting for goods delivered to be sold on commission. *(mm)* So, interest was refused on the affirmance of a judgment in *Jamaica*, in an action for the price of goods sold and delivered, and interest thereon, and on an account stated, and for interest on the balance; although it was sworn, that the inhabitants of *Jamaica* were always in the habit of charg-

(hh) 2 Moore, 206. 8 Taunt. 250. 5 Price, 536, S. C.; and see 8 Price, 516, 17. 9 Price, 440, 41.

(ii) 2 Camp. 428, n.; and see *id.* 472, 480. 13 East, 98. 3 Taunt. 157. 4 Taunt. 298.

(k) 5 Taunt. 758.

(l) 4 Taunt. 876.

(m) *Id.* 250.

(a) 2 Moore, 195. 8 Taunt. 245, S. C.; but see 2 Barn. & Cres. 348. 8 Dowl. & Ryl. 613, S. C.

(b) 2 New Rep. C. P. 205. 5 Taunt. 758, 9.

(c) 6 Taunt. 117.

(d) *Id.* 346.

(e) 2 Campb. 428, n.; and see *id.* 472, 480. 13 East, 98. 3 Taunt. 157. 4 Taunt. 298. 9 Price, 440, 41.

(f) 3 Taunt. 51.

(g) 2 H. Blac. 267.

(h) *Id.* 284.

(i) 2 Bos. & Pul. 219.

(kk) 2 New Rep. C. P. 360; and see 1 Campb. 518. 2 Campb. 428, n.

(ll) 6 Taunt. 530. 2 Marsh. 230, S. C.

(mm) 5 Taunt. 28.

ing interest on their balances, and that it was a component part of the sum recovered in the court below: (n) And interest is not allowed, on the affirmance of a judgment on a recognizance of bail, in the King's Bench; (o) nor in an action on a *replevin* bond; (p) nor on an *indemnity* bond, for damages assessed on a suggestion of breaches, under the stat. 8 & 9 W. III. c. 11, § 8. (q) So, in *debt* on recognizance against bail in error in the Exchequer chamber, the bail are not liable to pay interest between [*1184] the *time of the original judgment and affirmance; though they are liable for interest after affirmance. (a) [A]

In the Exchequer chamber, it is necessary to give a previous notice of moving for interest, on the affirmance of a judgment; (b) and on an affidavit of the service of such notice, (c) and of the nature of the cause of action, (d) where it does not otherwise appear to the court, they will grant the rule. And, in a case which requires it, interest is allowable on a judgment of *nonpros*, as well as on a judgment of affirmance. (e) But an affidavit of the cause of action is said to be not absolutely necessary, on moving for interest on the affirmance of a judgment in the Exchequer Chamber. (f) And the court will not, in the ordinary exercise of its discretion, give interest upon facts stated to them by *affidavit*: because the other party can have no opportunity of contradicting them: (g) but where interest is given, the debt must appear on the face of the record, to be one which carries interest. (g) Formerly, the rule to compute interest on the sum recovered by the judgment, was only a rule to show cause, in the King's Bench, (h) as well as in the Exchequer Chamber: (i) But now the rule, in both courts, is absolute in the first instance. (k) When interest is allowed, it was formerly calculated at the rate of *four pounds per cent. per annum*: (l) but it was afterwards raised to *five pounds per cent.* (m) And, in an action against bankers, for money deposited in their bank, an order was made for interest, after the same rate only at which it was the usage of the bank to allow it to their customers. (nn) On a contract to replace stock, and pay dividends in the mean time, *interest* is given, and not further *dividends*, on the affirmance of the judgment. (oo) And where the judgment is for principal and interest on a bill of exchange, or promissory note, &c., the practice is, for the officer of the court to sever that part of the judgment which was for interest from the principal, by reference to the instrument stated

(n) 7 Taunt. 244. 3 Price, 250, S. C.; and see 1 Stark. Ni. Pri. 219.

(o) 4 Taunt. 722. 6 Price, 338; and see 8 Price, 582.

(p) 4 Taunt. 30.

(q) 5 Taunt. 656.

(a) 4 Bur. 2127. 2 Durnf. & East, 58.

(b) 3 Price, 253. Append. Chap. XLIV. & 125.

(c) Append. Chap. XLIV. § 126.

(d) McClell. 366.

(e) 1 Bos. & Pul. 29.

(f) 2 Price, 7.

(g) 7 Taunt. 244. 3 Price, 250, S. C.

(h) Doug. 752, n. 3.

(i) 2 H. Blac. 284.

(k) Append. Chap. XLIV. § 127; but see 1 Dowl. & Ryl. 183. *Ante*, 1182.

(l) 2 H. Blac. 287.

(m) 1 Bos. & Pul. 30. *Ante*, 874.

(nn) 2 Moore, 206. 8 Taunt. 250. 5 Price, 536, S. C. *Ante*, 1182.

(oo) 7 Taunt. 14.

[A] In Pennsylvania, where a judgment is affirmed upon a writ of error, interest will be included in the execution from the date of the original judgment. *Republica v. Nicholson*, 2 Dall. 256. Where a judgment of the court of errors affirming a judgment of the Supreme Court of New York, is affirmed by the Supreme Court of the United States on a writ of error from that court, interest on the judgment is allowed only to the time of rendering the last judgment of affirmance. *Hoyt v. Gelston*, 15 Johns. 221.

on the record by which it became due, and to compute interest on the principal only.(p)

In the court holden before the Lord Chancellor, and treasurer and judges, (under the 31 Edw. III. stat. 1, c. 12,) for examining erroneous judgments in the Exchequer, the practice is to give interest, from the day of signing judgment, to the day of affirming it there; computed according to the current, not according to the strictly legal rate of interest.(q) In the House of Lords, they give large or small costs in their discretion, *according to the nature of the case, and the reasonableness or [*1185] unreasonableness of litigating the judgment of the court below:(aa) But it is not usual to give more than *one hundred* and *fifty* pounds costs, on the affurance of a judgment. And, in order to mitigate costs, the plaintiff will sometimes withdraw his errors. But the court of King's Bench would not refer it to the master, to tax the plaintiff his costs in error in parliament, on a judgment affirmed on error in the House of Lords without awarding costs, and remitted to the King's Bench, to the end that such proceedings might be had thereon, as if no such writ of error had been brought.(b)

After affirmance, or *nonpros* for not assigning errors, the defendant in error having taxed his costs, which may be done in *four* days exclusive after affirmance in the Exchequer chamber,(c) may take out *execution* for the sum recovered in the original action, as well as the damages and costs in error, or for these alone, by *fieri facias*,(d) against the goods and chattels of the plaintiff in error; by *elegit*, against his goods, and a moiety of his lands; or by *capias ad satisfaciendum*,(e) against his person.

But when the judgment is affirmed in the Exchequer chamber,(f) or House of Lords,(g) to which a transcript of the record only is removed by the writ of error, it is necessary that the transcript should be *remitted* to the court of King's Bench, before the execution is issued, or at least before it is returnable.(h) And when a writ of error determines in the Exchequer chamber, by abatement or discontinuance, the judgment is not again in the King's Bench, till there be a *remittitur* entered; for without a *remittitur*, it cannot appear to that court, but that the writ of error is still pending in the Exchequer chamber;(i) and therefore in such case, it is usual for the party succeeding in the original action to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution.(k) So, if the plaintiff recover a judgment against two defendants in the King's Bench, and one of them bring a writ of error in the Exchequer chamber, the plaintiff cannot charge the other defendant in execution, till the record be remitted; notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. And though a

(p) 5 Taunt. 758.

(q) 2 Bur. 1096. 1 Blac. Rep. 267, S. C.

(aa) 2 Bur. 1097. 1 Blac. Rep. 268, S. C.

(b) 2 Maule & Sel. 249.

(c) Imp. K. B. 10 Ed. 739. 2 Sel. Pr. 2 Ed. 392.

(d) Append. Chap. XLIV. § 138, &c.

(e) *Id.* § 148.

(f) Palm. 186, 7.

(g) Cowp. 843.

(h) Append. Chap. XLIV. § 128, 134, 5.

(i) 1 Salk. 261, 319. 1 Ld. Raym. 244, S. C.

(k) 1 Salk. 265. 1 Cromp. 3 Ed. 362. And for the form of a rule for execution, on *nonprossing* a writ of error, in the Exchequer of Pleas, see Append. Chap. XLIV. § 118.

writ of error abate by the death of the plaintiff in error, before it is returned and certified, yet execution cannot afterwards be issued on the judgment, without leave of the court: and the court, having set aside the execution on this ground, refused to give the plaintiff in the action leave to issue a *testatum fieri facias*, tested in the preceding term, on [*1186] *the return day of the original *fieri facias* which was after the allowance and service of the writ of error. (a) On a writ of error from the King's Bench to the Exchequer chamber, (bb) or House of Lords, (cc) after the proceedings are remitted into the King's Bench, they are entered at the foot of the original roll in that court; and if a writ of error be first brought in the Exchequer chamber, and afterwards in the House of Lords, the proceedings in both courts are entered, after a *remittitur*, on the same roll.

The writ of execution being founded on the record, must issue out of the court of King's Bench, where the record is; (dd) and that, as well where the judgment is affirmed on a writ of error *coram nobis*, or from the Common Pleas or an inferior court, returnable in the King's Bench. (ee) as where it is affirmed in the Exchequer chamber, (f) or House of Lords. (g) But there was formerly an exception to this rule, when a writ of error lay from the King's Bench in *Ireland* to the King's Bench in *England*; it being holden that a *capias* did not lie here, for costs given upon affirmance of a judgment in *Ireland*: But the method was, to issue a writ, reciting all the proceedings here, directed to the chief-justice of the King's Bench in *Ireland*, requiring him to issue process of execution; and by this mandatory writ, the cause was restored to that court. (h) The writ of execution should be directed to the sheriff of the county where the venue was laid in the original action; and if it issue into another county, should be made a *testatum*: and it must be returnable according to the nature of the former proceedings; if by *bill*, on a day certain at *Westminster*, or if by *original*, on a general return day, *ubicunque*, &c.

If judgment be *reversed*, the party shall be restored to all that he has lost by occasion of the judgment; (i) and a writ of *restitution* shall be awarded. (k) When the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party, we have seen, (l) shall have restitution without a *scire facias*; for there is a certainty of what was lost; otherwise where it was levied, but not paid; for there must then be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied, (m) &c.

If a man recover damages, and have execution by *fieri facias*, and upon the *fieri facias* the sheriff sell to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff has

(a) 7 East, 296. *Ante*, 996.

(bb) Append. Chap. XLIV. § 128.

(cc) *Id.* § 134.

(dd) *Ante*, 994, 5. 1 Ld. Raym. 427. 1 Salk. 321, S. C.

(ee) Cowp. 843; but see 4 Dowl. & Ry. 153.

(f) Palm. 186, 7.

(g) Cowp. 843.

(h) 1 Ld. Raym. 427. 1 Salk. 321, S. C.

(i) Cro. Jac. 698.

(k) Append. Chap. XLIV. § 149, 50; and see Append. Chap. XLVI. § 125.

(l) *Ante*, 1033.

(m) 2 Salk. 588. Append. Chap. XLIV. § 147, 8. Lil. Ent. 641, 650; and see 2 Wms. Saund. 5 Ed. 101, s.

sold it by command of the writ of *feri facias*.(n) But if a man *recover damages in a writ of *covenant* against B. and have an [*1187] *elegit* of his chattels and a moiety of his lands, and the sheriff upon this writ deliver a lease for years, of the value of 50*l.* to him that recovered, *per rationabile pretium et extentum, habendum* as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after B. reverse the judgment he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet here is no sale to a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored.(a) And, for the same reason, if personal goods were delivered to the party, *per rationabile pretium et extentum*, upon the reversal of the judgment, the owner shall be restored to the goods themselves.(b)

It may here be proper to say a few words of the writ of *false judgment*,(c) on account of the affinity it bears to a writ of *error*.

The writ of *false judgment* is an *original writ*, issuing out of Chancery; and lies, where an erroneous judgment is given in a court not of record, in which the suitors are judges:(d) This writ may be sued by any one against whom judgment is given, his heir, executor or administrator; or by any one who has sustained damage, though the other defendants do not join, as they ought to do in error;(e) And if the writ be brought upon a judgment in the sheriff's court, it is in nature of a *recordari*;(f) or, if upon a judgment in another court, not of record, it is in nature of an *accedas ad curiam*.(g) If there be no suitors, by whom the plaint may be certified, there shall not be a writ of false judgment: as in a copyhold court, in which, upon an erroneous proceeding, the copyholder must sue to the lord by *petition*.(g) And if it does not lie from a court of requests, to a superior court at *Westminster*: Therefore, where such writ was brought from the *Southwark* court of requests, to the court of Common Pleas, they directed it to be sent back by writ of *procedendo*; as the judgment in the court below was directed by statute to be given "according to equity and good conscience," and not according to the usual course of proceeding at common law.(h)

A writ of false judgment is made out by the cursitor; and ought to be served in court; or if the lord refuse to hold his court, a *distringas tenere curiam* goes against him;(i) and it is a *supersedeas* of execution at common law, from the time of the service.(k) The sheriff is not bound to pay attention to this writ, without being paid for the return of it.(l) And by the *statute 33 Geo. III. c. 68, § 3, "no execution shall be [*1188] stayed upon or by any writ of false judgment, for the reversing of any judgment given in any county court in *Wales*, unless the person or

(n) 2 Bac. Abr. 231.

(a) 2 Bac. Abr. 232. Cro. Jac. 246. 1 Maule & Sel. 425. *Ante*, 1033.

(b) 1 Rel. Abr. 778. 2 Bac. Abr. 232.

(c) Append. Chap. XLIV. § 151. Chap. XLV. § 101.

(d) F. N. B. 18.

(e) Moore, 854.

(f) Append. Chap. XLIV. § 151.

(g) F. N. B. 18. Co. Lit. 60, a.

(h) 9 Moore, 649. 2 Bing. 344, S. C.; and see 10 Moore, 32. *Id.* 171. 2 Bing. 463. S. C.

(i) 6 Hen. VII. 16, a.

(k) *Id.* 15, b.

(l) Barnes, 199.

persons who shall prosecute the said writ, be first bound unto the party or parties for whom the said judgment shall have been given, in a recognizance with *two* sufficient sureties, such as the sheriff in the said court shall approve and allow, in the sum of 10*l*. (except where the sum adjudged for costs and damages shall exceed the sum of 10*l*., and in such case in double the sum so adjudged,) to prosecute the said writ with effect, and also to pay and satisfy, if the said judgment be affirmed, or the said writ abated or nonprossed, all and singular the damages and costs adjudged, and also the costs and damages awarded for the delay of execution." Also, by the statute 34 Geo. III. c. 58, § 1, "no execution shall be stayed or delayed, upon or by any writ of false judgment, or *supersedeas* thereon, for the reversing of any judgment in any inferior court, within the county palatine of *Lancaster*, where the debt or damages are under *ten* pounds, unless the person or persons in whose name or names such writ of false judgment shall be brought, with *two* sufficient sureties, such as the court wherein the judgment is given shall allow of, shall first be bound unto the party for whom such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of false judgment with effect; and also to satisfy and pay (if the said judgment be affirmed, or the writ of false judgment be not proceeded in,) all and singular the debt, damages and costs adjudged, and all costs and damages to be awarded for the delaying of the execution." (a)

Upon the return of the writ, (b) when the whole proceedings are certified, and not before, the plaintiff shall assign his errors: (c) And if the defendant have day given by the roll, the plaintiff may assign errors, (d) with a *scire facias* against him. (e) To compel a joinder in error, the plaintiff may have a *scire facias ad audiendum errores*; (f) or he may serve a rule, as on a writ of error: (g) And, upon two *scire facias*'s *ad audiendum errores* awarded, and *nihil*s returned, or *scire feci* and default made, the judgment shall be reversed. (g)

When the parties are once in court, the subsequent proceedings in false judgment are the same as in error: (g) And if a writ of false judgment abate, or the plaintiff therein be nonsuited, the defendant shall have a *scire facias quare executionem non*. (h) On a writ of false judgment, no costs are in general recoverable; and it is therefore but seldom advisable to have recourse to this remedy.

(a) These provisions seem to have been taken from the statute 19 Geo. III. c. 70. *Ante*, 1149, 50. *Id.* (d).

(b) Append. Chap. XLIV. § 153, 4; 158.

(c) For the forms of an assignment of false judgment, and joinder, see Append. Chap. XLIV. § 156, 7; 159.

(d) F. N. B. 18.

(e) 2 Crompt. 3 Ed. 389.

(f) F. N. B. 18. *Ante*, 1172.

(g) 2 Crompt. 3 Ed. 389. Append. Chap. XLIV. § 155.

(h) F. N. B. 18.

*CHAPTER XLV.

Of the ACTION of EJECTMENT.[A]

IN the present chapter, it is intended to take a practical view of the action of *ejectment*, (a) which will be treated of under the following heads: First, the general nature and object of the action: Secondly, by and against whom it may be brought: Thirdly, for what things an *ejectment* will lie, and how they should be described: Fourthly, the title necessary to support it, and herein of the legal estate, and right of entry: Fifthly, within what time an *ejectment* must be brought: Sixthly, the remedy by entry, without suit: and in what cases an actual entry, and demand of rent was formerly necessary, and must now be made; Seventhly, the *ancient* mode of proceeding in *ejectment*, and in what cases it is still necessary; with the method of proceeding in the case of a *vacant* possession: Eighthly, the present mode of proceeding against the *casual* ejector, to judgment by default and execution, where the tenant or his landlord does not appear: Ninthly, the appearance of the *tenant*, or his *landlord*, and subsequent proceedings thereon, to trial, final judgment and execution: And lastly, the mode of reviving the judgment by *scire facias*, or of reversing it by writ of *error*.

The action of *ejectment* is a *mixed* action, by which a lessee for years, when ousted of his possession, may recover his term and damages: (b) It is *real* in respect of the lands, but *personal* in respect of the damages. (c) This form of action is said to have been invented in the reign of King *Edward* the second, or in the early part of that of *Edward* the third; (d) and at first, *damages* only were recoverable therein: (e) but afterwards, the plaintiff was allowed to recover his *term* also. This alteration seems to *have taken place in the reign of *Edward* the fourth; (aa) [*1190] and was finally established in that of *Henry* the seventh, in the King's Bench, (bb) and of *Henry* the eighth, in the Common Pleas. (bb) Even after this period, however, it was said that the term was not the

(a) For the history of this action, for whom, and in what cases it lies, and in what not, and the proceedings therein, see the very valuable Treatises of Lord Chief Baron *Gilbert*, Serjeants *Runnington* and *Adams*; the Abridgments of *Rolls*, *D'Anvers*, *Viner*, and *Bacon*, tit. *Ejectment*; Com. Dig. same title, and tit. *Pleader*, 2 Z. 3 Blac. Com. 199, &c., and *Bulwer's*, *Espinasse's*, and *Selwyn's Nisi Prius*, tit. *Ejectment*: And for the practice therein, see same title, in 2 Crompt. 2 Sel. Pr. Imp. K. B. & C. P. Burn's K. B. Lee's Pr. Dict. and 2 Archbold.

(b) F. N. B. 220.

(c) Run. Eject. 2 Ed. 1; but see Steph. Pl. Append. vii. viii., where it is doubted whether this is properly a *mixed* action.

(d) Ad. Eject. 2 Ed. 5, 6, 7; and see 3 Reeves, 28, 9. The first recorded instance of an *ejectione firmæ* is said to have been in the 44th year of *Edward* III. (Trin. 44 Edw. III. p. 22, pl. 26.) Ad. Eject. 2 Ed. 7, (g).

(e) P. 6 Ric. II. Fitz. Abr. tit. *Ejectione firmæ*, 2 M. 33 Hen. VI. p. 42, pl. 19. Bro. Abr. tit. *Quare ejcit infra terminum, per Choke*: and see F. N. B. 220, (a). 3 Blac. Com. 200. 3 Reeves, 29, 390. 4 Reeves, 165. Run. Eject. 13. Ad. Eject. 8.

(aa) 7 Edw. IV. 8, per *Fairfax*. Bro. Abr. tit. *Quare ejcit infra terminum*, 3. Hale's Hist. C. L. 5 Ed. 287. 3 Blac. Com. 201. Steph. Pl. 22, (t).

(bb) F. N. B. 220. Jenk. Cent. 77. Rast. Ent. 258, a; and see 3 Blac. Com. 201. 3 Reeves, 390, 91. 4 Reeves, 165. Run. Eject. 14, 15. Ad. Eject. 9. 3 Wils. 120.

principal to be recovered in this action, but that damages were the principal; and the term, if any part were to come, was only accessory or incident : (cc) but now, the term is considered as the principal, and the damages merely nominal.

This action may be brought by, or on the demise of, tenant in fee simple, fee tail, for life, or for years; and that, whether he claim in his own right, or in right of his wife, (dd) or as guardian in socage, (ee) heir at law, (f) devisee, (g) executor or administrator, (h) or assignee of a bankrupt, (i) or insolvent debtor; (k) or be entitled in severalty, or as joint tenant, coparcener, or tenant in common. (l) And it is either brought against a *stranger*, claiming in opposition to the title of the lessor of the plaintiff, or founded on a *privity* of estate between the parties; (m) as in the case of a lord claiming by escheat, or for a forfeiture; (n) or by the lessor, or assignee of the reversion, (o) against tenant for years, or person holding under him, on the expiration of a term, (p) or forfeiture of a lease; (q) or against tenant from year to year, on a notice to quit; (r) or by mortgagor against mortgagee; (s) or by one joint tenant, or tenant in common, against his companion; (t) or by tenant by *elegit*, (u) or conusee of a statute merchant, or statute staple, (u) or recognizance in nature of a statute staple, &c.

An *ejectment* will in general lie to recover possession of any thing on which an entry may be made, and whereof the sheriff can deliver possession; [A] as messuages, cottages, (x) mills, (y) barns, stables, coachhouses,

(cc) Dyer, 117, a, *per Saunders*.

(dd) Run. Eject. 260, 61, 2.

(ee) *Id.* 258, &c. Ad. Eject. 64, 270.

(f) Run. Eject. 362, 3. Ad. Eject. 249, &c.

(g) Run. Eject. 341, &c. Ad. Eject. 67, 256, &c.

(h) Ad. Eject. 66, 7, 266.

(i) *Id.* 64, 5; 270.

(k) 2 Car. & P. 79. 3 Bing. 203, S. C. 4 Bing. 348. *Ante*, 389.

(l) Run. Eject. 257, 8. Ad. Eject. 81, 270, 71.

(m) Ad. Eject. 271, &c.

(n) *Id.* 69, 279. Run. Eject. 392, &c.

(o) Ad. Eject. 68, &c., 278, 9.

(p) *Id.* 272, 3.

(q) *Id.* 277. Run. Eject. 73, &c. 94, &c.

(r) Run. Eject. 101, &c., 337, &c. Ad. Eject. 273, &c.

(s) Run. Eject. 119, &c. Ad. Eject. 58, 279.

(t) Ad. Eject. 271.

(u) *Id.* 65, 6; 267. Run. Eject. 43, 384, &c.

(x) Cro. *Eliz.* 818.

(y) 1 Mod. 90.

[A] The general rule is, that an action of ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession. *Jackson, ex dem. Saxton v. May*, 16 Johns. Rep. 184. Wherever a right of entry exists, and the interest is tangible, so that possession of it can be delivered, an ejectment will lie for it. *Jackson ex dem. Louz et al. v. Buel*, 9 John. Rep. 298. If the owner of lands allows another to erect buildings upon it, under a contract that when the buildings are completed he will either pay for them or convey the land at his election, ejectment will lie upon ouster of the building before such election is made. And if a creditor of him who owns the fee, levy an execution on the land, and do not include the buildings in the appraisement, ejectment will lie by the creditor of the builder who has levied an execution on any section of the building. *King v. Callin*, 1 Tyler's Rep. 355. Ejectment will only lie for things whereof possession may be delivered by the sheriff. *Black v. Hepburne et al.*, 2 Yeates, Rep. 331. *Farley v. Craig*, 3 Green, Rep. 192. It will lie to recover possession of a room in a house. *White v. White*, 1 Harringtons, Rep. 202. It will lie, in New Jersey, to recover an incorporeal hereditament. *Den v. Craig*, 3 Green, 191. In Pennsylvania, the owner of an equitable title may recover in ejectment or partition. *Willing v. Browne*, 7 Serg. & Rawle, 467. Ejectment will lie for land which was below high water mark in navigable waters and arms of the sea where it has been filled up and made hard land. *The People v. Mauran*, 5 Denio, 389. It will not lie for a mere privilege of a landing place held in common with other citizens of a town. *Black v. Hepburne*, 3 Yeates, Rep. 321. The right of the riparian proprietor to land below high water mark may be vindicated against a disseisor, in this action. *Nichols v. Lewis*, 15 Conn. Rep. 137. If a grantor reserves to himself, his heirs and assigns forever, "the right and privilege of erect-

warehouses,(z) outhouses, yards, gardens, orchards,* arable, meadow, and pasture land, woodland, underwood,† land covered with water,‡ furze and

(z) Cro. Car. 555.
(†) 2 Rol. Rep. 482.

(*) Cro. Eliz. 854. Cro. Jac. 654. 1 Lev. 58. 4 Mod. 1.
(‡) Co. Lit. 4, b.

ing a mill-dam, at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee or his heirs, &c.," he has such an interest in the land reserved as will support an ejectment. *Jackson, ex dem. Loux et al. v. Bucl*, 9 Johns. Rep. 298. But the grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer such a right as to enable the lessee to maintain ejectment. *Jackson, ex dem. Saxton v. May*, 16 Johns. Rep. 184. Ejectment may be brought on a contract for the sale of a mill, though the contract embrace other matters connected therewith. *Carmalt v. Platt*, 7 Watts, 318. *Irvine v. Bull*, 7 Watts, 323. The owner of the soil may maintain an ejectment for land in which others possess an easement or right of way; for the freehold still remains in him. *Cooper v. Smith*, 9 Serg. & Rawle, Rep. 26. When a highway is laid out over the land of a private person, the public acquires no more than a right of way, or easement, and the title of the original proprietor still continues; he may use the land in any manner not inconsistent with the public right; is entitled to all mines, &c., and may maintain trespass or ejectment, in relation to it. *Jackson, ex dem. Yates et al. v. Hathaway*, 15 Johns. 447, and *vide* to the same purport; *Cortelyou v. Van Brandt*, 2 Johns. Rep. 357. *Whitebeck v. Cook et ux.*, 15 Johns. Rep. 491. *Babcock v. Lamb et al.*, 1 Cowen's Rep. 238. *Peck v. Smith*, 1 Conn. Rep. 130.

It was once doubted, whether ejectment or other real action, would lie for the soil of a road or highway, because it was said, full seisin could not be delivered; and a dictum of Lord Hardwicke was quoted to that effect, in the case of *Goodtitle v. Alker et al.*, 1 Burr. 133; but that doubt was removed by the decision in that case, and very clearly it had no foundation in principle. And it was never doubted that the owner of a soil over which a highway was laid, could maintain trespass for an injury done to the soil. *Per Wilde, J.*, delivering the opinion of the court; 6 Pick. Rep. 59. In the case of *Stackpole et al. v. Haley*, 16 Mass. Rep. 35, *Putnam, J.*, delivering the opinion of the court said: "The principal question intended to be presented in this case, is whether the people of this commonwealth have a right to use the lands for the purpose of grazing, which have been laid out as highways. I hold it to be clear that the public have no other right but that of passing and repassing; and that the title to the land and all the profits to be derived from it consistently with and subject to the right of way, remain in the owner of the soil. The owner may maintain trespass for any injury done to the soil which is not incidental to the right of passage acquired by the people. The land covered by a highway may be recovered in ejectment." And *vide* to the same purport; *Alden v. Murdock*, 13 Mass. Rep. 256. *Perley v. Chandler*, 6 Ib. 456. *Commonwealth v. Peters*, 2 Ib. 127. *Chambers v. Furrys*, 1 Yeates, Rep. 167. A public highway only vests in the commonwealth a right of passage, but the freehold and the profits, such as trees upon it, and mines under it, belong to the owner of the soil, who has a right to all remedies for the freehold, subject, however, to the easement. *Bolling v. The Mayor, &c., of Petersburg*, 3 Rand. 563. But in the case of *Doe ex dem. The Minister, &c., of the Parish of St. Julien v. Cowley*, 1 Car. & P. Rep. 123, tried at the Shrewsbury Assizes, before Mr. Baron Hulloek, he held that ejectment cannot be brought against a person for setting up a stall in a street. The remedy is an action of trespass by the owner of the soil. Ejectment is almost the only action for trying title to land in Pennsylvania. *Morris v. Vandereen*, 1 Dallas, 67. Since the act of 1834, giving the Orphans' Court equity jurisdiction in the case of legacies charged upon the land, ejectment will not lie to enforce a provision in a will, by which the payment of a sum of money, or the support of a widow, &c., is charged upon land. *Cravin v. Bleakley*, 9 Watts, 19. *Downer v. Downer*, Watts, 60. *Strickler v. Sheaffer*, 5 Barr, 240. *Reed v. Reed*, 5 Barr, 241.; note. *Mohler's Appeal*, 8 Barr, 26. The owner of an equitable title may recover in ejectment or partition. *Willing v. Brown*, 7 Serg. & Rawle, 467. *Schuylkill Navigation Co. v. Farr*, 4 Watts & Serg. 374. In this state, ejectment is substituted for a bill in chancery, and wherever chancery would execute a trust, or decree a conveyance, the courts of Pennsylvania would direct a recovery in ejectment. *Peebles v. Reading*, 8 Serg. & Rawle, 484. Thus ejectment lies, in Pennsylvania, to enforce the specific performance of articles of agreement. *Hawn v. Morris*, 4 Binn. 77. *Vincent v. Huff*, 4 Serg. & Rawle, 301. When the party entitled to a conveyance does every thing necessary to be done in order to obtain a decree for a specific performance, he stands, in Pennsylvania, in a situation to support or defend an action for the possession of land. *Griffith v. Cochran*, 5 Binn. 105. *Martin v. Willink*, 7 Serg. & Rawle, 298. Ejectment will lie as a substitute for a bill in equity, to enforce execution of articles of agreement on the part of a vendee who has never been in possession; and in such action, equity in a proper case, will reform the

heath,§ moor and marsh,|| &c. It also lies for the recovery of a messuage or dwelling house,¶ messuage or burgage,¶ messuage or *tenement, [*1191] called the *Black Swan*; (a) or of a house generally, (b) or part of a house in *A.*; (c) or of a room and chamber in the second story of a house; (d) or of a passage room, (e) or room generally. (f) So, it lies for a close called *D.* containing three acres of land, (g) or two closes called *Higher* and *Lower Gulwell*, (h) or a croft called *Black acre*; (i) or for a coal or other mine, (k) or coal mines generally, in *Gartside*; (l) or for a boiery of salt, (m) or pool or pit of water; (n) for *Aldercarr* in *Norfolk*, (o) *Cattle gates* in *Yorkshire*, (p) *Beast gates* in *Suffolk*, (p) a bog or mountain in *Ireland*, (q) or a township, kneave, or quarter of land there; (r) for the first grass, or *prima tonsura*, (s) hay grass, or aftermath (t) herbage, (u) the pasture of one hundred sheep, (x) ten acres of pease, (y) or land being part of a highway. (z) But it lies not for a tenement generally [A] without any other description, ** or for a messuage or tenement, †† or messuage and tenement; †† though, after verdict in ejectment for a messuage and tenement, the court gave leave to enter the verdict, according to the judge's notes, for the messuage only, pending a rule to arrest the judgment, without obliging the lessor of the plaintiff to release the damages. †† So it lies not for a close, §§ croft, ||| or piece of land. ¶¶ generally, without giving it a name, or other description; or for the third part of a close, or fourth part of a meadow, *** or for mountain or waste in *England*, ††† or a watercourse, or rivulet, ††† In *ejectment* for land, the particular species should be mentioned in the declaration, as whether it be meadow or pasture, &c. because land, in its legal acceptation, signifies only *arable* land; §§§ and the number of acres must be expressed with certainty: therefore, an ejectment for *forty* acres of land, *by estimation*, is not good. |||||

- | | | |
|---|---|------------------|
| (§) 1 Mod. 90. 5 Bur. 2672. | () 5 Bur. 2672. | (¶) Hardr. 173. |
| (a) 1 Sid. 295. | (b) Cro. Jac. 654. Palm. 337, S. C. | |
| (c) Cro. Eliz. 286, 2 Str. 695. | (d) 3 Leon. 210. | |
| (e) 2 Ld. Raym. 1307. | (f) 3 Leon. 210. | |
| (g) Cro. Jac. 435; and see Cowp. 349. | (h) Cro. Jac. 435. | (i) Lev. 58. |
| (k) Cro. Jac. 150. Noy, 121. | | |
| (l) 1 Salk. 255. 4 Mod. 143. 1 Show. 367. Carth. 277. Comb. 201, S. C. | | |
| (m) Co. Lit. 4, b. Cro. Jac. 150. 1 Lev. 114. 1 Sid. 161, S. C. | | |
| (n) Co. Lit. 5, a, b. Yelv. 143. | (o) 2 Str. 1063. | |
| (p) Id. 1084. | (q) Cro. Car. 511, 12. | |
| (r) 1 Bur. 623, 630. | (s) Cro. Car. 362; and see 6 East, 602. | |
| (t) Hardr. 330; and see 2 Durnf. & East, 451. 4 Durnf. & East, 671, 677, 8. 5 Durnf. & East, 329. | (u) Hardr. 330; but see Co. Lit. 4, b. | (z) 2 Dalis. 95. |
| (y) 1 Brownl. 150. | (z) 1 Bur. 133, 145. | |
| (**) 2 Str. 834. 1 East, 441. 1 Moore & P. 330; but see 1 Durnf. & East, 11. | | |
| (††) 3 Wils. 23. | (††) 8 East, 357; and see 1 Moore & P. 330. | |
| (‡‡) 11 Co. 55. Godb. 53. 1 Rol. Rep. 55. | () 1 Rol. Rep. 55. | |
| (¶¶) Owen, 18. 1 Salk. 254. | (***) 1 Lev. 213. | |
| (†††) Hardr. 57. | (†††) Yelv. 143. | |
| (‡‡‡) 11 Co. 55. 1 Salk. 254; and see Cowp. 346. | () Ley, 82. | |

contract. *Tyson v. Passmore*, 2 Barr, 122. "An ejectment to enforce specific performance of a purchase, being with us, a substitute for a bill in equity, is to be affected with all those considerations that would affect a bill for that purpose in the contemplation of a chancellor. With him, the enforcement of the contract is not of right but of grace; and he withholds the exercise of his extraordinary power wherever there is a doubt about the facts on the basis of which it is invoked." *Brawdy v. Brawdy*, 7 Barr, 158, *per Gibson, C. J.* Ejectment, in Pennsylvania, is substituted for the bill in equity; but it is subject to all those considerations by which a claim to have the land itself may be defeated. *Pennoch v. Freeman*, 1 Watts, 408. *Bishop v. Reed*, 3 Watts & Serg. 264.

[A] *Contra, Den v. Woodson*, 1 Hayw. Rep. 24.

It seems, that an *ejectment* will lie for a *manor*, or moiety of a manor, generally, without any description of the number of acres or species of land contained therein; and that under such general description the jury *may find a verdict for the plaintiff, for a messuage, or for so many [*1192] acres "parcel of the said manor," and for the defendant, for the residue of the manor; (a) though it is said, in the old cases, not to be safe to bring an ejectment for a manor, without describing the quantity and species of the land. (b) And where an ejectment was brought *de castro, villâ, et terris*, without expressing the number of acres, it was holden insufficient even after verdict, on a writ of error; because too generally demanded, and therefore impossible for the sheriff to know what quantity he was to deliver upon *habere facias possessionem*. (c) [A]

At common law, an *ejectment* lay for a *rectory*, which consists of a church, glebe lands, and tithes, and which therefore has been said to resemble a manor; the church being compared to the mansion house, the glebe lands to the demesnes, and the tithes to the services. (d) But evidence of tithes only is not evidence of a *rectory*; and therefore it has been holden, that where the plaintiff could only prove that the defendant took the tithes belonging to the rectory, there was no evidence of an ejectment, or ouster of the rectory. (e) So it seems, that an *ejectment* will lie for a church, (f) or chapel, (g) though it should be demanded as a *messuage*; or for a place called the *vestry* in *D.*: (h) and it was said in argument, in one case, (i) that *ejectment* will lie for a prebendal stall, after collation.

Tithes being esteemed a part of the incorporeal inheritance, were, by

(a) Ad. Eject. 2 Ed. 28.

(b) Hetl. 146. Lit. Rep. 299, 301. Latch, 61, a.

(c) Yelv. 118. Run. Eject. 2 Ed. 149.

(d) Run. Eject. 2 Ed. 157.

(e) Latch, 62.

(f) 1 Salk. 256.

(g) 11 Co. 25, b. Sty. Rep. 101.

Doct. Pl. 291.

(h) 3 Lev. 96.

(i) 1 Wils. 11, 14.

[A] "The ancient rule required the description of the premises in the declaration to be so certain, that the sheriff might know, from his execution, exactly of what to deliver possession. The relaxation of that rule has opened the way to numerous and vexatious applications to correct the errors of the sheriff in delivering possession; and the settled rule of the Supreme Court, where a general verdict is given for the plaintiff, is to restrict him to the taking possession of so much only as he gave evidence of his title to on the trial." *Per Spencer, Senator, in Seward v. Jackson, ex dem. Van Wyck*, (in error,) 8 Cowen, Rep. 427.

There must be such a description of the land claimed in an action of ejectment, as will enable the sheriff to deliver possession after judgment. *Fenwick v. Floyd's Lessee*, 1 Har. & Gill, Rep. 172. *Clark v. Clark*, 7 Verm. Rep. 190. *Sawyer v. Fitts*, 4 Stewart & Porter, Rep. 365. *Jones v. Porter*, 3 Penn. Rep. 132. *Pickett v. Doe*, 5 Smed. & Marsh. Rep. 470. *Harrison v. Stephens*, 12 Rand. 170. *Van Alstyne v. Spraker*, 13 Ib. 578. *Fouke v. Kemp*, 5 Harr. & John. Rep. 155. *Brooks v. Tyler*, 2 Verm. Rep. 348.

As to what description of the land is sufficient, see *Russell v. Fee*, 1 Browne, 194. *Griffith v. Dobson*, 3 Penn. 228. *Hawn v. Norris*, 4 Binn. 77. *Fisher v. Larick*, 7 Serg. & R. Rep. 99. *Den v. Woodson*, 1 Hayw. 24. *Chamberlain v. Crawford*, 1 Har. & M'Hen. 355. *Redding v. M'Cubbin*, 1 Har. & M'Hen. 368. *Barclay v. Howell*, 6 Pet. 498. *Fenwick v. Floyd*, 1 Har. & Gill, 172. *Fouke v. Kemp*, 5 Har. & John. 135. *Talbot v. Wheeler*, 4 Day, 448. *Wooster v. Butler*, 13 Conn. Rep. 309. *Job v. Tebbetts*, 4 Gilman, 159.

The lessor of the plaintiff may declare for an indefinite number of tracts of land, and recover according to the quantity to which he proves title. *Huggins v. Ketchum*, 4 Dev. & Batt. Rep. 414. A plaintiff in ejectment, claiming under a deed conveying the balance of a tract of land, must show what the balance is and where situate, or he cannot recover. *Taylor et al. v. Taylor et al.*, 3 A. K. Marsh. Rep. (Ky.) 19. If the plaintiff in ejectment declare for the whole, he may recover a part; or if he declare for a part, he may recover less; the rule is, that he may recover less, though he cannot recover more than he declares for. *Lessee of Patton et al. v. Cooper*, 1 Cooke, Rep. 133. The plaintiff may recover, though the defendant be in possession of less than is declared for. *White v. Saint Gairons*, 1 Minor, Rep. 331, (Ala.) *Mitchell v. Glover*, 1 Harr. & Johns. 507. *Mower v. Mower*, 20 Wend. 635.

the common law, only of ecclesiastical consueance: But, by the statute 32 Hen. VIII. c. 7, "every lay person having any estate of inheritance, freehold, term, right or interest in tithes, and being thereof disseised, de-forded, wronged, or otherwise kept from the same, shall have his remedy in the courts of law for them, in like manner as for lands." Hence an *ejectment* now lies for *tithes*. It is, however, given only to lay impropriators; (i) for the act leaves *spiritual* persons to pursue their old remedy in the spiritual court; the words only extending to such tithes, pensions, oblations, and other spiritual and ecclesiastical profits, as are made temporal, or admitted to be and abide in temporal hands, or for lay uses. (i) This doctrine is said to have been since extended, by analogy, to tithes in the hands of the clergy. (k) And the *ejectment* for tithes lies only against the person claiming or pretending to have title thereto; and not against such persons as refuse or deny to set them out, by which is meant sub-tractors of tithes: In such case, the lay person is, by the express words of the act, left to his remedy in the spiritual court. (l)

[*1193] *A *common appendant*, or *appurtenant*, may be recovered in *ejectment* brought for the lands to which it is appendant or appurtenant, provided such right of common be mentioned in the description of the premises; because he who has possession of the land, is also entitled to the common, and the sheriff, by giving possession of the one, executes the writ as to the other. (aa) But it may be proper to state in the declaration, that the common so claimed is a common appendant, or appurtenant; although it has been holden, after verdict, that an *ejectment* for lands, and also for "common of pasture" generally, is sufficient. (bb) With these exceptions, an *ejectment* will not lie for *incorporeal* hereditaments, or things that lie merely in grant, and are not capable of being delivered in execution; (c) as for a *rent*, (c) *advowson*, (d) or *common in gross*, or *per cause de vicinage*, or for *pannage*. (e) And where the owner of the fee, by indenture, granted to A. his partners, fellow adventurers, &c. free liberty to dig for tin and all other metals, throughout certain lands therein described, and to make adits, &c. together with the use of all water and watercourses, reserving to himself liberty to drive new adits, and to convey any water-course over the premises granted, *habendum* for twenty-one years, with a right of re-entry for breach of covenant; the court held, that this deed did not amount to a lease, but contained a mere license to dig, &c. and the grantee could not maintain *ejectment* for mines lying within the limits of the set, but not connected with the workings of the grantee. (f) In the earlier cases it was holden, that an *ejectment* would not lie for a *fishery*, because it was only a profit *apprendre*: (g) though it was said by *Ashhurst, J.* in a later case, (h) "there is no doubt but that a *fishery* is a tenement; *trespass* will lie for an injury to it, and it may be recovered in *ejectment*." This, however, must it seems be understood of a *several fishery*. (ii)

(i) 1 Wils. 31, 14.

(k) 3 Blac. Com. 206. Run. Eject. 2 Ed. 155. Ad. Eject. 2 Ed. 73. *Sed quære*; as the authorities cited in Cro. Car. 301; and 2 Ld. Raym. 789, do not seem to warrant the position.

(l) Run. Eject. 2 Ed. 154, 5; and see 27 Hen. VIII. c. 21. 32 Hen. VIII. c. 7. 2 & 3 Edw. VI. c. 13. (aa) Ad. Eject. 2 Ed. 19. (bb) Cas. temp. Hardw. 127. 1 Str. 54.

(c) 3 Blac. Com. 199, (2), 206.

(d) Cro. Jac. 146; but see 2 Wils. 116.

(e) 1 Lev. 212, 13. 1 Sid. 416, S. C.

(f) 2 Barn. & Ald. 724.

(g) Cro. Jac. 144. Cro. Car. 492. Yelv. 143. 8 Mod. 275, 277.

(h) 1 Durnf. & East, 358, 361.

(ii) Co. Lit. 4, b.

In order to maintain an *ejectment*, it is necessary that the lessor of the plaintiff should have a *legal* estate in the tenements sought to be recovered; [A] an *equitable* title not being deemed sufficient. It was indeed declared by Lord Mansfield, in the case of *Lade v. Holford*,^(k) that he and many other of the judges had resolved, never to suffer a plaintiff in ejectment to be nonsuited, by a term outstanding in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but would presume it to be surrendered: And accordingly, a reversioner was formerly allowed to recover his reversionary interest in ejectment, subject to a lease and immediate right of possession in another.^(l) This doctrine, however, *has been since overruled; and it is now [*1194] settled, that though where trustees ought to convey to the beneficial owner, it shall be left to the jury to presume that they have conveyed accordingly; (a) or, where the beneficial occupation of an estate by the possessor, under an equitable title, induces a probability that there has been a conveyance of the legal estate to the person who is equitably entitled to it; (b) yet where the facts of the case preclude such presumption, and it clearly appears that the legal estate is still outstanding in a trustee, the *ejectment* must be brought in his name, and cannot be maintained in that of the *cestui que trust*.^(cc) It even seems, that a trustee may in strictness maintain an *ejectment* against his own *cestui que trust*:^(dd) and an unsatisfied term, outstanding in trustees, will bar the recovery of the heir at law, even though he claim only subject to the charge.^(ee) So, an *ejectment* cannot be maintained by a mortgagee, or tenant by *elegit*,^(f) against the tenant in possession, hold-

(k) Bul. Ni. Pri. 110. 2 Bur. 1416. 1 Blac. Rep. 428, S. C.; and see *Doug.* 282, *accord*.

(l) 1 Durnf. & East, 758, a. 2 Durnf. & East, 698, S. C., cited.

(a) 4 Durnf. & East, 682. 7 Durnf. & East, B. 49.

(b) 8 Durnf. & East, 122; and see 2 Barn. & Ald. 710, 782.

(cc) 2 Durnf. & East, 684; and see 7 Durnf. & East, 3, 49. 8 Durnf. & East, 122, 3. 5 East, 138.

(dd) 8 Durnf. & East, 122, 3.

(ee) 2 Durnf. & East, 684.

(f) 8 Durnf. & East, 2.

[A] The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. *Eldon v. Doe*, 6 Blackf. Rep. 341. *Huddleston v. Garrett*, 3 Humph. 629. *Winn v. Cole*, Walker, Rep. 119. The plaintiff in ejectment must show a complete title, and identify the land in accordance therewith; and where the court instructed the jury that in the absence of any proof of title to the land in controversy, on the part of the defendant, he had no right to complain of any adjustment between the lessor of the plaintiff and the person through whom the lessor of the plaintiff claimed as to the particular land the vendee of the lessor designed conveying, and that the land he designed conveying was in fact that which was actually conveyed, it was held erroneous. *M. Raven v. M. Guire*, 9 Smedes & Marsh. Rep. 24. Where a plaintiff relies on a documentary proof of title, a complete title must be shown; and if a material link be wanting, his documentary proof should be excluded from the jury. *Jenkins v. Noel*, 3 Stew. Rep. 60. It is not indispensable that the plaintiff should show a perfect indefeasible estate in fee simple to authorize a recovery against one who can establish no legal right, either of property or possession. *Lewis v. Gogutte*, 3 Stew. & Port. Rep. 184. The plaintiff in ejectment relied on a judgment in partition only, and that being void, it was held, that he could not recover in such case his undivided share without deducing a regular title as if no such judgment of partition had been entered. *Jackson v. Brown*, 3 Johns. Rep. 459. Where the plaintiff in an action of ejectment, commenced in 1809, showed title by a release made in 1767, in partition to eighteen-twentieths of the premises in question, and proved by witnesses that all the lots in the patent so divided with which they were acquainted, were held agreeably to that partition, and no outstanding title in the two remaining patentees appearing: held, that it might legally be inferred that the lessor had a perfect title to the whole. *Doe v. Campbell*, 10 Johns. Rep. 475.

ing under an existing lease or agreement, made prior to the mortgage, or judgment on which the *elegit* issued: (g) The remedy in these cases is by action or distress for the rent: (h) But a mortgagee, having the legal estate, may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. (i)

An *ejectment* being a possessory remedy, the lessor of the plaintiff must have a *right of entry*, on the day of the demise: (k) and therefore, an *ejectment* will not lie, when the right of entry is taken away: as by the *discontinuance* of an estate tail, (l) &c. by a *descent cast*, (m) or by the statute of *limitations*. (n) In the first of these cases the only remedy is by writ of *formedon*, which, by the statute of limitations, (n) must be brought within *twenty* years next after the right of entry accrued; and in the two latter, it is usual to proceed by writ of *right*: So, the lessor of the plaintiff must have an *immediate* right of entry, at the time of the demise in ejectment; and therefore, it lies not for a remainder-man or reversioner, during the continuance of the particular estate. At common law, a right of entry was not assignable, nor, as it seems, devisable; (o) and, by the statute [*1195] 32 Hen. VIII. c. 9, § 2, "no person shall buy or sell any pretended right or title to land, &c. unless the vendor, or his ancestors, or those under whom he claims, have been in actual possession of the same, or of the reversion or remainder, or taken the rents or profits thereof, for the space of one whole year next before the sale; on pain that the buyer and seller shall each forfeit the value of such land to the king and the prosecutor." An *ejectment* therefore cannot be maintained, under a conveyance made by the party who is out of possession. [A]

As the lessor of the plaintiff must have a right of entry, in order to support an *ejectment*, so the action must be brought within *twenty* years next after his title accrued: for, by the statute 21 Jac. I. c. 16, § 1, "no person shall make any entry upon any lands, &c., but within *twenty* years next after his right or title shall first descend, or accrue to the same; and on default thereof, such person so not entering, and his heirs, shall be utterly

(g) Ad. Eject. 2 Ed. 588.

(h) Doug. 278.

(i) *Id.* 21.

(k) Run. Eject. 2 Ed. 44. Ad. Eject. 2 Ed. 34.

(l) Run. Eject. 2 Ed. 44, 5, &c. Ad. Eject. 2 Ed. 35, &c.

(m) Run. Eject. 2 Ed. 49, &c. Ad. Eject. 2 Ed. 41, &c. It is said, however, to be scarcely possible to suggest a case, in which the doctrine of *descent cast* can be now so applied, as to prevent a claimant from maintaining an *ejectment*; as, from the principle of disseisin and election, he may always lay his demise in the time of the ancestor, and elect not to be disseised. *Id.* 41, (e).

(n) 21 Jac. I. c. 16. Run. Eject. 2 Ed. 54, &c. Ad. Eject. 2 Ed. 45, &c.; and see 6 Moore, 542. 3 Brod. & Bing. 217, S. C.

(o) 1 H. Blac. 32. 8 East, 552. 1 Taunt. 578, S. C. in Error.

[A] Possession of land by a party claiming it as his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance. *Ricard v. Williams et al.*, 7 Wheat. Rep. 93. *Stewart v. Town*, 4 Cow. 602. But possession alone, unexplained by collateral circumstances, evidences no more than the mere fact of present occupation by right; the law will not presume a wrong; and a mere possession is just as consistent with a present interest under a lease for years, or for life, as in fee. It must depend on the collateral circumstances, what is the quality and extent of the interest claimed by the party; and to that extent only will the presumption of law go in his favour. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate. *Ricard v. Williams et al.*, 7 Wheat. Rep. 105, 106. *Sparkman v. Porter*, 1 Paine's Rep. 457.

excluded and disabled from such entry after to be made: Provided, that if any person that shall have such right or title of entry, shall be at time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person and his heir shall or may, notwithstanding the said *twenty* years be expired, bring his action, or make his entry as he might have done before that act; so as such person or his heir shall, within *ten* years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no time after the said *ten* years."(a) And therefore, if it appear that there has been an *adverse* possession by the defendant, or those under whom he claims, for the last *twenty* years, and the claimant has not been prevented from prosecuting his claim earlier, by reason of some of the disabilities allowed by the statute, he will be barred of his remedy by ejectment.(b) And an adverse possession of *twenty* years is not only a negative bar to the plaintiff's recovery in ejectment, but takes away his right of possession, and gives a positive title to the opposite party:(c) Therefore, where A. had the possession of lands for *twenty* years without interruption, and then B. got into possession of them, upon which A. was put to his ejectment; here, though A. was plaintiff, yet possession of *twenty* years was deemed a good title, and he recovered accordingly.(d) But it has been justly remarked, that an adverse possession will be negatived in the following cases: First, when the parties claim under the same title: Secondly, when the possession of one party is consistent with the title of the other: Thirdly, when the party claiming title has never, in contemplation of law, been out of possession: Fourthly, when the possessor has acknowledged a title in the claimant:(e) And lastly, an adverse *possession for *twenty* years [*1196] is no bar to a rector or vicar, except as against the same incumbent who submitted to such possession.(aa)

To entitle a party to the benefit of the exceptions in the above statute, it is necessary that the disability to enter should exist at the time when his title accrued; for if he had the power to enter but for an instant, no subsequent disability will be sufficient to arrest the operation of the statute:(bb) And the principle is the same, where a disability existing at the time of the commencement of the title is afterwards removed, and a subsequent disability ensues; the statute continuing to run, notwithstanding the second disability.(cc)[A] So, where the ancestor, to whom the right first accrues,

(a) § 2.

(b) Ad. Eject. 2 Ed. 46, 7.

(c) Run. Eject. 2 Ed. 55.

(d) 2 Salk. 421; and see 1 Bur. 119. Bur. Set. Cas. 451.

(e) Ad. Eject. 2 Ed. 47; and for the cases in support of these positions, see *id.* 47, &c.

(aa) 5 Barn. & Cres. 696. 8 Dowl. & Ryl. 450, S. C.

(bb) 4 Durnf. & East, 300; and see Ad. Eject. 2 Ed. 55.

(cc) Ad. Eject. 2 Ed. 55.

[A] The general rule is, that when the statute of limitations once begins to run, it continues to run, notwithstanding any subsequent disability. *Peck v. Randall's trustees*, 1 Johns. 176, (per Kent, Ch. J., delivering the opinion of the court). *Crozier v. Ganoetuz*, 1 Bibb, Rep. 261. *Fewell et ux. v. Collins*, 1 Constit. Rep. South Car. 202. *Den, ex dem. Andrews v. Mulford*, 1 Hayw. Rep. 321, 322. *Anon.* 1 Hayw. Rep. 416. *Fitzhugh v. Anderson et al.*, 2 Hen. & Munf. Rep. 289. *Movers v. White et al.*, 6 Johns. Ch. Rep. 372. *Dow v. Warren*, 6 Mass. Rep. 238. *Hudson v. Hudson's administrators et al.*, 6 Munf. Rep. 352. *Den, ex dem. Pearce et al. v. House*, 3 North Car. Law Rep. 305. *Lessee of Hall v. Vandegrift*, 3 Binn. Rep. 374. *Faysoux v. Prather*, 1 Nott & M'Cord, Rep. 296. *Croddock's Lessee v. Stalcup*, 1 Ten. Rep. 353. *Waldin v. The Heirs of Gratz*, 1 Wheat. Rep. 296. *Lessee of Neilly v. M'Cormick*,

dies under a disability, which suspends the operation of the statute, his heir must make his entry within *ten* years next after his ancestor's death; provided more than *twenty* years have elapsed from the time of the commencement of the ancestor's title, to the time of the expiration of the *ten* years.(*dd*)[A]

Whenever a party has a right of entry, either by reason of an adverse title, or for a condition broken,(*ee*) or on the expiration of a term, or notice to quit,(*f*) he may lawfully enter and take possession of the premises, if vacant, or turn cattle thereon,(*f*) without bringing an *ejectment*; provided he can find an opportunity of doing so, without using force: And where a tenant had omitted to deliver up possession when his term expired, after a regular notice to quit, it was holden that the landlord might, in his absence, break open the door and resume possession, though some articles of furniture remained.(*g*) So it seems, that a tenant by *elegit* may enter on lands extended by virtue of a writ of *elegit*, without bringing an *ejectment*.(*h*) And, after a recovery in *ejectment*, the lessor of the plaintiff may peaceably enter on the premises, without suing out a writ of possession:(*i*) and he may even enter thereon, pending a writ of error, if he find the premises vacant, though he cannot take out a writ of execution.(*k*) But in all the foregoing cases, actual force or personal violence must be carefully avoided; for if used, it would subject the parties to an indictment for a forcible entry,(*l*) or assault.

Anciently it was always necessary for the claimant, if not actually ousted, to enter and seal a lease upon the premises, for the purpose of [*1197] *trying his title, in *ejectment*: It being deemed an offence, by the old law of *maintenance*, to convey a title to another, when the grantor himself was not in possession.(*a*) But, according to the present mode of proceeding, the necessity of an actual entry is dispensed with, by the rule to confess lease, entry and ouster, except for the purpose of avoiding a fine, and in some other cases, which will be mentioned hereafter.(*b*) It was also formed necessary, where the *ejectment* was founded on a *proviso* of re-entry for non-payment of rent, to make an actual entry on the premises, for completing the title of the lessor of the plaintiff:(*c*) but it

(*dd*) 6 East, 80.

(*ee*) Dom. Dig. tit. *Condition*, O. 3.

(*f*) 7 Durnf. & East, 431; and see 1 Price, 53.

(*g*) 1 Bing. 158; and see 1 Man. & Ryl. 220, 221, (*c*). 7 Barn. & Cres. 339, S. C.

(*h*) 6 Taunt. 202. 1 Marsh. 542, S. C.; and see 3 Durnf. & East, 292. 3 Blac. Com. 5, (4).

(*i*) 1 Bur. 60, 88; and see 2 Sid. 155, 6.

(*k*) 12 Mod. 398. 2 Ld. Raym. 806, 808; and see Run. Eject. 2 Ed. 147. Ad. Eject. 2 Ed. 301, 311.

(*l*) 7 Durnf. & East, 432; and see 3 Durnf. & East. 292, 295.

(*a*) Ad. Eject. 2 Ed. 11, 140.

(*b*) *Post*, 1198, 1201, 1204.

(*c*) 3 Keb. 218. 1 Vent. 248, S. C. 1 Salk. 259. 2 Ld. Raym. 750. Holt, 264, S. C. Doug. 478.

2 Yeates, Rep. 448. *Cotterel v. Dutton*, 4 Taunt, Rep. 830. *Wells v. Newbold*, Gam. & Norw. Rep. 407. *Rogers v. Hillhouse*, 3 Conn. Rep. 398. *Adamson, administrator, &c., v. Smith*, 2 Rep. Const. Ct. South Car. 269. *Langford's administrators v. Gentry*, 4 Bibb, Rep. 468. *Doe, ex dem. Prichard et al. v. Lawger*, 1 Hawkes, Rep. 337. *Jones, administrator, &c. v. Brodie, administrator, &c.*, 3 Murph. Rep. 594.

[A] For the Statutes of Limitations of the various States, the reader is referred to Adams on Eject. p. 64, 4th Am. ed., and Appendix, p. 501, 551.

was afterwards holden, agreeably to what is now the settled practice, that in such case the proof of an actual entry was unnecessary; the confession of it by the consent rule being deemed sufficient.^(c) And at length, by the statute 4 Geo. II. c. 28, § 2, "in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the nonpayment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment, for the recovery of the demised premises; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments, comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof: which service, or affixing such declaration in ejectment, shall stand in the place and stead of a demand and re-entry. And in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry and ouster, it shall be made appear to the court where the said suit is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

And in case the lessee or lessees, his, her or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity, within *six* calendar months after such execution executed; then and in such case the said lessee or lessees, his, her or their assignee or assignees, and all other persons claiming and deriving under the *said lease, shall be barred and foreclosed from all relief or remedy [*1198] in law or equity, other than by writ of error, for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises, discharged from such lease: And if, on such ejectment, verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited therein, except for the defendant or defendants not confessing lease, entry and ouster, then, in every such case, such defendant or defendants shall have and recover his, her and their full costs. Provided always, that nothing therein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession; so as such mortgagee or mortgagees shall and do within *six* calendar months after such judgment obtained, and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, person or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements, which on the part and behalf of the first

(c) See note (c), preceding page.

lessee or lessees are and ought to be performed." The objects of this statute were first, to facilitate the mode of proceeding in ejectment, by landlord against tenant, where half a year's rent is in arrear, and no sufficient distress on the premises: and secondly, to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity, and to limit and confine the tenant to *six* calendar months after execution executed, for his doing this, or else that the landlord should thenceforth hold the demised premises discharged from the lease.(a)

It is still necessary however, in certain cases, to make an actual entry on the premises, before an ejectment is brought: as where a *fine* has been levied with proclamations, in which case an actual entry must be made to avoid it,(b) and the demise laid after such entry.(c) An actual entry is also necessary, when the claimant proceeds in ejectment on a *vacant* possession,(d) or, as it seems, in an inferior court:(e) And as an ejectment cannot be maintained by a joint-tenant or tenant in common, against his companion, without proof of an actual ouster or denial of entry, it is still necessary in this case, that an actual entry should be made, or attempted to be made, by the claimant or his attorney, and that there should have been such an ouster or denial of entry by the tenant, before the ejectment is brought.

The entry, when necessary, must be made by the party who claims the land, or by some person appointed to enter for him, by power of [*1199] *attorney:(aa) And, although the entry, to avoid a *fine*, be made by a stranger, in the name of the person who has the right, without any previous command from him, yet if he afterwards assent to the entry, within *five* years after the *fine* is levied, such entry will be sufficient;(bb) But if the assent be not given within *five* years, any subsequent assent will not avail; for the statute of *fin*es, being made for the purposes of repose and tranquillity, is always taken strictly.(cc) A guardian for nurture or in socage, may enter in the name of his ward, without any command or assent; and such entry shall save his right. So also, the remainder-man or reversioner, or lord of a copyhold, may enter in the name of the tenant for life or years, or copyholder; or these particular tenants, in the name of the reversioner or remainder-man, or lord, without any command or assent, on account of the privity between the parties:(dd) So likewise, an entry by a *cestui que trust* will be sufficient.(ee) And the entry of one joint-tenant, coparcener, or tenant in common, will avoid the effect of a *fine*, as to the other joint-tenant, coparcener, or tenant in common.(f)

With respect to the mode of making the entry, it must be upon the

(a) 1 Bur. 619; and see 1 Wms. Saund. 5 Ed. 287, (16).

(b) Doug. 484. Run. Eject. 2 Ed. 224, &c.; and see Ad. Eject. 2 Ed. Chap. IV. 1 Wms. Saund. 319. 7 Durnf. & East, 433, 727. 1 Car. & P. 91; but see 9 East, 17. 1 Car. & P. 130.

(c) 2 Str. 1086. Willes, 327. Andr. 125. 13 East, 499, S. C.; and see 7 Durnf. & East, 727.

(d) Ad. Eject. 2 Ed. Chap. VI. 2 Sel. Pr. 91, 130, 134. Post, 1201, 1204.

(e) 1 Keb. 690, 795; and see Gilb. Eject. 38. Run. Eject. 2 Ed. 174. Ad. Eject. 2 Ed. 173, 176, 7. 3 Blac. Com. 203, (3).

(aa) Co. Lit. 258, a.

(bb) Id. 245, a, 248, a. 2 Str. 1128.

(cc) Poph. 108. Moore, 450, S. C. Id. 457. 9 Co. 106, a. Cro. Eliz. 561.

(dd) 9 Co. 106, a.

(ee) 1 Ld. Raym. 716.

(f) Bro. Abr. tit. Entry Congeable, 37. 1 Rol. Abr. 740. 6 East, 173.

lands comprised in the fine; for an entry into other lands claiming those comprised in the fine, will not be sufficient: *(g)* And when all the lands lie in one county, the party may enter into any part of them, making a declaration in the name of the whole; but if the lands lie in different counties, there must be a separate entry for each several county. *(h)* The entry must also, be made *animo clamandi*, with an intention of claiming the freehold against the fine: *(i)* And therefore where, upon a special verdict in ejectment, it was found that a fine had been levied of the premises, and that the lessor of the plaintiff entered thereon, with intent to make the demise mentioned in the declaration, but not for the purpose of avoiding the fine, it was holden that such entry was not sufficient. *(k)* If the claimant be deterred by menaces, or bodily fear, from entering on the lands whereof a fine has been levied, he must then make his claim as near the land as he can, which in that case will be deemed as effectual as if he had made an actual entry. *(l)* But, by the statute 4 Ann. c. 16, § 16, "no claim or entry to be made of or upon any lands, &c. shall be of any force or effect, to avoid a fine levied with proclamations according to the statute, or a sufficient entry or claim within the statute of limitations, unless, upon such entry or claim, an action be commenced within *one* year next after the making of such entry or claim, and prosecuted with effect."

*Previously to the statute 4 Geo. II. c. 28, it was necessary to [*1200] make a demand of the rent, in order to maintain an ejectment, on a *proviso* of re-entry for the nonpayment of it, *(a)* unless there was an express stipulation to the contrary in the *proviso*; *(b)* which demand must have been made by the landlord, either in person, or by an agent properly authorized: *(cc)* and it must have been so made, of the precise rent due, a convenient time before sunset, upon the very day when the rent was payable by the lease, to save the forfeiture; and where the *proviso* was, that "if the rent should be behind or unpaid, by the space of *thirty* or any other number of days after the day of payment, it should be lawful for the lessor to re-enter," a demand must have been made on the *thirtieth* or other last day. *(d)* The demand of rent must also have been made upon the land demised, and at the most notorious part of it, unless a place were appointed where the rent was payable, in which case the demand must have been made at such place; *(d)* and if there were a dwelling house upon the land, it must have been at the front or fore door, *(d)* but it was not necessary to enter the house, though the door was open. *(d)* By the above statute, the service of the declaration in ejectment was substituted for the demand of rent, which at common law must have been made upon the day when the forfeiture accrued, in case of non-payment; and therefore it was holden to be no ground of nonsuit in ejectment, that the declaration was served on a day subsequent to that on which the demise was laid, and which was after the rent became due; because the title of the lessor must be taken to have accrued on the day when the forfeiture would have been incurred

(g) Hardr. 400.

(h) Lit. § 417. Run. Eject. 2 Ed. 168, &c., 232.

(i) 1 Vent. 42.

(k) 2 Str. 1086. Willes, 327. Andr. 125. 13 East, 489, S. C.

(l) Lit. § 419. Co. Lit. 253, b. 3 Blac. Com. 174.

(a) Co. Lit. 201. 7 Co. 28. 7 Durnf. & East, 117.

(b) 2 Barn. & Cres. 490. 4 Dowl. & Ryl. 45, S. C.; and see Doug. 486.

(cc) 7 East, 363.

(d) Co. Lit. 201, 2. 1 Wms. Saund. 5 Ed. 287, (16); and see Ad. Eject. 2 Ed. 144.

at common law, for nonpayment of the rent.(e) And the statute does not seem to be altogether confined to cases of ejectment brought after half a year's rent due, where no sufficient distress was to be found on the premises.(f) But it has been determined, that the landlord cannot recover in ejectment on this statute, if there be a sufficient distress on the premises, to countervail the arrears of rent due at the time of serving or affixing the declaration ;(g) nor can an ejectment be maintained in such case, for non-payment of rent, independently of the statute, unless the rent be demanded in proper time, with all the formalities required by the common law.(h)

The *ancient* mode of proceeding in ejectment was for the freeholder, or other person having a legal estate and right of entry, to make an actual entry on the premises, and to seal and deliver a lease to a third person; and after the lessee had entered, he continued in possession, [*1201] until he was *ejected by the tenant, or some other person entering thereon *animo possidendi*, or even by chance,(a) who was called the *casual* ejector. An action of ejectment was then brought, founded on the lease; in which the lessee, who was usually some friend of the lessor, was plaintiff, and the tenant in possession, or casual ejector, was defendant. But if the ejectment was brought against the casual ejector without notice to the tenant, the latter might have been turned out of possession, without having an opportunity of defending his title;(b) to remedy which a rule was laid down, that no plaintiff should proceed in ejectment against the casual ejector, without delivering a declaration to the tenant in possession;(c) and it was the practice for the tenant, on receipt of the declaration, if he had any title to the lands, to apply to the court for permission to defend the action; which application was granted, upon his undertaking to indemnify the defendant from the expenses of the suit. The action, however, proceeded in the name of such defendant; though the tenant in possession was permitted at the trial to give evidence of his own title.(dd)

In the case of a *vacant* possession, when the premises are wholly deserted by the tenant, and his place of residence is unknown,(e) and the case is not provided for by the statute 4 Geo. II. c. 28,(f) the claimant, if he mean to proceed by ejectment, must make an actual entry, and seal and deliver a lease on the premises, in person or by attorney; after which, the ejectment is brought by the lessee, against the person who ejects him. But an ejectment cannot be maintained, as on a vacant possession, when there is any thing left by the tenant on the premises, however trifling; as beer in a cellar, or hay in a barn;(g) and in the case of renting ground, on which there is no house or barn, if it be known where the tenant lives, he must be served.(g)

(e) 3 Barn. & Cres. 752. 5 Dowl. & Ry. 711, S. C.; and see 2 Ken. 320.

(f) 7 East, 363.

(g) 7 Durnf. & East, 117; but see 1 Moody & M. 77.

(h) 7 Durnf. & East, 117; and see Ad. Eject. 2 Ed. 144. 2 Phil. Evid. 224, &c.

(a) 1 Lil. Pr. Reg. 673.

(b) 1 Keb. 705.

(c) Sty. Rep. 368. 1 Sid. 24. 1 Lil. Pr. Reg. 497; and see 3 Bur. 1290, 1297. 1 Blac. Rep. 360. Run. Eject. 2 Ed. 18. Ad. Eject. 2 Ed. 13.

(dd) Ad. Eject. 2 Ed. 13.

(ee) *Id.* 173. 2 Sel. Pr. 2 Ed. 133. *Post* 1204, 1215.

(ff) 2 Sel. Pr. 2 Ed. 130.

(gg) 2 Str. 1064. Bul. Ni. Pri. 97, S. C.; and see 2 Chit. Rep. 177.

The method of proceeding in ejectment, on a *vacant* possession, is as follows. A lease for years^(h) being previously prepared, and a power of attorney⁽ⁱ⁾ executed when necessary, the party claiming title, or his attorney, must enter upon the premises, before the essoin day of the term, and there seal and deliver the lease to the lessee, who is usually some friend of the lessor, and at the same time put him into possession: but it is a rule of court,^(k) in the King's Bench and Common Pleas, for the prevention of maintenance and brocage, that "no attorney shall be lessee in ejectment." The lease being executed, and possession delivered, the lessee continues on the premises, until some other person enters thereon, usually by agreement before-hand, and turns him out of possession: upon which the copy of a declaration in ejectment, which has been *previously [*1202] prepared, is delivered on the premises to the ejector, founded upon the demise contained in the lease. This declaration is similar to that in ordinary cases, except that the parties to it are real, and not fictitious persons,^(a) the lessee being made plaintiff, on the demise of the lessor, and the ejector defendant: And in lieu of the ordinary notice, for the tenant to appear and be made defendant, instead of the casual ejector, a notice is subscribed to the declaration, signed by the plaintiff's attorney, and addressed to the real defendant, informing him, that unless he appear in court on the *first* day, or within the first *four* days, in *London* or *Middlesex*, or, in any other county, within the first *eight* days of the next term, at the suit of the plaintiff, and plead to the declaration, judgment will be entered against him by default.^(b)

In the King's Bench, the motion for judgment against the defendant, in the case of a *vacant* possession, is founded on an *affidavit*, stating the entry of the lessor of the plaintiff, and his sealing a lease on the premises, the entry of the lessee, and ouster by the defendant, with the delivery to the latter, of a copy of the declaration in ejectment:^(c) An *affidavit* should also be made, of the execution of the power of attorney, if the entry was made by a third person.^(d) The *rule* for judgment, in this court, is absolute in the first instance: And where the plaintiff, having obtained judgment against the defendant, had neglected to take away the rule from the office, before the end of the term, the court of King's Bench would not assist him, by granting a rule for judgment in the next term.^(e) In the Common Pleas, a motion for judgment is unnecessary, in the case of a *vacant* possession; it being deemed sufficient in that court, for the plaintiff to give a rule to plead, as in common cases, and at the expiration of the time for pleading, if there be no appearance and plea, he signs judgment as a matter of course.^(f) And there is said to be no instance, where any person claiming title to the premises, has been let in to defend; but

(h) Append. Chap. XLVI. § 14.

(i) *Id.* § 12.

(k) R. M. 1654, § 1. K. B. & C. P.

(a) *Ante*, 1201.

(b) Append. Chap. XLVI. § 16; and see 1 Lill. Pr. Reg. 498. In most of the books of practice, the notice to a declaration in ejectment in the King's Bench, on a *vacant* possession, is, in *London* and *Middlesex*, to appear and plead on the *first* day of the next term, or, in any other county, in the next term generally. 2 Sel. Pr. 2 Ed. 131. Imp. K. B. 10 Ed. 561. Burn's K. B. 598; but in Ad. Eject. 2 Ed. 342, it is stated as above, according to the usual practice in other cases, to be within the first *four* days, in *London* or *Middlesex*, or, in any other county, within the first *eight* days of the next term; and, in the Common Pleas, it is so stated in Imp. C. P. 7 Ed. 612.

(c) Append. Chap. XLVI. § 17.

(d) *Id.* § 13.

(e) 2 Chit. Rep. 188.

(f) Append. Chap. XLVI. § 17, n.

he that can first seal a lease thereon, must obtain possession, and any other person claiming title thereto, may eject him if he can : and, by the course of the court, no defence can it is said be made in this case, except by the defendant in ejectment, who is a real ejector.(g)

Having thus shown the ancient method of proceeding in *ejectment* founded on an *actual* demise, by the lessee against the person [*1203] who ejects *him, I shall next treat of the present mode of proceeding therein, on a *feigned* demise, in the name of the *nominal* plaintiff, against the *casual* ejector : and in so doing, it will be proper to consider, first, the origin and nature of this mode of proceeding ; secondly, the proceedings against the casual ejector, previously to the appearance of the tenant or his landlord, &c. ; and thirdly, the appearance, and subsequent proceedings thereon, to trial, final judgment, and execution.

The present mode of proceeding in ejectment is said to have been introduced by Lord Chief Justice *Rolle*, who presided in the Upper Bench, during the time of the Commonwealth ;(a) to avoid, on the one hand, the necessity of making an actual entry, and sealing a lease on the premises, for trying the title ; and, on the other, to obviate the inconvenience arising from the action being brought against the casual ejector, and give the tenant in all cases an opportunity of defending his title, upon proper terms. In this mode of proceeding, it is not necessary for the claimant to make an actual entry, or seal and deliver a lease on the premises, or for the lessee to enter thereon, and be ousted by the defendant ; but the first proceeding is the delivery of a declaration to the tenant in possession, on a *feigned* demise, in which the supposed lessee is the *nominal* plaintiff, and a *casual* ejector defendant : to which declaration a *notice* is annexed, from the casual ejector to the tenant in possession, advising him to appear within a limited time, (being the *first* day, or within the first *four* days of the next term, in *London* or *Middlesex*, or in the next term generally, in any other county,) and cause himself to be made defendant in his stead, otherwise that judgment will be entered therein against the casual ejector, by default, and the tenant will be turned out of possession.

On receipt of this declaration and notice, if the tenant do not appear within the limited time, he is supposed to have no title to the premises ; and an *affidavit* having been made of the service of the declaration and notice, the court will order judgment to be entered against the casual ejector by default, and possession of the premises will be given to the lessor of the plaintiff, who is considered as the real claimant. But if the tenant mean to appear, pursuant to the notice, a rule of court is drawn up, by consent, of the parties, or their attorneys, (which is called the *consent* rule,) by which it is ordered, that the tenant be made defendant instead of the casual ejector ; and forthwith appear at the suit of the plaintiff, and file common bail in the King's Bench by *bill*, and receive a declaration in an action of *trespass* and *ejectment*, for the premises in question, (describing them according to the late rule,)(b) and plead thereto not guilty ; and upon the

(g) Barnes, 177. Bul. Ni. Pri. 95.

(a) Run. Eject. 2 Ed. 19. Ad. Eject. 2 Ed. 14, 15.

(b) R. M. 1 Geo. IV. K. B. R. H. 1 & 2 Geo. IV. C. P. R. E. 2 Geo. IV. Excheq.

trial of the issue, confess lease entry and ouster, and insist upon the title only; otherwise that judgment will be entered for the plaintiff against the casual ejector by default: And as the lessor of the plaintiff will not, in this mode of proceeding, be able to prove an actual lease, entry and ouster, it is further ordered by the consent rule, *that if, [*1204] upon the trial of the issue, the tenant shall not confess the same, whereby the plaintiff shall not be able further to prosecute his suit against him, then no costs shall be allowed for not further prosecuting the same, but the tenant shall pay costs to the plaintiff. On the other hand, as the ejectment is brought in the name of the nominal plaintiff, against whom the defendant, if he succeeded, would have no remedy for his costs, it is further ordered, that if upon the trial of the issue, a verdict shall be given for the defendant, or it shall happen that the plaintiff shall not further prosecute his suit, for any other cause than for not confessing lease, entry and ouster, then the lessor of the plaintiff shall pay costs to the defendant.

This mode of proceeding however cannot, we have seen, (a) be pursued in the case of a *vacant* possession, where there is no tenant to whom the declaration can be delivered; nor, as between landlord and tenant, when the premises are wholly deserted by the latter, and his place of residence is unknown, (bb) and the case is not provided for by the statute 4 Geo. II. c. 28; (c) nor, as it seems, when the ejectment is brought in an *inferior* court, which has not the power of framing the rule to confess lease, entry and ouster, nor the means, if such rule were entered into, of enforcing obedience thereto. (d) In these cases therefore, the claimant must still proceed in the ancient mode, by making an actual entry, and sealing a lease on the premises. (e)

In treating of the proceedings against the *casual* ejector, it will be proper to consider, first, the declaration in ejectment; secondly, the notice, or notices, for the tenant to appear, &c.; thirdly, the different modes of serving the declaration, and notices; fourthly, the affidavit of service; fifthly, the motion and rule for judgment against the casual ejector; and sixthly, the judgment by default against him, and execution thereon.

The *declaration* in ejectment is considered as the first process; (f) and should regularly be *entitled* of the term in which it is delivered; or if, as is usual, it be delivered in *vacation*, of the preceding term: and though the demise be laid after the first day of that term, yet the defendant being a nominal person merely, cannot take advantage of the objection; and if the tenant appear, and apply to be admitted defendant, instead of the casual ejector, he is then bound, by the consent rule, to accept a declaration, entitled of a subsequent term, which obviates the objection. (g) So, if the declaration be not entitled of any term, the omission is immaterial (h) and no advantage can be taken of its being entitled by mistake of a wrong term, provided the tenant has sufficient notice given him to appear. (i)

(a) *Ante*, 1201.

(bb) *Ad. Eject.* 2 Ed. 173. 2 *Sel. Pr.* 2 Ed. 133. *Ante*, 1201. *Post*, 1215.

(c) 2 *Sel. Pr.* 2 Ed. 130.

(d) 1 *Keb.* 690, 795. *Ante*, 1198.

(e) 1 *Lil. Pr. Reg.* 498, 9.

(f) 1 *Str.* 567. *Barnes*, 186. 2 *Crompt.* 3 Ed. 165. *Run. Eject.* 2 Ed. 177. *Ad. Eject.* 2 Ed. 206.

(g) *Run. Eject.* 2 Ed. 239, 40. *Ad. Eject.* 2 Ed. 181, 2.

(h) *Goodtitle ex dim. Price v. Badtittle*, H. 58 Geo. III. K. B. *Ad. Eject.* 2 Ed. 181.

(i) 2 *Chit. Rep.* 172, 3; but see *Barnes*, 186.

*An ejectment being a *local* action, the *venue* must be laid in [*1205] the county in which the premises are situate. And the form of the declaration varies, as the action is commenced by *original writ*,^(a) or by *bill*.^(b) In the King's Bench, ejectments are now most usually commenced by *original writ*,^(a) to prevent the delay arising from bring writs of error in the Exchequer chamber :^(c) but they may be also, and are sometimes commenced by *bill*.^(d) In the Common Pleas, they are always commenced by *original writ*; and in the Exchequer of Pleas, by *bill*.^(e) The declaration by *original*, in the King's Bench, begins by stating that the casual ejector was *attached* to answer.^(f) &c. ; but where it began with a recital, that the *tenant* was attached to answer, &c. and then went on and used the name of the *casual ejector*, throughout the rest of the declaration, a rule for judgment was granted against the latter: The learned judge, however, who granted it, suggested to the counsel, that it might be advisable to amend; for though, if the tenant did not appear, this would be immaterial, yet if he did, he might set aside the proceedings.^(gg)

The declaration in ejectment is founded on one or more demises, *real* or *supposed*. In the case of a *vacant* possession, the demise, we have seen,^(hh) is real; but in other cases, it is merely fictitious, and the declaration supposes that the claimant, who is called the lessor of the plaintiff, demised the premises to the plaintiff, who is a mere nominal person, for a certain term of years; by virtue of which demise, the plaintiff entered, and continued in possession till ejected by the defendant, who is also a nominal person, and called the casual ejector. The demise or demises in ejectment are commonly laid on some day after, though they may be laid on the very day, the right of entry accrued,⁽ⁱⁱ⁾ and it is usual to lay them as far back as possible, with a view to the recovery of the mesne profits.^(k) When an entry is necessary to avoid a fine, the demise must be laid after such entry;^(l) and if the ejectment be brought on a *proviso* of re-entry in a lease, for non-payment of rent within a limited time, the demise must be laid after that time has expired.

When several persons have distinct interest in the premises, there should be several demises;^(m) and, if the lessors of the plaintiff claim as tenants in common,⁽ⁿ⁾ there should be a separate demise by each of them. The rule was formerly considered to be, that in laying demises in ejectment, tenants in common must sever, joint tenants must join, and coparceners might either join or sever.^(o) But where the tenant had paid one entire rent to the clerk of several trustees of a charity, appointed at different [*1206] *times, it was holden that proof of such payment, not rebutted by express evidence that the trustees were entitled as tenants in common only, would support an ejectment on their joint demise.^(aa) And

(a) Append. Chap. XLVI. § 18; and for the form of the sheriff's return thereto, see *id.* § 19.

(b) *Id.* § 26, 7.

(c) Run. Eject. 2 Ed. 235, &c.

(d) Append. Chap. XLVI. § 26.

(e) *Id.* § 27.

(f) *Ante*, 433. Append. Chap. XLVI. § 20, 22, &c.

(gg) 1 Chit. Rep. 573, a. 2 Chit. Rep. 173, 4, S. C.

(hh) *Ante*, 1201, 2.

(ii) Bul. Ni. Pri. 105. 2 Wils. 274.

(k) Bul. Ni. Pri. 87, 8.

(l) 2 Str. 1086. Willes, 327. Andr. 125. 13 East, 489, S. C. *Ante*, 1198.

(m) Append. Chap. XLVI. § 23, 24.

(n) *Id.* § 25.

(o) 12 East, 61.

(aa) 12 East, 221; and see 1 Esp. Rep. 360.

where the lessors of the plaintiff are joint tenants, or coparceners, it seems they may either join in one demise, or lay several demises, at their election.(b) In the King's Bench, if a person be named in a declaration in ejectment, as one of the lessors of the plaintiff, without his authority, he may move the court, before appearance, to have his name struck out of the declaration:(c) And even a verdict in ejectment, on a supposed demise by a party, without his authority, has been set aside.(d) But the court of Common Pleas would not, at the instance of the defendant in ejectment, interfere against a plaintiff, who had laid a demise by the assignees of a bankrupt, without their permission; they having given up the property to the bankrupt, and the plaintiff claiming under him.(e)

When there are several demises laid on the same day, it is usual to lay only one entry and ouster;(f) but otherwise there should be as many entries and ousters, as there are demises.(g) The statute 48 Geo. III. c. 149,(h) requiring copies of declarations to be written in the usual and accustomed manner, on which a duty of *four pence* a sheet was formerly imposed, and it not having been the practice to write such copies on both sides of the stamped sheet of paper, the court of King's Bench held, that service of several copies of declarations in ejectment so written and delivered to different tenants in possession, was irregular.(i)

It was formerly holden, that the declaration in ejectment could not be amended, before appearance; and afterwards, the rule was, that it could be amended in *form* only, but not in the demise,(k) or other matter of *substance*: For the declaration being considered as the first process,(l) there was nothing preceding it, to warrant an amendment. A more liberal principle however has since been adopted; an ejectment being considered as a fictitious mode of proceeding, for the trial of possessory titles, and open to every equitable regulation for expediting the true justice of the case;(m) and hence it is now settled, that the declaration in ejectment may be amended, in the day of the demise,(n) &c. [A] And it has become the practice, to permit the plaintiff to add a new demise, when founded on the *same* title, as by a mortgagee, or trustee of a term to attend the inheritance, &c.; though not on a *different* title. In a late case, the plaintiff in ejectment was permitted to amend his declaration, on payment of costs, *by adding a new count, on another demise, after three [*1207] terms had elapsed, and the roll had been made up and carried in.(aa) And a declaration in ejectment has been amended, in the description of the premises, by leaving out the word "*tenements*," after judgment, and a writ of error brought."(bb)

The declaration in ejectment could not formerly have been amended, by

(b) 12 East, 57, 61; but see 1 Ld. Raym. 404. 2 Wils. 232. 1 H. Blac. 15.

(c) 2 Chit. Rep. 171.

(d) *Id.* 170.

(e) 3 Taunt. 440.

(f) Append. Chap. XLVI. § 23.

(g) *Id.* § 24. And for the forms of declarations in ejectment, in the different courts, with one or several demises, entries and ousters, see *id.* § 20, 22, &c.

(h) *Sched.* Part II.; and see stat 55 Geo. III. c. 184. *Sched.* Part. II. *in principio*.

(i) 1 Dowl. & Ry. 562. *Ante*, 322, 3; 452.

(k) Carth. 401. 1 Salk. 48. 5 Mod. 332, S. C. Barnes, 186; and see *id.* 17.

(l) *Ante*, 1204.

(m) 2 Blac. Rep. 941.

(n) 4 Bur. 2447. 1 Chit. Rep. 536, *in notis*. Ad. Eject. 2 Ed. 199, &c.

(aa) 2 Chit. Rep. 302. 1 Dowl. & Ry. 173, S. C.

(bb) 1 Chit. Rep. 537, *in notis*; and see Ad. Eject. 2 Ed. 25.

[A] See Adams on Ejectment, p. 245, 4th ed., Am. note.

enlarging the term, without consent; (c) but afterwards it was allowed to be amended in this respect, without any consent; (d) And where the term had expired several years before the ejectment was brought, it was enlarged, upon payment of costs, though the issue was made up, a special jury struck, and the cause gone down to trial, before the mistake was discovered; the court considering that it was a mere mistake in the declaration, and ought to be amended by the writ, which speaks of a term not yet expired. (e) In a subsequent case, (f) an enlargement of the term was permitted, where a judgment in ejectment *Ireland* had been affirmed, on a writ of error in the King's Bench in *England*; but from various delays, the term in the declaration had expired, before the lessor of the plaintiff could obtain possession. But where the lessor of the plaintiff had neglected to sue out a writ of possession for more than *twenty* years after the recovery in ejectment, and in the mean time there had been several changes of the property and possession, the court of King's Bench refused to grant a rule for enlarging the term, which had expired. (g) And where a party had been prevented from suing out execution in ejectment, by an injunction in Chancery, which continued in force for many years, during which the term in the declaration in ejectment expired, the court would not permit it to be enlarged, unless it were quite clear, that the amendment would work no injustice to the opposite party. (h)

The notice, at the foot of the declaration, should be given, either by the casual ejector, for the tenant to appear, and be made defendant, in his stead: (i) or by the lessor of the plaintiff, for the tenant to appear, and find bail, &c. on the statute 1 Geo. IV. c. 87. (k) In ordinary cases, the notice to appear should regularly be given by, and subscribed with the name of the casual ejector: but where it was subscribed with the name of the nominal plaintiff, instead of the casual ejector, the court of King's Bench refused to set aside the proceedings. (l) This notice should be directed to the tenant in possession, by name; (m) a notice directed to the personal representatives of a deceased tenant, having been deemed insufficient. (n) The *christian* and *surname* of the tenant in possession are also usually prefixed [*1208] *to the notice; (a) but where a part of the christian name was abbreviated, as where it was written *John B. Jones*, instead of *John Benjamin Jones*, the notice was deemed sufficient. (bb) If there be *several* tenants, it is usual to prefix all their names to the notice; although it does not seem to be necessary to prefix more than the name of the individual tenant, upon whom each particular declaration is served. (cc) And, in the Common Pleas, where several tenants had been duly served with copies of the declaration, judgment was allowed to be entered against the casual ejector; although the notice, at the foot of the declaration, was not addressed to any or either of such tenants. (dd)

(c) Comb. 110. 1 Salk. 257. 6 Mod. 130. Barnes, 8 Cas. temp. Hardw. 165; but see Comb. 50, *semb. contra*.

(d) 2 Str. 1272.

(e) 2 Blac. Rep. 940.

(f) Cowp. 841; and see 4 Taunt. 16. 1 Chit. Rep. 535, 6, (a). Ad. Eject. 2 Ed. 200.

(g) 2 Barn. & Ald. 773. 1 Chit. Rep. 535, S. C.

(h) 1 Barn. & Cres. 121. 2 Dowl. & Ryl. 227, S. C.

(i) Append. Chap. XLVI. § 21, 28.

(k) *Id.* § 29, 30.

(l) 3 Durnf. & East, 351. Barnes, 172, *contra*.

(m) 1 Chit. Rep. 215, a. Ad. Eject. 2 Ed. 202. Append. Chap. XLVI. § 21, 28.

(n) 1 Moore, 113; and see 2 Chit. Rep. 179.

(a) 1 Chit. Rep. 573.

(bb) *Id.* (a).

(cc) 7 Durnf. & East, 477.

(dd) 5 Moore, 73.

The notice should require the tenant or tenants in possession to appear on the *first* day in full term, (not the *essoin* day,)(*e*) or within the first *four* days of the next term, in *London* or *Middlesex*; or, in any other county, in the term next after the delivery of the declaration. Formerly, when the declaration was served before the *essoin* day of *Easter* or *Michaelmas* term, the notice was usually given for the tenant to appear in those terms;(*f*) though, in the Common Pleas, it might, it seems, have been given to appear in the next *Trinity* or *Hilary* term, being the issuable terms following, passing over *Easter* or *Michaelmas* term.(*g*) But now, since the late rule,(*h*) by which "in all country ejectments, served before the *essoin* day of *Michaelmas* or *Easter* term, the time for the appearance of the tenant in possession, shall be within *four* days after the end of such *Michaelmas* or *Easter* term, and shall not be postponed till the *fourth* day after the end of *Hilary* or *Trinity* terms following," the notice in all country ejectments, in the King's Bench and Common Pleas, should be to appear in the next term after the delivery of the declaration, whether it be an issuable term or not. And where the notice required the tenant to appear in *eight* days of Saint *Hilary*, instead of *Hilary* term generally, the court of Common Pleas would not allow judgment to be signed, but left the party to bring a fresh action; as the notice was irregular and void.(*i*) Where the notice however, in a town cause, was to appear not on the *first* day, but in the *beginning* of the next term, the court granted a rule for judgment.(*k*) So, where the notice, by reference to the title of the declaration, is to appear in a wrong term, this does not seem to be material, provided the notice be properly dated,(*l*) or the tenant has been apprised of the mistake.(*l*) And where the notice was of a wrong term, the court permitted it to be amended.(*m*) In the King's Bench by *bill*, the notice should require the tenant to appear in his majesty's court of King's Bench at *Westminster*, where the court is holden,(*n*) or, by *original*, *wheresoever his majesty shall then be in *England*;(a) But where [*1209] the notice, by *original*, was not to appear *wheresoever*, &c., but at *Westminster*, as in proceedings by *bill*, it was deemed sufficient.(*b*) In the Common Pleas, the notice is to appear in his majesty's court of Common Bench;(c) and, in the Exchequer, in the office of pleas of his majesty's court of Exchequer, at *Westminster*.(*dd*)

In ejectment, by *landlord* against *tenant*, on the statute 1 Geo. IV. c. 87,(*ee*) "where the term or interest of any tenant, holding under a lease or agreement in writing, any lands, &c., for any term or number of years certain, or from year to year, shall have expired, or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing,(*ff*) made and signed by the landlord or his agent, and served personally upon, or left at

(e) 2 Str. 1049.

(f) Say. Rep. 49.

(g) Barnes, 186, 250. 4 Taunt. 738.

(h) R. E. 2 Geo. IV. 4 Barn. & Ald. 539. 2 Chit. Rep. 375, 6, K. B. 2 Brod. & Bing. 705. 5 Moore, 637. 2 Chit. Rep. 380, C. P. 9 Price, 299, Excheq.

(i) 8 Moore, 79.

(k) Barnes, 175.

(l) 2 Chit. Rep. 171, 2.

(m) 7 Durnf. & East, 469.

(n) Append. Chap. XLVI. § 26.

(a) Append. Chap. XLVI. § 21.

(b) 2 Chit. Rep. 171.

(c) Append. Chap. XLVI. § 21.

(dd) *Id.* § 28.(ee) *Id.* § 1.

(ff) Append. Chap. XLVI. § 46.

the dwelling house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment, for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, on the *first* day of the term then next following, or, if the action shall be brought in *Wales*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham* respectively, then, on the first day of the next session or assizes, or at the court day, or other usual period for appearance to process, then next following, (as the case may be,) there to be made defendant, and to find such bail, if ordered by the court, and for such purposes, as are thereafter specified;”(g) This notice should be signed by the lessor of the plaintiff, and not by the casual ejector;(h) and ought to be a separate notice, in addition to the ordinary one given by the latter;(h) for besides that it is given by a different person, its object is also different, the notice given by the casual ejector being merely for the tenant to appear and be made defendant in his stead, but the notice by the lessor of the plaintiff is to appear and find bail, &c., according to the statute; and the latter notice is always to appear on the *first* day of the next term, whereas the notice given by the casual ejector, in country causes, is to appear in the next term generally. The notice required by the statute may it seems either state the nature of the bail or undertaking, and the recognizance to be given and entered into by the tenant and his sureties, specially, or may describe them generally, with reference to the statute.

The declaration in ejectment should be *personally* served, by delivering a true copy of it, and of the notice or notices thereunder written, to the tenant in possession, or his wife, and at the same time reading [*1210] over the *notices, and explaining the intent and meaning of such service; or by acquainting them generally, with the intent and meaning of the declaration and notices.(a)[A] And where the declaration

(g) *Id.* § 29, 30.

(h) 1 Dowl. & Ry. 435, a; and see 5 Barn. & Ald. 849. 6 Moore, 56, (a).

(a) Append. Chap. XLVI. § 31.

[A] Serving the declaration is the commencement of the action of ejectment at common law. *Baron v. Abeel*, 3 Johns. R. 481. *Pindell v. Maydwell*, 7 B. Monr. R. 314. *Taylor et al. v. Taylor et al.*, 3 Marsh Rep. (Ky.) 19. In ejectment, the declaration and notice must be entered on the record at the term it is returnable, or it is discontinued; and proceedings at a subsequent term are irregular, though when noted on record at the proper term, the suit has relation to the service of the notice. *Stair v. Pickels*, 3 Marsh Rep. (Ky.) 551. The service of a declaration is not equivalent to a demand of possession. *Den v. Westbrook*, 3 Green, Rep. 371. Where a printed declaration and notice in ejectment were served upon an illiterate tenant, who was told merely that they were a declaration in ejectment, without any further explanation, but it appeared from circumstances that he must have known the nature of the papers, the court considered this equivalent to a technical service. *Jackson, ex dem. Beaver v. Siler*, 1 Cow. Rep. 222. Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded: held, that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises. *Doe v. Stanton*, 2 Barn. & Ald. Rep. 371. It must appear from the affidavit of service that the persons on whom the service was made were tenants in possession, and that they were served with copies of the declaration and notice. *Wharton v. Clay*, 4 Bibb, 167. In the case of *Jackson, dem. Salisbury v. Salisbury*, 3 Wend. Rep. 430, the declaration was served by delivering it to the wife of the defendant, on the premises claimed. The service not being on the defendant personally, leave was asked pursuant to the revised statutes of N. York, (Part 3, Ch. 6, Tit. 1, Sec. 15, Vol. 2, p. 305,) to enter a rule for the defendant to appear and plead, which was granted. If the service

was not read over and explained to the tenant in possession, on whom it was served, but who subsequently acknowledged that he had received it, and knew what it was, this was deemed sufficient. (b) The declaration must be delivered before the *essoin* day of the term, in which the notice is given to appear; otherwise the plaintiff cannot have judgment till the next term: (c) and, in a late case, where the service of the declaration was before the *essoin* day, but the explanation of it to the tenant in possession did not take place till after, the court held that the lessor of the plaintiff was not entitled to judgment. (d) It has been doubted, whether a declaration in ejectment, being in nature of process, can be served on a *Sunday*: (e) And where a declaration in ejectment was left at the house of the tenant in possession on *Saturday*, and the tenant afterwards acknowledged that he received it on the following *Sunday*, which was before the *essoin* day;

(b) 2 Chit. Rep. 186; and see *id.* 184.

(c) Barnes, 172, 3.

(e) 2 Crompt. 3 Ed. 165.

(d) 1 Dowl. & Ry. 563.

of the declaration in ejectment is not in the regular or ordinary manner, a judgment by default for want of an appearance should not be entered until the court on a rule to show cause has sanctioned the mode of service. *Den, ex dem. Auten v. Fenn*, 5 Halst. Rep. 247. Service of the declaration in ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house or on the premises, is insufficient to support a rule for judgment against the casual ejector. *Right, ex dem. Bonsall v. Wrong*, 2 Dowl. & Ry. Rep. 84. Where a declaration in ejectment was left at the house of the tenant on Saturday, who afterwards acknowledged that he received it on the following Sunday, (which was before the *essoin* day,) held, that this was not good service. *Doe v. Roe*, 5 Barn. & Cress. Rep. 764. Service of the declaration in ejectment, upon the servant on a Saturday, with acknowledgment by tenant on a Sunday, is insufficient for a judgment against the casual ejector. *Goodtitle, ex dem. Mortimer v. Nolette*, 2 Dowl. & Ry. Rep. 232. Service of the declaration in ejectment, must be before the *essoin* day of the term; but where the service was before that day, and the explanation of it to the tenant in possession did not take place till after, held, that the lessor of the plaintiff was not entitled to judgment. *Doe v. Roe*, 1 Dowl. & Ry. Rep. 563. Where the service is made upon the tenant in possession, and he neglects to give notice to his landlord, and suffers judgment to go by default, it will not be disturbed for that cause. *Breeding v. Taylor*, 6 B. Monr. Rep. 62. Service of notice in ejectment upon the land which was occupied by the slaves of the defendant, was held good, although the defendant resides elsewhere. *Doe, ex dem. Clay et al. v. Woods et al.*, A. K. Marsh. Rep. (Ky.) 152. Service of a declaration in ejectment on the tenant in possession with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for judgment *nisi* against the casual ejector. *Doe v. Snee*, 2 Dowl. & Ry. Rep. 5. Several tenants claiming severally parts of the land sued for, may be sued in one action of ejectment. *Camden et al. v. Haskill*, 3 Rand. Rep. 462. *White v. Pickering*, 12 Serg. & Rawle, 435.

Ejectment may be brought against several persons, occupying different rooms in plaintiff's house. *Marshall v. Wood*, 5 Verm. 250. Proof that the copy of the declaration was served upon A. B., "said to be one of the directors of, &c.," has been held to be insufficient. *Den v. Applegate*, 5 Halst. 237. And so proof that the service was on the daughter of the tenant, without showing that such service was made on the premises in question, is insufficient. *Ib.* 7 Halst. 321. So a return upon the writ of "executed," is no evidence of the service of the declaration. *Cravins v. Armour*, 6 Yerger, 467. *Lytle v. Fen*, 3 M'Lean, 411. The return of the marshal in ejectment, stating that he had shown the original to one defendant, and delivered a copy at the dwelling of another, in presence of his wife, is not sufficient; as it is necessary that a copy of the declaration should be left at the house of each, and the notice read or explained. If it appear by the marshal's return, that both defendants reside in the same house, then it is sufficient to deliver one copy of the declaration. *Campbell v. Harper*, 3 Wash. C. C. R. 356. Unless a writ of *habere facias possessionem* be actually returned executed, the plaintiff who has been turned out of possession by the defendant, may upon a suggestion of "*vicecomes non misit breve*," obtain an attachment, or sue out a new writ of *habere facias*, so as to regain the possession; and the fact of the writ having been executed, is not sufficient, unless it appears of record; and the writ need not be returned, unless on the application of the plaintiff. *United States v. Slaymaker*, 4 Wash. C. C. R. 169. One of several plaintiffs may be nonsuited, and the cause go on as to the rest. *Okeson v. Silverthorn*, 7 W. & S. 247. *Hinckle v. Riffert*, 6 Barr, 197.

the court held, that this was not good service.(f) But where the tenant in possession acknowledged on a *Sunday*, the receipt of the declaration, which before the essoin day had been delivered to his daughter, who was made acquainted with its contents, this was holden to be sufficient.(gg)

The tenant himself may be served any where:(h) but service on the *wife* should regularly be on the premises, or at her husband's dwelling house:(i) or, if elsewhere, it should appear that she and her husband were living together as man and wife.(k) And where the service was upon the wife of the tenant, who had left the kingdom to settle abroad, and did not intend to return, the court granted a rule for judgment against the casual ejector.(l) But, in a subsequent case, where the affidavit of service of a declaration in *ejectment* stated, that it had been left with the wife of the tenant in possession, *the husband having absconded*, the court of Exchequer held it to be insufficient to found a motion for judgment against the casual ejector. 10 Price, 30. When there are *several* tenants in possession of *different* parts of the premises, a copy of the declaration must be served on each of them, to entitle the lessor of the plaintiff to a rule for judgment against the casual ejector for the whole:(m) and it seems, that when a house is let out in lodgings, a copy of the declaration should be served on each lodger. But where several persons are in possession of the *same* premises, as joint-tenants, &c. service on one of them seems to be good service on all, so as to entitle the plaintiff to a rule absolute for judgment against the casual ejector;(n) though the practice of the King's [*1211] Bench in such *case formerly was, to grant a rule to show cause, why service on one of the tenants, should not be deemed good service on all of them.(a) And where there were *three* defendants, who held severally, and the service was perfect as to *two* of them, but imperfect as to the other, the court granted a rule absolute for judgment against the *two* only.(b)

When the tenant, or his wife, cannot be met with, a copy of the declaration and notice may be delivered to a relation or servant of the tenant, or other person, on the premises, to whom the notice should be read over and explained;(c) and if the tenant afterwards acknowledge the receipt of the declaration, before the essoin day of the next term, it will be deemed good service:(d) But, without such acknowledgment, service of the declaration on a relation or servant, &c. will not be deemed sufficient.(d) And, in the Common Pleas, the mere acknowledgment of the wife, that she has received a declaration in ejectment, will not, it seems, bind the husband.(e)

(f) 5 Barn. & Cres. 764. 8 Dowl. & Ryl. 342, 764, S. C.

(gg) Barnes, 183; but see 1 H. Blac. 628. 2 Dowl. & Ryl. 232. In the latter case, however, the *Sunday*, on which the acknowledgment was made, was the essoin day of the term.

(h) 2 Str. 1064; and see 4 Durnf. & East, 464.

(i) Append. Chap. XLVI. § 36; and see 6 Durnf. & East, 765. 2 Blac. Rep. 800. 1 H. Blac. 644. 2 Bos. & Pul. 55. 1 New Rep. C. P. 308. 1 Chit. Rep. 228, (a), 500, *in notis*.

(k) 1 Chit. Rep. 499, (a). 2 Dowl. & Ryl. 84.

(l) 1 Dowl. & Ryl. 514.

(m) 1 Chit. Rep. 141; and see 3 Moore, 578.

(n) 1 Chit. Rep. 141. 1 Bos. & Pul. 369; and see 4 Durnf. & East, 464, 5. 7 East, 551.

(a) 2 Chit. Rep. 174, 5, 6.

(b) *Id.* 176.

(c) *Id.* 182.

(d) 1 Salk. 255. 14 East, 441; and see 1 Chit. Rep. 100, 118, (a). 2 Chit. Rep. 180, 186, 7, 8, K. B. Barnes, 175, 6. 4 Moore, 20, C. P. 1 Price, 399, Excheq.; but see Barnes, 183. 1 H. Blac. 644, *semb. contra*.

(e) 1 Bos. & Pul. 384. 1 Chit. Rep. 121; and see *id.* 100, (a), 118, (a); but see Barnes, 183. 1 H. Blac. 644, *semb. contra*.

Where the defendant's attorney, however, had acknowledged the receipt of the declaration from his client, (f) the court granted a rule to show cause, why it should not be deemed good service. And a similar rule was granted, where the declaration in ejectment was served upon the tenant in possession, who was confined to her room, and could not be seen, by leaving it with her daughter; who acknowledged, the day before the *essoin* day of the term, that she had read over the declaration to her mother, to whom she explained its meaning. (g)

When the declaration has been personally served on, and explained to the tenant, or his wife, or admitted by the tenant to have come to his possession, before the *essoin* day, it is considered as a *perfect service*. (h) And where the tenant resides abroad, the declaration, we have seen, (i) may be served on his wife. (k) So, where it appeared that the tenant, who was abroad, carried on his business by an agent, residing on the premises, the court held, that delivering the declaration to such agent, in the usual way, and also fixing it on the premises, was sufficient. (l) But where the tenant had left this country, and resided abroad, for the purpose of avoiding his creditors, and it appeared that a copy of the declaration had been delivered to a servant on the premises, who was left in charge of them, and another copy affixed on the outer door of the house, this was deemed insufficient. (m)

Where the tenant was confined to his bed by *illness*, the delivery of a copy of the declaration, and explaining it to his servant, on the premises, *has been deemed a sufficient ground for a rule *nisi*. (a) [*1212] So, where the tenant was a *lunatic*, and the declaration served on his committee, the court granted a rule on the committee and lunatic, to show cause, why the service should not be deemed good; and made it a part of the rule, that service on the committee should be deemed sufficient. (b) And if the person who has the care of the lunatic, and management of his affairs, be not a regular committee, the rule should be to show cause generally, and not on any particular person. (c) Where the tenant was *dead*, leaving a servant in possession of the premises, it was ruled that the lessor of the plaintiff should endeavour to get possession; and if the servant resisted, he might then consider him as tenant, and serve him with a declaration; and if he did not resist, it might then perhaps be treated as a case of vacant possession. (d)

Where the ejectment was brought for a house, which was rented by the *churchwardens* and *overseers* of a parish, for the purpose of accommodating some of the parish poor, a service of the declaration upon the churchwardens and overseers was deemed sufficient, although they did not occupy the house, otherwise than by placing the poor in it. (e) And, in an ejectment for a *chapel*, the service may be made on the *chapel-wardens*, or on the persons to whom the keys are entrusted. (ff) So, a rule *nisi* was granted,

(f) 2 Chit. Rep. 187. 2 Dowl. & Ryf. 5.

(g) 2 Dowl. & Ryf. 12.

(h) 3 Moore, 578; and see Barnes, 171, where it is said that in order to constitute a good service, an actual delivery, or tender and refusal, ought either to be proved or confessed. See also 2 Chit. Rep. 180, 81.

(i) *Ante*, 1210.

(k) 1 Dowl. & Ryf. 514.

(l) 4 Barn. & Ald. 653.

(m) 3 Moore, 576.

(a) 2 Chit. Rep. 182, 3; and see 2 Dowl. & Ryf. 12.

(b) Barnes, 190.

(c) 2 Chit. Rep. 183.

(d) *Id.* 179, per *Holroyd, J.*; and see 1 Chit. Rep. 118. 12 Mod. 313. *Cas. temp. Hardw.* 164, *accord.*

(e) Barnes, 181.

(ff) *Run. Eject.* 2 Ed. 157.

that service of a declaration in ejectment on the *clerk* of a public body, appointed under the direction of an act of parliament, should be deemed good service.(g) And service on the *attorney* for the tenant has, under circumstances, been deemed sufficient. Thus, where the declaration was served on an attorney, who represented himself to be the agent of the tenants in possession, and desired the persons serving it not to trouble the tenants, but to give it to him, and he would appear for them, the court granted a rule *nisi*, that it should be deemed good service, and directed the rule to be served on the attorney.(g) So, where the tenant in possession was out of the way, and, on reference to his attorney, he directed that the declaration should be sent by the two-penny post, to the tenant's last place of abode, which was done accordingly, and it appeared that service had been made on a person on the premises, whom the deponent believed to have been left there by the tenant in possession, and also on the attorney, a rule *nisi* was granted, which was afterwards made absolute.(h) And a rule *nisi* was also made absolute, where the declaration had been served on a servant on the premises, which were shut up, and no one in them except the servant, who had the keys of the premises, and a copy of the declaration was also stuck up on a conspicuous part of them.(i) But where the ejectment was for a house, service upon a person off the premises, having charge of the keys, in order to let the house, was holden not to [*1213] be *good service.(a) So, service upon a person appointed by the court of Chancery, to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, has been deemed insufficient, as being nothing more than service on a gentleman's bailiff.(b)

In case the tenant, or his wife, refuse to accept a copy of the declaration when tendered, the notice should be read and explained to them, and a copy of the declaration and notice left on the premises, or put through a window, &c.; after which, an application should be made to the court, on an affidavit of the circumstances, for a rule for judgment, or that it may be deemed good service. Thus, where it appeared that the tenant in possession refused to accept the declaration, when tendered to him, though acquainted with the contents, and that he brought a gun, and swore he would shoot the person who tendered it, if he did not get off his land, whereupon the declaration was laid down on the ground in the presence of the tenant and his servant, whom the tenant ordered not to take it up, the court were of opinion that these circumstances amounted to good service, and granted a rule absolute for judgment.(c) So, where the declaration was tendered to the wife of the tenant in possession, who refused to open the door of a house, but looked out at a parlour window, and was acquainted with the contents, and the notice was read to her, after which, she refusing to accept the declaration, it was put in at the window to her, the service was held sufficient.(d) But where it appeared, that a person tendered a copy of the declaration to the wife of the tenant in possession in a shop, and would have read to her the notice, but she refused to hear it, or receive the declaration, and said she would have nothing to do with it, and went

(g) 2 Chit. Rep. 181.

(h) *Id.* 179; and see *id.* 187. 2 Dowl. & Ry. 5.

(a) 13 Mod. 313; and see 3 Moore, 576. *Ante*, 1211.

(b) 1 Bos. & Pul. 385.

(d) *Id.* 178; and see *id.* 180, 81; 185. 2 Chit. Rep. 185.

(i) 2 Chit. Rep. 184.

(c) Barnes, 174.

out of the shop, and shut the door after her, whereupon the declaration was left in the shop, the court thought this service not quite sufficient, as the notice ought to have been read aloud in the shop, though no person was there; but as it was a hard case, they made a rule to show cause, why this should not be deemed good service.^(e) And a similar rule was granted, where the tenant was in *Newgate*, and refused to take the declaration, which was pushed through the iron grating to him, and in his presence.^(f) Where several ineffectual attempts had been made to serve the tenant, who was denied by his servant, and the last time, the servant stated that his master was in the house, but refused to be seen by any person, unless he sent in his name and message, whereupon the declaration was delivered to the servant, the court granted a rule *nisi*, that it should be deemed good service, which was afterwards made absolute.^(g) And a rule *nisi* was granted, where the servants refused to call their master, or to receive the ejectment, saying they had orders to take no papers.^(h)

*When the tenant absconds, or keeps out of the way, to avoid [*1214] being served, a copy of the declaration should be delivered to his relation or servant, or some other person, on the premises, to whom the notice should be read over and explained, and another copy affixed on the outer door, or some conspicuous part of the premises; and thereupon, if it be made appear, to the satisfaction of the court, that the tenant absconded, or kept out of the way to avoid being served, but not otherwise, the court, on an affidavit of the facts, will grant a rule *nisi*, that the service on his relation or servant, &c. shall be deemed good service;^(a) and direct in what manner the rule shall be served.^(a)

When there is no house or building on the premises, or they are shut up, the declaration should be served on the tenant, or his wife, if they can be met with; or if not, a copy of the declaration should be affixed on the most conspicuous part of the premises, and an application made to the court, on an affidavit of the circumstances, that it may be deemed good service. Thus, where a rule was moved for, to show cause, why nailing the declaration on the door of a barn, in which the tenant had occasionally slept, there being no dwelling house on the premises, should not be deemed good service, and it appeared that the tenant was not to be found at his last place of abode, and that no person belonging to him was to be found upon the premises, the court hesitated much whether this motion could be attended to; but at length deemed it reasonable, and granted it; adding to the rule, "and why service of it, in like manner as the declaration had been served, should not be deemed good service, unless the tenant himself could be found."^(b) And a similar rule was granted, where the house was shut up, and no tenant in possession, and the declaration was stuck up on the most conspicuous part of the premises.^(c) So, where it appeared that diligent inquiry had been made after the late tenant of the premises, which were entirely shut up, and that it was not known nor could be learnt where he then resided, or could be found, so as to serve him with a copy of the declaration, and notice, but

(e) 2 Wils. 263. (f) 2 Chit. Rep. 185; and see Ad. Eject. 2 Ed. 210, 11.

(g) 2 Price, 112. 1 Chit. Rep. 100, (a).

(h) 1 Str. 575. Cas. temp. Hardw. 164, S. C. cited.

(a) 1 Str. 575. Cas. temp. Hardw. 164, S. C. cited. Barnes, 173, 188, 190, 192. 2 Bur. 1116. 1 Blac. Rep. 290, 317. 2 Bur. 1181. 2 Wils. 263. 3 Moore, 576. 1 Chit. Rep. 100,

(a). 2 Chit. Rep. 176, 7, 8. Ad. Eject. 2 Ed. 210, &c.

(b) 1 New Rep. C. P. 293.

(c) 2 Chit. Rep. 178.

it was believed that he had absconded to avoid being arrested for debt, and that a copy of the declaration and notice had been thereupon affixed on the outer door of the house, the court granted a rule *nisi*, that it should be deemed good service. (d) But where due diligence had not been used to serve the tenant, as where the person serving the declaration had called at his house in the morning, and again in the evening, and not finding him either time at home, nailed the declaration upon the most conspicuous part of the premises, this was not deemed sufficient, even for a rule *nisi*. (e) So, where the declaration had been stuck upon the house, there being nobody in it, and the neighbours believing that the tenant in possession [*1215] had absconded, (f) *or it had been stuck upon the gateway of the premises, (a) a rule *nisi* was refused; as it did not appear that the tenant kept out of the way to avoid being served. And, in ejectment for a stable, service of the declaration, by nailing it on the door of the stable, no person being therein, and then going to the defendant's house, and informing him of what had been done, was deemed insufficient: (b) The declaration in this case should have been delivered to the tenant.

The *affidavit of service* [A] of the declaration in ejectment, and notice, should regularly be made by the person who served them; or, in the Common Pleas, it may be made by a person who was present, and saw the declaration served, and heard it explained. (c) This affidavit should be *enti-*

(d) 1 Chit. Rep. 506; but see 3 Moore, 576.

(e) 1 Chit. Rep. 505, (a).

(f) *Id. ibid.*; and see 4 Barn. & Cres. 259.

(a) 1 Chit. Rep. 505, (a); and see 4 Barn. & Cres. 259.

(b) 1 Chit. Rep. 505, 6; and see 6 Moore, 480.

(c) 2 Bos. & Pul. 120.

[A] Affidavit of service is necessary only where it is not done by an officer of the court. *Lessee of Campbell v. Harper et al.*, 3 Wash. Circuit Ct. Rep. 456. Under the Pennsylvania act of the 13th of April, 1808, section 2, the sheriff's return of "served in ejectment," is *prima facie* evidence, that the person on whom such service is made is in possession, whether he be or be not the party named in the writ. *Gratz et al. v. Banner*, 13 Serg. & R. Rep. 110. In ejectment, the affidavit, to be sufficient, must allege that the persons were tenants in possession, and that they were served with copies of the declaration and notice. *Wharton v. Clay*, 4 Bibb, Rep. 167. Whether the tenant in ejectment is in possession, is not a question upon the merits, but merely of irregularity, and affidavits may be heard upon it on both sides. *Jackson, ex dem. Beaver v. Stiles*, 1 Cow. Rep. 222. It must appear by affidavit, that the declaration and notice were served upon the tenant in possession, before default can be taken against the casual ejector. *Ib.* Acknowledgment by indorsement of service of the declaration must be proved. *Freeman v. Oldham's Lessee*, 4 Monr. Rep. 420. An affidavit of the service of a declaration in ejectment, which states that the copy was served upon A. B., "said to be one of the directors of the within named company," is sufficient. *Den, dem. Auten v. Applegate*, 5 Halst. Rep. 237. *Ib.* 7 Halst, 321, S. C. The notice subjoined to the declaration, must be read, or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service; and that it has been so done, should be stated in the affidavit. *Ib.* If the affidavit, on which to move for judgment against casual ejector in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of the service. *Doe, ex dem. Seabrook v. Roe*, 4 Moore, Rep. 350. In ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit, to ground a motion for a judgment against the casual ejector, to state that a copy of the declaration was served on the tenant, who occupied the one part, and that another copy was affixed to the door of that part which was vacant. *Ib.* The affidavit of service of the declaration in Mississippi, is unnecessary. *William v. Spelt*, 1 Smedes & Marsh. Rep. 559. An affidavit of service of a copy of the declaration, and notice in ejectment on the son of the tenant in possession, and that the tenant acknowledged that he had received the same, is not sufficient; as it must state that such acknowledgment was made before the esoin day. *Doe, ex dem. McDougal v. Roe*, 4 Moore, Rep. 20. An affidavit stating that the declaration was served on the daughter of the tenant, must also show that the service was made on the premises in question. *Den v. Applegate*, 7 Halst. 321.

pled in the court where it is sworn, and with the names of the nominal plaintiff, on the demise of his lessor, or several demises of his lessors, if more than one, against the casual ejector; an affidavit entitled with the names of the real defendants, instead of the casual ejector, having been deemed insufficient: (d) But where the declaration was entitled "*Doe* on the demise of A. and B. against C.," and the affidavit of service was entitled "*Doe* on the demise of B. and A. against C.," it being a mere clerical mistake, the court, notwithstanding the variance in the arrangement of the lessors' names, granted a rule for judgment against the casual ejector. (e) The *jurat* of this, like that of other affidavits, must state the day on which it was sworn; and if the affidavit be sworn before a commissioner, and the day omitted, the *jurat* must either be amended by inserting it, and the affidavit re-sworn, or an affidavit produced, on the part of the commissioner, as to his recollection of the day when it was sworn. (f)

The affidavit begins with the time of serving the declaration, in order to show that it was before the essoin day of the term; and then proceeds to state on whom, and in what manner, it was served. (g) When the declaration is served on the tenant, it must appear by the affidavit, that he is *tenant* in possession of the premises; an affidavit of service on the tenant, without showing him to be in possession, (h) or on the *person* in possession, (i) or who appeared to be in possession, (k) or upon a *person* whom the deponent believes to be tenant in possession, (l) being insufficient. In general, it should appear by the affidavit, that the notice was read over and explained to the tenant; but where it appeared by the affidavit, that the declaration was not read over or explained, though he subsequently acknowledged that he had received it, and knew what it was, this, we have *seen, (aa) was deemed sufficient, and the court granted a rule [*1216] absolute for judgment against the casual ejector. So, where it appeared from circumstances, that the tenant understood the contents of the declaration, though the affidavit did not state that it was explained to him, a rule *nisi* was granted, that the service should be deemed sufficient. (bb)

When the declaration is served on the *wife* of the tenant, it must appear by the affidavit that she was his wife, (cc) or at least that the party believed her to be so; (dd) an affidavit of the service of the declaration upon a *woman* on the premises, who represented herself to be the wife of the tenant in possession, without adding that the deponent believed her to be so, being insufficient. (ee) An affidavit that deponent did serve A. B., tenant in possession, or C. his wife, is not sufficient, it not being certain as to either: (ff) And where the affidavit stated, that deponent served the wives of A. and B., who, or *one of them*, were tenants in possession, &c., the court refused to make a rule for judgment. (gg) It must also be stated in the affidavit, that the wife was served on the premises, or at her husband's dwelling house; or, if served off the premises, that she and her husband were living

(d) 2 Chit. Rep. 181.

(e) *Id.* 174; and see 3 Dowl. & Ryl. 230.

(g) Append. Chap. XLVI. § 31, 2.

(i) *Doe ex dem. Robinson v. Roe*, T. 35 Geo. III. K. B. 1 Price, 399; and see 1 Chit. Rep. 118, (a), 121, 162.

(k) 1 Chit. Rep. 574.

(l) *Id.* 215, 505; and see 4 Moore, 350.

(bb) 2 Chit. Rep. 184.

(dd) Barnes, 194.

(ee) 1 Chit. Rep. 228; but see 2 Chit. Rep. 182, 3.

(gg) *Id.* 174, 5.

(f) 1 Chit. Rep. 228.

(h) 1 Chit. Rep. 575.

(aa) *Ante*, 1210.

(cc) Append. Chap. XLVI. § 33.

(ff) Barnes, 173.

together as man and wife, at the time of service.(h) In the King's Bench, this must appear by the affidavit on which the rule for judgment against the casual ejector is originally moved for; nor can any rule be drawn up in that court, till a perfect affidavit be produced.(i) But, in the Common Pleas, where the affidavit stated that the declaration was served upon the tenant's wife, who admitted that her husband had received it, the court granted the rule, provided a *supplemental* affidavit were produced, that the wife lived with her husband, and not otherwise.(k) It is sufficient, however, that the affidavit state the declaration to have been served upon the wife, on the premises, although it be not expressly stated that her husband is tenant in possession, provided that fact can be collected by necessary inference.(l)

When the declaration has been served on several tenants, in possession of *different* parts of the premises, there should be one or more affidavits, stating the service on each of them: If they were all served by one person, on the same day, a single affidavit of service is sufficient, stating generally, that he personally served A. B. C. D., &c., tenants in possession.(m) &c.; but otherwise there should be several affidavits, stating the service on each particular tenant.(n) And where the declaration has been served on one of several persons, in possession of the *same* premises, as joint-tenants, &c., or co-partners in trade,(o) the affidavit must state that [*1217] they are *all* tenants in possession;(a) though it does not seem to be necessary to describe them as joint-tenants, or tenants in common.(b) And where it appears by the affidavits, that some only of the tenants have been served, the court, we have seen,(c) will grant a rule absolute for judgment against them only.

When the tenant, or his wife, cannot be met with, the affidavit should state, that a copy of the declaration was delivered and explained to a relation or servant, or other person, on the premises, and that the tenant afterwards acknowledged the receipt of it;(dd) an acknowledgment by the wife not being sufficient to bind her husband:(ee) and it must be stated in the affidavit, that the acknowledgment was made before the *essoin* day of the term.(f) In case the tenant, or his wife, refuse to accept a copy of the declaration, when tendered, the affidavit should state the tender act and refusal, and that the notice was read over and explained to them, and a copy of the declaration and notice left on the premises, or put through a window,(g) &c. And where the tenant absconds, or keeps out of the way, to avoid being served, it is not sufficient to state in the affidavit, that the deponent called at the tenant's house, and, not finding him at home, affixed the declaration on the most conspicuous part of the premises;(hh) but it

(h) 1 Chit. Rep. 499, (a). 2 Dowl. & Ry. 84. *Ante*, 1210.

(i) 1 Chit. Rep. 499; and see *id.* 506. 2 Dowl. & Ry. 84.

(k) 1 New Rep. C. P. 308.

(l) 1 Chit. Rep. 500, *in notis*.

(m) Append. Chap. XLVI. § 34.

(n) *Id.* § 35.

(o) 2 Chit. Rep. 174, 5.

(a) 1 Chit. Rep. 141; and see Append. Chap. XLVI. § 34, 5, 6.

(b) 2 Chit. Rep. 175; and see 1 Bos. & Pul. 369.

(c) *Ante*, 1211.

(dd) Per *Ld. Kenyon*, M. 38 Geo. III. K. B. 1 Chit. Rep. 100, 101; and see *id.* 118, (a), 213. 2 Chit. Rep. 180, 186.

(ee) *Ante*, 1211.

(f) 14 East, 441. 4 Moore, 20; and see Barnes, 171. 1 Price, 399. 1 Chit. Rep. 100, 118, (a). 2 Chit. Rep. 180, 186. 3 Moore, 578; but see Barnes, 183. 1 H. Blac. 644, C. P. *contra*.

(g) *Ante*, 1213, and the cases there cited.

(hh) 1 Chit. Rep. 505, (a); and see 3 Moore, 576. 2 Chit. Rep. 176, 7.

should be shown, that the deponent made diligent inquiry after the tenant, without effect, and that he verily believes he has absconded, or keeps out of the way, to avoid being served with a declaration;(i) and it must also be stated, that a copy of the declaration has been *left*, as well as affixed on the premises.(k)

When the premises are *deserted* by the tenant, and the landlord proceeds on the statute 4 Geo. II. c. 28, § 2, the affidavit should state, that a copy of the declaration and notice was affixed upon the door of the messuage, or some notorious place of the premises, there being no person in possession, upon whom the declaration could be legally served; that half a year's rent was then due from the late tenant, and no sufficient distress to be found upon the premises, to countervail the same; that the late tenant held the premises, by virtue of a lease, from the lessor of the plaintiff; and that a clause of re-entry is contained therein, for non-payment thereof.(l) And if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for the affidavit, to ground a motion for judgment against the casual ejector, to state that a copy of *the [*1218] declaration was served on the tenant, who occupied the one part, and that another copy was affixed on the door of that part which was vacant.(a) If the *affidavit* of service of a declaration in ejectment be defective, a rule for judgment will not be granted, in the King's Bench, until a proper affidavit be produced;(b) but it seems to be otherwise in the Common Pleas,(c) in which latter court *supplemental* affidavits are allowed for this, as well as other purposes.

The *motion* for judgment against the casual ejector, is a motion of course, requiring only the signature of a counsel or serjeant; and, when the motion paper is signed, it should be taken by the plaintiff's attorney, to the clerk of the rules in the King's Bench, or to one of the secondaries in the Common Pleas, who will draw up the rule. In the King's Bench, if the premises be situate in *London* or *Middlesex*, and the notice require the tenant to appear on the *first* day, or within the first *four* days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear in *four* days, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until a later period of the term, the court will order the tenant to appear in *two* or *three* days, and sometimes *immediately*, in order that the plaintiff may proceed to trial at the sittings after term; but, if the motion be not made before the last *four* days of the term, the tenant need not appear, until *two* days before the *essoin* day of the subsequent term:(d) And, in a *town* cause, the motion cannot be made in a term subsequent to that in which the tenant had notice to appear.(e) In the Common Pleas, it is a rule, that "the motion should be made, in *town* causes, within one week next after the first day of *Michaelmas* or *Easter* term, and within *four* days next after the first day of *Hilary* or *Trinity* term:"(f)

(i) 1 Chit. Rep. 506; and see *id.* 100, (a). Ad. Eject. 2 Ed. 210. *Ante*, 1214, and the cases there cited.

(k) 1 Chit. Rep. 506. 4 Moore, 350, (a).

(l) Cas. Pr. C. P. 68, (a). Run. Eject. 2 Ed. 183. Append. Chap. XLVI. § 40, 41.

(a) 4 Moore, 469; and see Woodf. L. & T. 464. Ad. Eject. 2 Ed. 213.

(b) 1 Chit. Rep. 499; and see *id.* 506. 2 Dowl. & Ryl. 84. *Ante*, 1216.

(c) 1 New Rep. C. P. 308. *Ante*, 1216.

(d) Ad. Eject. 2 Ed. 217, 18. Imp. K. B. 10 Ed. 576, 580.

(e) 2 Ken. 272.

(f) R. T. 32 Car. II. C. P.

but this rule relates only to ejectments served on tenants in possession, and does not extend to cases where the possession is vacant,^(g) or on the statute 4 Geo. II. c. 28,^(h) which may therefore be moved at any time in term.^(h) In *country* ejectments, when the declaration was served before the *essoin* day of *Easter* or *Michaelmas* term, with notice to appear in those terms, the plaintiff, in the King's Bench, must formerly have moved for judgment, the same term in which the tenant had notice to appear,⁽ⁱ⁾ but afterwards, he was allowed in that court^(k) as well as in the Common Pleas,^(l) to move for judgment at any time during the next issuable term;^(m) [*1219] though, where the notice was to appear in *Michaelmas* term, it was deemed too late to move for judgment in *Trinity* term following:^(a) And now, since the late rule,^(b) the motion for judgment, in *country* causes, should in all cases be made in the term in which the tenant is required by the notice to appear.

When the service of the declaration is *perfect*, as where it was personally delivered, and the notice read over and explained to the tenant, or his wife, the court, on motion, supported by a proper affidavit,^(c) will grant a rule absolute in the first instance, for judgment against the casual ejector:^(dd) and a similar rule will be granted, where the declaration was left with a relation or servant of the tenant, who afterwards acknowledged the receipt of it, before the *essoin* day of the next term.^(ee) The rule for judgment is also absolute in the first instance, when the premises are deserted, and the landlord proceeds on the statute 4 Geo. II. c. 28, § 2;^(ff) or, in the King's Bench, on a *vacant* possession.^(gg) But when there is any thing in the service of the declaration out of the common way, it should be mentioned to the court, from the affidavits, and they will thereupon either grant or refuse the rule for judgment in the first instance; and if the service of the declaration be *imperfect*, as where the tenant absconds, or keeps out of the way, to avoid being served, &c. the court will grant a rule to show cause, why service of the declaration, by leaving a copy of it with his relation or servant, or other person, upon the premises, or by fixing the same upon some conspicuous part thereof, should not be deemed good service;^(gg) and why, in default of appearance, judgment should not be entered against the casual ejector; and will direct by the rule, in what manner it shall be served.^(hh) It was formerly usual, in the King's Bench, to grant such rule, with respect to

(g) *Id.* (a).

(i) Run. Eject. 2 Ed. 191. Imp. K. B. 10 Ed. 576, 580.

(k) 2 Chit. Rep. 189.

(l) Barnes, 186, 250. 4 Taunt. 738. Run. Eject. 2 Ed. 191.

(m) The rule in such case was at first only a rule to show cause, in the King's Bench; *Doe ex dem. Pearson v. Roe*, H. 54 Geo. III. K. B. Ad. Eject. 2 Ed. 219. 2 Chit. Rep. 189, (a); but afterwards, a rule absolute was granted in the first instance; 2 Chit. Rep. 189, which, however, was required to be served on the tenant.

(a) 2 Chit. Rep. 190.

(b) R. E. 2 Geo. IV. 4 Barn. & Ald. 539. 2 Chit. Rep. 375, 6. K. B. 2 Brod. & Bing. 705. 5 Moore, 637. 2 Chit. Rep. 380, O. P. 9 Price, 299, Excheq. *Ante*, 1208. *Post*, 1220, 21.

(c) Append. Chap. XLVI. § 31, &c.

(ee) *Ante*, 1211, 1217.

(gg) *Ante*, 1202.

(hh) 1 Str. 576. *Cas. temp. Hardw.* 164, S. C. cited. Barnes, 173, 188, 190, 192. 2 Bur. 1116. 1 Blac. Rep. 290, 317. 2 Bur. 1181. 2 Wils. 263. 3 Moore, 576. 1 Chit. Rep. 100, (a). 2 Chit. 176, 7, 8. Ad. Eject. 2 Ed. 210, &c. Append. Chap. XLVI. § 38, 9. *Ante*, 1214, 1217.

(h) Barnes, 172.

(dd) *Id.* § 42, &c.

(ff) *Ante*, 1197, 1217, 18.

future service only, and not with any retrospect;(*i*) but the practice in that court was altered, in the beginning of the last reign,(*j*) and made conformable to the course of the Common Pleas;(k) and it is now the practice in both courts, to grant the rule, on a proper affidavit, for giving effect to a *past service*. This rule may either be granted upon the tenant, his attorney or other person, by name,(l) or generally, without naming any person in particular;(m) and if the rule be made absolute, the rule for judgment will be drawn up as a matter of course. When the tenant, or his wife, refuses to accept a copy of the declaration, the rule for judgment, we have seen,(n) is absolute in the first instance, or the court *will [*1220] only grant a rule *nisi*, according to circumstances: But the rule is always *nisi*, when the tenant absconds or keeps out of the way, to avoid being served, and a copy of the declaration is in consequence delivered to a relation or servant, or other person, on the premises.(a)

The rule for judgment against the casual ejector, in the King's Bench, is a conditional rule or order of the court, that, "unless the tenant in possession of (or, *if the premises are untenanted*, "unless some person claiming title to") the premises in question, shall appear and plead to issue on a certain day, being *four* days after granting the rule in *town* causes, or *four* days after the last day of term in *country* causes, judgment shall be entered for the plaintiff, against the casual ejector, by default."(*b*) In the Common Pleas, the rule is, that "unless the tenant in possession of the tenements in question, or some other person concerned in the title thereof, shall appear on a certain day, by an attorney of that court, who shall thenceforth receive a declaration, and plead thereto the general issue, and consent to the common rule for confessing lease, entry and ouster, upon the trial to be had, judgment shall be entered against the casual ejector; and in the mean time proceedings are to stay."(*c*)

When there are *several* tenants in possession of the premises, and it appears from the affidavits, that they have all been served, there is only one rule for judgment against the casual ejector; wherein they are mentioned generally, as "tenants in possession of the premises in question," though the name of each tenant was separately prefixed to the notice served on him.(d) But where it does not appear from the affidavits, that all the tenants have been served, the rule is drawn up specially, mentioning the name or names of those tenants only who have been served, and describing them as "tenant or tenants in possession of part of the premises."(*e*) And where there were separate declarations, and the notices to appear were addressed to the tenants severally, and there are separate affidavits of service, several rules are drawn up, as in several ejectments; and they must afterwards, if necessary, be consolidated.

The rule for judgment in *town* causes, we have seen,(f) is for the tenant or tenants in possession to appear and plead, in the King's Bench and Common Pleas, on a day certain in term, at the distance of *four* days from the day of granting the rule.(g) In *country* causes, the tenant or person

(i) 2 Bur. 1116. 1 Blac. Rep. 290, S. C. *Id.* 317.

(k) Barnes, 173, 188, 190, 192.

(m) 2 Chit. Rep. 183. *Ante*, 1212.

(a) *Ante*, 1214, 1217, 1219.

(c) *Id.* § 45.

(e) Append. Chap. XLVI. § 44.

(g) Append. Chap. XLVI. § 42, &c.

(l) Append. Chap. XLVI. § 38, 9.

(n) *Ante*, 1213.

(b) Append. Chap. XLVI. § 42, &c.

(d) 7 Durnf. & East, 477. *Ante*, 1208.

(f) *Ante*, 1218, 1220.

claiming title to the premises, had formerly in all cases until *four* days after the end of the next issuable term, to appear and plead: (h) And, in the Exchequer, it was a rule, that "in all country ejectments, which were moved in a term not issuable, the defendant should have *four* days next after the end of the issuable term, immediately succeeding the respective terms in which such ejectments were moved, to appear thereto." But now, by a late rule of all the courts, (i) "in all country ejectments, [*1221] *which shall be served before the essoin day of any *Michaelmas* or *Easter* term, the time for the appearance of the tenant in possession shall be within *four* days after the end of such *Michaelmas* or *Easter* term, and shall not be postponed till the *fourth* day after the end of *Hilary* or *Trinity* terms respectively following."

The clerk of the rules, in the King's Bench, and secondaries of the Common Pleas, are required to keep a book, "in which shall be entered all the rules which from time to time shall be *delivered out* in ejectment, (instead of the book formerly kept, containing a list of ejectments *moved*;) in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff, (with the words "and others," if there be more than one,) and also the name of the casual ejector: And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules, or secondaries, within *two* days after the end of the term in which the ejectment is moved, no rule shall be drawn up, or entered in the book, nor shall any proceedings be had in such ejectment." (a) If the rule be not taken away from the office in due time, the clerk of the rules, or secondaries, will not deliver it out, without a rule of court, or order of a judge, authorizing them to do so.

In ejectment, by *landlord* against *tenant*, on the statute 1 Geo. IV. c. 87, (b) it is enacted; that "upon the appearance of the party, at the day prescribed in the notice to appear and find bail, &c., or, in the case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the lease or agreement in writing, under which the tenant held any lands or tenements, for any term or number of years certain, or from year to year, &c. or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner therein mentioned, to move the court for a rule for such tenant or person to show cause, in a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the

(h) Run. Eject. 2 Ed. 191. Ad. Eject. 2 Ed. 219. 4 Taunt. 738.

(i) R. E. 2 Geo. IV. 4 Barn. & Ald. 539. 2 Chit. Rep. 375, 6, K. B. 2 Brod. & Bing. 705. 5 Moore, 637. 2 Chit. Rep. 380, C. P. 9 Price, 299, Excheq. *Ante*, 1208, 1218, 19. And see a former rule of T. 26 & 27 Geo. II. § 7. 8 Price, 212. But see R. H. 39 Geo. III. Excheq. Man. Ex. Append. 224. 8 Price, 504, *contra*. Ad Eject. 2 Ed. 219, 20.

(a) R. M. 31 Geo. III. K. B. 4 Durnf. & East, 1. R. E. 48 Geo. III. C. P. 1 Taunt 317; and see 2 Chit. Rep. 188. *Ante*, 1202.

(b) § 1. *Ante*, 1209.

time of trial, or if the action shall be brought in *Wales*, or in the counties palatine respectively, then of the session, *assizes or [*1222] court day, as the case may be, at which the trial shall be had; and also why he should not enter into a *recognizance*, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the court, upon cause shown, or upon affidavit of the service of the rule, in case no cause shall be shown, to make the same absolute, in the whole or in part, and to order such tenant or person, within a time to be fixed, in consideration of all the circumstances, to give such *undertaking*, and find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same, so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff." And by a subsequent clause of the same statute, (a) "all recognizances and securities entered into pursuant to the provisions of that act, may and shall be taken respectively in such manner, and by and before such persons, as are provided and authorized in respect of recognizances of bail, upon actions and suits depending in the court in which any such action of ejectment shall have been commenced; and that the officer of the same court, with whom recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid: but no action or other proceeding shall be commenced upon any such recognizance or security, after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord. Provided always, that nothing in that act contained, shall be construed to prejudice or affect any right of action or remedy, which landlords already possessed, in any of the cases therein before provided for." (b)

This statute has been holden to extend to a tenancy, by virtue of an agreement in writing, for a term certain. (c) And where a landlord had entered into a written agreement with the tenant, to grant him a lease for a certain term, which lease however was never granted, and at the expiration of the term the tenant held over, after having been served with a proper notice to quit, and he was then served with a written demand of possession, with an intimation that if he did not deliver it, an ejectment would be brought; the court decided, first, that the tenant held under an agreement in writing, and was not to be treated as a tenant from year to year; and secondly, that the demand of possession was sufficient to entitle the plaintiff to the benefit of the undertaking and security required by the statute. (d) But a tenancy for years, determinable on lives, is not a holding for any term or number of years certain, within the meaning of the above statute. (e) And the statute does not extend to the case of a *lessee, holding over after notice to quit given by himself, [*1223] where his tenancy has not expired by efflux of time. (aa) So,

(a) § 4.

(c) 5 Barn. & Ald. 766. 1 Dowl. & RyL. 433, S. C.

(d) 2 Dowl. & RyL. 565.

(e) 7 Barn. & Cres. 2.

(b) § 7.

(aa) 1 Dowl. & RyL. 540.

where a tenant holds from year to year, without a lease or agreement in writing, it is not a case within the statute.^(b)

In proceeding on this statute, the lease or agreement under which the tenant holds the premises, or a counterpart or duplicate thereof, must be produced, though it need not it seems be *left* in court; and the execution of the same must be proved by *affidavit*,^(c) as well as that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit;^(d) and that a *demand* in writing of the possession has been made, and signed by the landlord or his agent, and personally served upon, or left at the dwelling house or usual place of abode of the tenant, or person holding under him;^(e) upon which the court will grant a *rule* to show cause,^(f) why the tenant upon being made defendant instead of the casual ejector, beside entering into the common consent rule, and giving the usual undertaking, should not undertake, in case a verdict should pass for the plaintiff, to give him judgment, to be entered up of the preceding term, against the real defendant, and why he should not enter into a recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff, pursuant to the statute.^(g) This rule, however, need not specify all the particulars required by the statute; as the court may mould the rule, conformably to its requisites, on showing cause:^(h) and if no sufficient cause be shown, they will, on making the rule absolute,⁽ⁱ⁾ order the tenant to give the additional undertaking required by the statute, and also that he enter into a recognizance, by himself and two sufficient sureties, in a certain sum, to be fixed by the court, conditioned to pay the costs and damages, &c.^(j) The time within which the undertaking is to be given and recognizance entered into, is to be fixed by the court, at the time when the rule is granted.^(k) And, in the Common Pleas, the court observed, that they were only empowered to require a recognizance in a reasonable sum, for the costs of the action, and not for the *mesne* profits; and that what was to be considered a reasonable sum, must be ascertained by the prothonotary.^(l) The *undertaking* to give judgment of the preceding term, is usually inserted in the consent rule;^(m) and the *recognizance* is taken before a judge in town causes, or, in the country, before a commissioner for taking bail.⁽ⁿ⁾

[*1224] *A rule for judgment having been obtained against the casual ejector, the tenant in possession, or his landlord, either *appears*, and enters into the consent rule to be made defendant, instead of the casual ejector, and to confess lease, entry and ouster, &c. *confesses* the action, or makes *default*. In the latter case, the plaintiff's attorney, having ascertained the fact, by searching the ejectment books at the judges' chambers in the King's Bench, and the plea book at the prothonotaries' office in the Common Pleas, may sign judgment against the casual ejector;^(a) pre-

(b) 5 Barn. & Ald. 770; and see 6 Moore, 54, in which latter case, the agreement from year to year was in writing, though not so stated in the report. See also M'Clel. 492.

(c) Append. Chap. XLVI. § 48.

(d) Append. Chap. XLVI. § 1, &c. 47.

(e) *Id.* § 46.

(f) *Id.* § 50.

(g) 6 Moore, 54.

(h) 5 Barn. & Ald. 768. 1 Dowl. & Ryl. 433, S. C.

(i) Append. Chap. XLVI. § 52.

(j) 2 Dowl. & Ryl. 688; and see 3 Dowl. & Ryl. 230.

(k) 6 Moore, 54.

(l) Append. Chap. XLVI. § 69.

(m) Stat. 1 Geo. IV. c. 87, § 4. *Ante*, 1222.

(n) Append. Chap. XLVI. § 55.

viciously to which, common bail must be filed for the casual ejector, in the King's Bench by *bill*; (*b*) though it does not seem necessary to enter an appearance for him, by *original* in that court, or in the Common Pleas; (*c*) nor is it necessary to give a rule to plead before judgment is signed. (*d*) It was formerly necessary to sue out a bill of *Middlesex* or *latitat*, before judgment could be signed against the casual ejector, in the King's Bench; (*e*) but this is now dispensed with: for his being admitted to bail implies he was once a prisoner, and whether he came into court regularly by *latitat* or not, yet the judgment is not *coram non judice*. (*f*) The judgment, however, must not be signed until the afternoon of the day next after that on which the rule expires: and if *Sunday* happen to be the last day, it cannot be signed until the afternoon of *Tuesday*. (*g*)

In order to sign judgment against the casual ejector, the rule for judgment must be drawn up with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, and an *incipitur* of the declaration made, which is called the judgment paper, and also on a roll of the same term with the rule, beginning, in the King's Bench, with the warrants of attorney; (*h*) but in the Common Pleas the warrants of attorney are made out and filed with the clerk of the warrants, who marks the judgment paper; which is taken to the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas; and, on producing the rule, the clerk will sign the judgment: after which, a writ of possession (*i*) may be immediately sued out and executed; for which a *præcipe* is required in the King's Bench, but not in the Common Pleas. (*k*)

If the judgment against the casual ejector be *irregular*, the court, on motion, will order it to be set aside, with costs: And where the judgment was set aside for irregularity, and possession ordered to be restored, but the lessor of the plaintiff, who held possession, absconding, the rule was ineffectual, the court of Common Pleas, on motion, ordered a writ of restitution, on behalf the late tenants in possession. (*l*) And even though *the judgment against the casual ejector be *regular*, yet [*1225] the courts in this, as in other actions, will order it to be set aside, upon an affidavit of merits, and payment of costs. (*aa*) But the court of Common Pleas refused to set aside a judgment and execution in ejectment, in order to let in a person to defend; though he made an affidavit, setting forth a clear title, and offered to pay costs. (*bb*) So, where a plaintiff had obtained judgment and possession in an undefended ejectment, without collusion, and had sold part of the premises, and transferred the possession, that court would not let in the landlord, from whom his tenants had concealed the ejectment, to appear and defend it, on payment of costs. (*cc*) In *vacation*, a judge at chambers, on an affidavit of merits, will compel the plaintiff to accept a plea, or stay the proceedings, provided he will not waive his judgment, on payment of costs. (*dd*)

(*b*) R. T. 14 Car. II. reg. 1. R. M. 33 Car. II. K. B.

(*c*) Imp. K. B. 10 Ed. 579. Imp. C. P. 7 Ed. 631.

(*d*) Ad. Eject. 2 Ed. 222.

(*e*) R. T. 14 Car. II. reg. 1. R. M. 33 Car. II. K. B.

(*f*) R. T. 14 Car. II. reg. 1, (*a*). Gilb. Eject. 22. Ad. Eject. 2 Ed. 221, 2.

(*g*) Say, Rep. 303; and see 4 Dowl. & Ryl. 393.

(*h*) Append. Chap. XLVI. § 55.

(*i*) *Id.* § 112, &c.

(*k*) 2 Sel. Pr. 2 Ed. 100, 121. Imp. C. P. 7 Ed. 631.

(*l*) Barnes, 178.

(*aa*) 2 Str. 975. 1 Ken. 380. 4 Burn. 1998. 5 Taunt. 205. 11 Price, 507. 13 Price, 260.

(*bb*) 3 Taunt. 506; and see 4 Taunt. 820. 2 Moore, 581.

(*cc*) 4 Taunt. 820; and see 8 Taunt. 538. 2 Moore, 581.

(*dd*) Imp. K. B. 10 Ed. 579. Imp. C. P. 7 Ed. 631.

It will next be proper to consider the *appearance* of the *tenant*, or his *landlord*, &c., and the proceedings thereon, to trial, final judgment, and execution.

The *appearance* in ejectment is either by the *tenant*, or his *landlord*, &c., or by both. If the tenant appear, either alone or jointly with his landlord, within the time limited by the rule for judgment, he must enter into the common *consent* rule,^(e) to be made defendant, instead of the casual ejector, and to confess lease, entry and ouster, &c. By the terms of the *consent* rule, which is in substance the same in all the courts,^(f) the party applying, we have seen,^(g) consents to be made defendant, instead of the casual ejector; to appear, at the suit of the plaintiff, and, if the proceedings are by *bill*, to file common bail; to receive a declaration in ejectment, and plead not guilty; and, at the trial of the issue, to confess lease, entry and ouster, and insist upon the title only; that if, at the trial, the party appearing shall not confess lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit, such party shall pay costs to the plaintiff; and that if a verdict shall be given for the defendant, or the plaintiff shall not further prosecute his suit, for any other cause than for not confessing lease, entry and ouster, the lessor of the plaintiff shall pay costs to the defendant.^(h)

It was formerly usual to draw up the consent rule, in the King's Bench, generally, for the tenant to be admitted defendant, and confess lease, entry and ouster, "for the premises in question,"⁽ⁱ⁾ or (as in the Common Pleas,)^(j) "for so much of the premises as were in the possession of the defendant, or his tenant, or any person claiming by or under his [*1226] *title;"^(a) or to describe the premises, for which the ejectment was meant to be defended, specially, at the discretion of the defendant.^(b) And it was a rule in the King's Bench, that "where the defendant, by the consent rule, confessed lease, entry and ouster, for so much of the premises as were in his possession, or that of his undertenants, his attorney should immediately deliver to the plaintiff's attorney, a note in writing of the tenements, so being in the possession of the defendant, or his undertenants."^(c) If this was not done, the plaintiff might have called on the defendant, by a judge's order, to specify for what he defended, when that was not ascertained by the consent rule:^(dd) And the lessor of the plaintiff was bound, at the trial, to prove the defendant in possession of the premises for which the ejectment was brought.^(ee) But now, by a late rule of all the courts,^(ff) "in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend;^(gg) and shall consent in such rule to confess, upon the trial, that he (if he defend as tenant, or, in case he defend as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises;^(gg)

(e) Append. Chap. XLVI. § 64.

(g) *Ante*, 1203, 4.

(i) *Id.* § 67.

(a) Run. Eject. 2 Ed. 233, 4. Ad. Eject. 2 Ed. 233. *Id.* Append. 354, 5.

(b) 2 Sel. Pr. 2d Ed. 103; and see 7 Durnf. & East, 329, &c.

(cc) R. T. 15 *Car. II. reg. 1* K. B.

(dd) 7 Durnf. & East, 332, and the cases there cited; and see Append. Chap. XLVI. § 81.

(ee) 1 Wils. 220. 7 Durnf. & East, 327. 1 Bos. & Pul. 573; and see 5 Maule & Sel. 393.

(ff) R. M. 1 Geo. IV. K. B. 4 Barn. & Ald. 198. 2 Chit. Rep. 375. R. H. 1 & 2 Geo. IV. C. P. 5 Moore, 310. 2 Brod. & Bing. 470. 2 Chit. Rep. 379, 80. R. E. 2 Geo. IV. Excheq. 9 Price, 299, 300.

(gg) Append. Chap. XLVI. § 65, 68.

(f) 7 Durnf. & East, 333, 4.

(h) Append. Chap. XLVI. § 64.

and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed." This rule operates as a notice of the premises for which the tenant means to defend, and supercedes the necessity of the plaintiff's proving him in possession of them at the trial.

If the tenant mean to appear, his attorney procures a blank consent rule, from a stationer's in the King's Bench, or from the secondaries' office in the Common Pleas, and fills it up, by entitling it of the term of appearance, and inserting in the margin, the county in which the ejectment is laid, and the names of the original parties, thus: "— to wit, A. B. on the demise of C. D. (or, on the several demises of C. D. and E. F. &c.) against G. H." and by making the tenant defendant, instead of the casual ejector, in the body of the rule; which must specify for what premises he means to defend.(g) But, where there are several demises, the rule need not be entitled, in the Common Pleas, with the christian and surname of each of the lessors of the plaintiff.(h) The defendant's attorney then signs his name at the bottom, leaving a blank space for the plaintiff's attorney to do the like: for this, it should be *observed, is rather [*1227] an agreement between the parties for a rule, than the rule itself, which is afterwards drawn up by the proper officer.(a) Common bail is then filed by the defendant's attorney, in the King's Bench by *bill*, with the clerk of the common bails; and the *plea* of not guilty(b) engrossed, and annexed to the consent rule: which being done, the plea and rule are carried to, and left at the chambers of one of the judges in the King's Bench, or at the prothonotaries' office in the Common Pleas.(c)

When the tenant appears for the *whole* of the premises, they may either be described in the consent rule generally, as in the declaration, or as they really are; but, when he appears for *part* of the premises only, that part must be particularly specified in the consent rule;(d) and the plaintiff in such case, having obtained the rule for judgment, may sign judgment against the casual ejector for the residue.(e) When there are *several* tenants, they may all join in the consent rule, to defend for the whole of the premises, stating of what they consist; or they may severally defend for different parts, specifying the particular part each of them occupies.(ff)

When an ejectment is brought by a tenant in common, joint-tenant, or coparcener, against his companion, it is necessary for the lessor of the plaintiff to prove, in order to maintain it, an actual ouster or denial of entry by the defendant, unless admitted by the consent rule;(gg) and, therefore, if there has been no actual ouster, the defendant ought to apply to the court, for a special rule,(hh) to confess lease and entry, and also ouster of the nominal plaintiff, if an actual ouster of the plaintiff's lessor, by the defendant, shall be proved at the trial, but not otherwise; which rule the

(g) Append. Chap. XLVI. § 65, 68.

(h) 3 Moore, 96.

(a) Append. Chap. XLVI. § 66.

(b) *Id.* § 79.

(c) 2 Sel. Pr. 2 Ed. 102. Imp. K. B. 10 Ed. 583, 4. Imp. C. P. 7 Ed. 637, 8.

(d) Append. Chap. XLVI. § 65, 68.

(e) 2 Sel. Pr. 2 Ed. 104.

(ff) 7 Durnf. & East, 330. Run. Eject. 2 Ed. 233. Ad. Eject. 2 Ed. 237. 2 Sel. Pr. 2 Ed. 100, 101, and see Append. Chap. XLVI. § 65, 68.

(gg) Run. Eject. 2 Ed. 219, &c. Ad. Eject. 2 Ed. 234, 5.

(hh) Append. Chap. XLVI. § 72.

court of King's Bench will grant, on an affidavit that there has been no actual ouster by the defendant;(i) and, in the Common Pleas, it is said to be merely a matter of course to grant the rule, whenever the defendant is a joint-tenant, tenant in common, or coparcener.(k)

Before the making of the statute 11 Geo. II. c. 19, *landlords* were permitted to defend ejectments, by joining with the tenants in possession, and even, as it seems, without their being joined.(l) But the court of King's Bench, in one case, refused to set aside a judgment against the casual ejector, where the landlords had obtained a rule to be made defendants with the tenants in possession, and entered their appearance, but the tenants, having been practised upon, refused to appear, or make any defence, saying, that the rule was only that the landlords should be made defendants, together with the tenants in possession; and therefore, if they [*1228] would not stand the suit, the landlords could not be let in.(m) *This

decision seems to have occasioned the passing of the above statute; by which it is enacted, that "every tenant, to whom any declaration shall be delivered, for any lands, &c. shall forthwith give notice thereof to his or her landlord or landlords, or his, her or their bailiff or receiver, under penalty of forfeiting the value of *three years'* improved or rack rent of the premises, so demised or holden, in the possession of such tenant, to the person of whom he or she holds; to be recovered by action of *debt*, &c."(a) This clause of the statute, however, has been construed to extend only to those cases, in which the ejectment is inconsistent with the landlord's title:(b) Therefore, a tenant of a mortgagor, who does not give him notice of an ejectment brought by the mortgagee, upon the forfeiture of the mortgage, is not within the penalties of the clause.(b)

By the same statute,(c) "it shall and may be lawful for the court in which an ejectment is brought, to suffer the landlord or landlords to make him, her or themselves defendant or defendants, by joining with the tenant or tenants to whom such declaration in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector, for want of such appearance; but if the landlord or landlords of any part of the lands, tenements or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule, that, by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done, then the court, where such ejectment shall be brought, shall and may permit such landlord or landlords so to do, and order a stay of execution upon such judgment, against the casual ejector, until they shall make further order therein."

This latter clause of the statute has been construed to extend not only to landlords, properly so called, who are in receipt of the rents and profits of the premises, but also to all persons claiming title thereto, consistently with the possession of the occupier, though they have not previously exercised any act of ownership over the property; as to the heir,(d) devisee in

(i) *Id.* § 71.

(k) 2 Taunt, 397.

(l) 1 Salk, 256, 7. Comb. 208. 12 Mod. 211. 3 Bur. 1301.

(m) 2 Str. 830.

(a) § 12. In this action, the plaintiff obtaining a verdict, is only entitled to single costs. 2 Barn. & Ald. 662, (a). *Ante*, 987.

(b) 1 Durnf. & East, 647; and see 11 Price, 507.

(d) 3 Durnf. & East, 783.

(c) § 13.

trust,(e) or mortgagee,(f) who has never been in possession, or to remainder-men or reversioners,(g) or even, as it seems, to a lord claiming by escheat.(h) But a parson, claiming a right to enter and perform divine service in a chapel, was, before the statute, holden not to have a sufficient title to be admitted defendant.(i) And where a person claims in *opposition to the title of the tenant in possession, he cannot be [*1229] considered as landlord.(a) In such case therefore, if a party should be admitted to defend as landlord, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs.(b)

When a landlord means to defend, a *motion* should be made for a rule that he may be made defendant with the tenant, if he appear; and, if the tenant do not appear, then, that he may appear by himself, and enter into the common rule, and defend his title.(c) This, in ordinary cases, is a mere motion of course, requiring only the signature of a counsel or serjeant; but it is said, that when the party who wishes to be made defendant, is not the tenant or actual landlord, but has some particular interest to sustain, the court must be moved, on an affidavit of the facts, to permit him to defend, with or without the tenant, as the case may require.(dd)

The motion for a rule to admit the landlord to defend, instead of the tenant, ought regularly to be made before judgment is signed against the casual ejector: and if it be delayed until after that time, the court will grant or refuse the rule, at their discretion.(ee) Thus, where a judgment against the casual ejector was signed, and a writ of possession executed thereon, and it appeared upon motion, that the landlord's delay in his application arose from the tenant's negligence, in not giving him due notice of the service of the declaration, according to the provisions of the statute 11 Geo. II. c. 19, § 12, the court ordered the judgment and execution to be set aside, compelled the tenant to pay all the costs, and permitted the landlord to be made defendant on the usual terms; notwithstanding it was strongly argued by the opposite party, that the judgment was perfectly regular, and that the tenant's negligence was entirely a matter between him and his landlord, for which the statute had given the landlord ample compensation.(ff) But where the landlord applied to be made defendant, after judgment had been signed, but before execution, and the claimant offered to waive his judgment, if the landlord, who resided in *Jamaica*, would give security for the costs, to which offer the landlord's counsel would not accede, the court refused the application, and permitted the plaintiff's lessor to take out execution.(gg) And, in a modern case, the court of Common Pleas, after a recovery in an undefended ejectment without collusion, and after the lessor of the plaintiff had contracted for the sale of part of the premises, and let the purchaser into possession,

(e) 4 Durnf. & East, 122; but see Barnes, 193. 3 Durnf. & East, 783, *semb. contra*. There is said, however, to be a mistake in the report of the latter case; the application to the court being there made by the *cestui que trust*. 4 Durnf. & East, 122, (a).

(f) 8 Durnf. & East, 645.

(g) Comb. 339. 3 Bur. 1290. 3 Durnf. & East, 783. 4 Durnf. & East, 122.

(h) 3 Bur. 1290.

(i) 2 Str. 914; but see 1 Salk. 256, *contra*.

(a) 2 Blac. Rep. 1259. 3 Bur. 1290.

(b) *Doe ex dem. Harwood v. Lippincott*, Ad. Eject. 2 Ed. 230.

(c) Append. Chap. XLVI. § 75, 76, 77.

(ee) 2 Str. 975.

(gg) Barnes, 186.

(dd) Ad. Eject. 2 Ed. 237.

(ff) 4 Bur. 1996.

refused to set aside the judgment and writ of possession, upon an application of this nature; and assigned as their reason, that the concealment of the delivery of the declaration was a matter between the tenant and his landlord, with which the plaintiff's lessor had no concern. *(h)*

[*1230] *When the landlord defends with the tenant, he joins with him in the consent rule; but when the tenant refuses or neglects to appear, judgment is signed against the casual ejector: *(a)* the reason for which is, that under such judgment, the plaintiff, if a verdict be given for him, may obtain possession of the premises, which he could not do, by virtue of a judgment against a person out of possession; *(b)* and in that case, the landlord alone must enter into the consent rule; but execution is stayed, until the court shall further order. *(c)* Where A. was admitted to defend alone, as landlord, in *ejectment*, and died before the termination of the action, having devised all his real estates to B., and the statute of limitations prevented the lessor of the plaintiff from bringing a fresh ejectment; the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless B. would appear and defend the action as landlord. *(d)* The rule, for admitting the landlord to defend, *(e)* being drawn up by the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, a copy thereof is made and annexed to the plea, together with the agreement for the consent rule, properly filled up and signed; and common bail being filed, with the clerk of the common bails in actions by *bill*, the plea and rules are left at a judge's chambers in the King's Bench, or prothonotaries' office in the Common Pleas.

The tenant, or his landlord, having appeared, either separately or jointly with each other, and entered into the consent rule, or agreement to confess lease, entry and ouster, &c., and left the same at a judge's chambers, in the King's Bench, or prothonotaries' office in the Common Pleas; and the tenant, when necessary, having given the undertaking, and entered into the recognizance, required by 1 Geo. IV. c. 87, the plaintiff's attorney must search the ejectment books, at the judges' chambers in the King's Bench, for the consent rule or agreement, which in that court is signed by the judge, and for which a receipt is given in the ejectment book: and after the plaintiff's attorney has signed his name thereon, over that of the defendant's attorney, he carries it to the clerk of the rules, who files it, and draws up the rule therefrom, which is nothing more than a copy of the agreement, prefixing only the day on which it is drawn up, and adding, "*By the Court*," instead of the attorneys' names at the end. In the Common Pleas, when the defendant has appeared, the consent rule is obtained from the prothonotaries' office; and the plaintiff's attorney, having signed his name thereon, over that of the defendant's attorney, carries it to the secondaries' office, where it is filed; and *two* rules are drawn up therefrom, one for each party.

By the terms of the consent rule, the tenant or landlord, when he appears, engages to receive a *declaration*, and plead thereto the general
[*1231] issue *of not guilty. In practice, however, it is not usual to deliver a declaration to the defendant's attorney; but the plea of not

(h) 4 Taunt. 820; and see 2 Moore, 581. Ad. Eject. 2 Ed. 238, 9. *Ante*, 1225.

(a) Append. Chap. XLVI. § 55, &c.

(b) Barnes, 179, 208. 2 Sel. Pr. 2 Ed. 107, 8. Imp. K. B. 10 Ed. 587.

(c) Imp. K. B. 10 Ed. 587. Imp. C. P. 7 Ed. 640, 41. Append. Chap. XLVI. § 75, &c.

(d) 5 Barn. & Cres. 457.

(e) Append. Chap. XLVI. § 75, 6, 7.

guilty is annexed to the agreement for the consent rule. And if the lessor of the plaintiff mean to proceed in the action, his attorney, having drawn up the rule with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, proceeds to make up and deliver the *issue* to the defendant's attorney, with notice of trial for the assizes, or sittings in *London* or *Middlesex*. If the plaintiff do not seem inclined to proceed in the action, the defendant may give him a rule to reply; (a) which is obtained from the master in the King's Bench, or secondaries in the Common Pleas, and sign judgment of *non pros*, (a) for want of a replication: But he is not entitled to any costs, unless the lessor of the plaintiff, or his attorney, has joined in the consent rule. (a)

When the tenant or landlord has appeared, his attorney may call for an account of the residence of the lessor of the plaintiff, if unknown to him; (b) or may take out a summons, and obtain an order, for a particular of the premises, or breaches of covenant, for which the action is brought; or he may move the court to consolidate ejectments, or stay proceedings therein, when unnecessarily and vexatiously brought; or to stay proceedings against him, until security be given for the payment of costs, or until the costs are paid of a former ejectment; or on payment of rent, &c., on statute 4 Geo. II. c. 28, or mortgage money, &c., on statute 7 Geo. II. c. 20, § 1. And the lessor of the plaintiff may move to set aside a release by the nominal plaintiff; or, if a landlord defray the costs of defending an ejectment, he may move to set aside a *retraxit* and *cognovit* by the tenant. Of these therefore in their order.

When the lessor of the plaintiff is unknown to the defendant, the latter may call for an account of his residence or place of abode, from the plaintiff's attorney; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the courts will stay the proceedings, until security be given for the payment of costs. (c) If the plaintiff declare generally in ejectment, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call upon him, by a judge's summons, to specify them; (d) and, on the other hand, the plaintiff may call upon the defendant to specify for what he defends, when that is not sufficiently ascertained by the consent rule. (e) So, when an ejectment is brought on the forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant on which he intends to rely. (f) The particular, in this case, should state the substance* of [*1232] the covenant on which the ejectment is brought, as well as the breaches of covenant: And where an *ejectment* was brought to recover premises forfeited for non-payment of rent, a difference between the amount of the rent proved to be due, and the amount demanded in the particular, was holden not to be material. (aa)

(a) 2 Blac. Rep. 763; and see *id.* 904.

(b) *Ante*, 533.

(c) 2 Str. 681. Ad. Eject. 2 Ed. 315. *Ante*, 533, 4. For the notice of motion for this purpose, see Append. Chap. XX. § 8; and for the rule in K. B. for staying proceedings till security be given for costs, see Append. Chap. XLVI. § 90.

(d) Append. Chap. XLVI. § 81, 2; and see R. T. 15 Car. II. reg. 1 K. B. 7 Durnf. & East, 330.

(e) Append. Chap. XLVI. § 83.

(f) 6 Durnf. & East, 597. Append. Chap. XLVI. § 84; and see 7 Durnf. & East, 327, and the cases there cited. R. M. 1 Geo. IV. K. B. 4 Barn. & Ald. 196. 2 Chit. Rep. 375. R. H. 1 & 2 Geo. IV. C. P. 2 Brod. & Bing. 470. 2 Chit. Rep. 379, 80. R. E. 2 Geo. IV. in *Seac.* 9 Price, 299, 300. *Ante*, 1226.

(aa) 3 Bing. 3. 10 Moore, 252, S. C. *Ante*, 600.

When several ejectments are brought for the *same* premises, upon the *same* demise, the court on motion, or a judge at chambers, will order them to be consolidated. (b) And where the lessor of the plaintiff had two actions depending at the same time, for the *same* premises, in different courts, the proceedings in one of them were stayed, until the other should be determined. (c) When the ejectments are brought for *different* premises, the court will not it seems consolidate them. (d) But where *thirty-seven* ejectments had been brought against several tenants for different premises, on the same demise, Lord *Kenyon* C. J., on a rule to show cause why the proceedings in all the causes should not be stayed, and abide the event of a special verdict in one of them, said "it was a scandalous proceeding; that they all depended precisely on the same title, and ought all to be tried by the same record:" and the rule was accordingly made absolute. (e)

When the lessor of the plaintiff is an infant, (f) resident abroad, (g) or dead, (h) the courts will stay the proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. (i) And a similar undertaking is required in an action for the mesne profits, brought in the name of the nominal plaintiff in ejectment. (k) But the court will not stay the proceedings, until a real and substantial plaintiff be named, to pay costs, on the ground of the poverty of the lessor of the plaintiff. (l)

In a second *ejectment*, the courts will stay the proceedings, until the costs are paid of a prior one, for the trial of the same title, (m) and also the costs of an action, if any has been brought, for the mesne profits. (n) [*1233] And *it matters not whether the second ejectment be brought by the lessor of the plaintiff, or by the *defendant*, in the former one; (aa) or by or against all, or some of the parties; (bb) or by a *third* person, under whom the lessor of the plaintiff claims; (cc) or for the same or different premises, so as it be on the same title, (dd) and for part of the same estate; (ee) nor whether it be brought in the same, or a different court. (ff) And the length of time which has elapsed between the first and second ejectment, is not material; (gg) for there may be many good reasons why

(b) *Barnes*, 176. *Cas. Pr. C. P.* 119, S. C.

(c) *Andr.* 297. 2 *Sel. Pr.* 145, 6. *Ad. Eject.* 2 Ed. 321. (d) 2 *Keb.* 524. 2 *Str.* 1149.

(e) *Doe ex dim. Pulteney & others v. Freeman & others*, T. 30 *Geo. III. K. B.* 2 *Sel. Pr.* 144; and see *Ad. Eject.* 2 Ed. 235, 6.

(f) 1 *Str.* 694. 2 *Str.* 932, 1206. 1 *Wils.* 130. *Cowp.* 24. *Barnes*, 183. *Bul. Nl. Pri.* 111. *Ad. Eject.* 2 Ed. 314, 15. *Append. Chap. XLVI.* § 88, 9; but see *Cowp.* 128.

(g) 2 *Bur.* 1177. *Say. Costs*, 153, S. C. *Smith ex dim. Jordan v. Roe*, M. 22 *Geo. III. K. B.* *Ad. Eject.* 2 Ed. 315.

(h) *Barnes*, 147. 2 *Str.* 1056. 2 *Wils.* 7. *Ad. Eject.* 2 Ed. 315.

(i) *Append. Chap. XLVI.* § 90. (k) *Say. Rep.* 78. *Say. Costs*, 154, S. C.

(l) *Cas. Pr. C. P.* 16; and see 2 *Str.* 1121. *Goodtitle v. Mayo*, H. 29 *Geo. III. K. B.* *Ante*, 98, 9; 535.

(m) 1 *Salk.* 255, 258, 9. 1 *Str.* 548, 554. 8 *Mod.* 225, S. C. 2 *Str.* 1152, 1206. *Smith ex dim. Jordan v. Roe*, M. 22 *Geo. III. K. B.* 1 *Durnf. & East*, 492. 1 *Chit. Rep.* 195, K. B. *Pr. Reg.* 174. *Barnes*, 133. 2 *Blac. Rep.* 904. *Say. Costs*, 239, S. C. 2 *Blac. Rep.* 1158, 1180, O. P.

(n) 4 *East*, 585. But they will not extend the rule, so as to include the *damages* in the action for the mesne profits, however vexatious the proceedings of the lessor of the plaintiff may have been. 15 *East*, 233.

(aa) 6 *Durnf. & East*, 223. 3 *Bos. & Pul.* 22, S. P. *Ad. Eject.* 2 Ed. 317, 18.

(bb) 6 *Durnf. & East*, 740. *Ad. Eject.* 2 Ed. 316, 17, 18.

(cc) *Doe v. Law*, H. 25 *Geo. III. K. B.* 8 *Durnf. & East*, 645.

(dd) *Fairclain v. Thrustout*, E. 24 *Geo. III. K. B.* *Doe v. Law*, H. 25 *Geo. III. K. B.*

(ee) 6 *Durnf. & East*, 740.

(ff) *Ad. Eject.* 2 Ed. 316, and the cases there cited.

(gg) 6 *Durnf. & East*, 223, 740.

the defendant did not call for the costs sooner, such as poverty of the other party, or in order to quiet any further controversy.^(h) The vexation of the party is said to be the foundation of these rules;⁽ⁱ⁾ and therefore, when there appeared to be no vexation, the courts would not formerly have made a rule for staying proceedings, until the costs were paid of a prior ejectment:^(k) But the practice in that respect is altered;^(l) and it is now settled, that the proceedings may be stayed in all cases, until the costs are paid of a former ejectment.^(l) And the courts will stay them, if the conduct of the party against whom the application is made, has been vexatious or oppressive, although he is not liable to the costs of the first action.^(m) But they will not stay the proceedings in the second action, where the party is already in custody under an attachment, for nonpayment of the costs of the first action;⁽ⁿ⁾ nor, as it seems, if it appear that the verdict in the former action was obtained by fraud and perjury.^(o) So, the court of Common Pleas would not stay the proceedings in a writ of *right*, till the costs of a prior ejectment were paid.^(p) And the court of King's Bench refused to stay the proceedings in ejectment, until the taxed costs were paid of a suit in *equity*, brought by the same party, for the recovery of the same premises.^(q) So, in a second ejectment by a *pauper*, the court we have seen,^(r) refused to grant a rule for staying the proceedings, until the costs were paid of a prior ejectment for the same cause:^(s) but it was admitted, that he would not, in such second action, be allowed to sue in *forma pauperis*.^(r) And where a rule had been obtained for staying the proceedings in ejectment, till the costs of a former ejectment were paid, the court would not interfere, and permit the defendant, in case those costs were not paid before a certain day to be named by the court, to *nonpros* the second ejectment.^(t)

*If there be judgment for the plaintiff in ejectment, and the [*1234] defendant bring a writ of *error*, the court of King's Bench will not suffer the latter to proceed in a new ejectment on the same title, till he has quitted possession, or the tenants have attorned to the lessor of the plaintiff:^(a) So, if there be judgment for the defendant in ejectment, and the lessor of the plaintiff bring a writ of *error*, the court will not suffer him to proceed in a new ejectment on the same title, until the costs are paid of the former ejectment: unless he can satisfy them, that the writ of *error* is brought with some other view than to keep off the payment of costs.^(b)

Where the *ejectment* was brought, on a clause of re-entry, for non-payment of rent, it was usual for the courts before the statute 4 Geo. II. c. 28, to stay the proceedings, at any time before execution executed, on the tenant's bringing into court all the rent in arrear, and costs.^(c) And now, by that statute,^(d) "if the tenant or his assigns shall, at any time before

(A) *Id.* 741. Ad. Eject. 2 Ed. 318.

(i) 4 Mod. 379. 2 Str. 1152.

(k) *Id.* 1 Str. 681. 2 Str. 1099, 1121.

(l) Ad. Eject. 2 Ed. 319. *Ante*, 538.

(m) *Id.* 318. 2 Str. 1152. 2 Blac. Rep. 904. *Ante*, 538.

(n) Barnes, 180.

(o) 2 Barn. & Cres. 622. 4 Dowl. & Ryl. 145, S. C.

(p) 3 Bing. 167.

(q) 3 Barn. & Ald. 602.

(r) *Ante*, 98, 9; 535, 1232.

(s) *Goodtitle v. Mayo*, H. 29 Geo. III. K. B.; and see 2 Str. 1121. *Ante*, 98, 9; 535, 1232.

(t) 5 Barn. & Ald. 523.

(a) 1 Salk. 258, 9.

(b) 1 Str. 554. Ad. Eject. 2 Ed. 321.

(c) 2 Salk. 597. 10 Mod. 383. 8 Mod. 345. 2 Str. 900; and see 7 East, 363.

(d) § 4.

trial, pay or tender to the landlord, his executors, &c. or pay into court, all the rent and arrears, together with the costs, all further proceedings on the said ejectment shall cease and be discontinued.”(e) This statute is not confined to cases of *ejectment* brought after half a year’s rent due, where no sufficient distress was to be found on the premises.(f) And where the ejectment was brought, on a clause of re-entry in a lease, for not repairing, as well as for rent in-arrear, under the statute it was argued, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the court, notwithstanding, made the rule absolute, with liberty for the lessor to proceed on any other title.(g) It also seems, that after judgment against the casual ejector, and before any writ of possession executed, the courts will stay the proceedings, on payment of the rent and costs;(h) which rent can only be calculated to the last rent day, not to the day of computing;(i) and the mortgagee of a lease has the same right to relief against an ejectment for non-payment of rent, and upon the same terms as the lessee, against whom the recovery is had.(k) But the court will not, *after* trial, stay the proceedings, on payment of the rent, &c.; the statute only warranting such application *before* trial.(l) And, in a late case, (m) the court of Common Pleas would not refer it to the prothonotary, to take an account of moneys received by the lessor of the plaintiff, in respect of annuities, as well as to ascertain and settle the costs of the action, which had been brought for non-payment of rent. Where a

tender of the rent had been made before the ejectment delivered, [*1285] the court of Common Pleas set aside the *proceedings, with costs.(a) But in that court, if a party obtaining a rule do not choose to proceed on it, the other party cannot compel him.(b)

So, in *ejectment* by a mortgagee, for the recovery of the possession of mortgaged premises, or in *debt* on bond for the payment of mortgage money, or performance of covenants in the mortgage deed, when no suit in equity is depending for a foreclosure, or redemption, it is enacted by the statute 7 Geo. II. c. 20, § 1, that “if the person having a right to redeem shall, at any time pending the action, pay to the mortgagee, or, in case of his refusal bring into court, all the principal moneys and interest due on the mortgage, and also costs to be ascertained and computed by the court, or proper officer appointed for that purpose, the same shall be deemed and taken to be in full satisfaction and discharge of the mortgage; and the court shall discharge the mortgagor of and from the same accordingly;(c) and compel the mortgagee, by rule, to re-convey the mortgaged premises, and deliver up all deeds, &c. relating to the title thereof, to the mortgagor, or to such other person as he shall nominate or appoint.” Upon this statute, the proceedings in ejectment on a mortgage may be stayed by the mortgagor, or his assignee of the equity of redemption, on payment of the principal, interests and costs, without paying off a bond debt due to the mortgagee;(d) And a rule has been granted

(e) Append. Chap. XLVI. § 85, 6.

(f) 7 East, 363.

(g) Bul. Ni. Pri. 97; and see 7 East, 385. Ad. Eject. 2 Ed. 153, 4.

(h) 10 Mod. 383. 8 Mod. 345. 2 Str. 900; and see Ad. Eject. 2 Ed. 152, 3.

(i) 4 Taunt. 883.

(k) 3 Taunt. 402.

(l) 7 East, 363.

(m) 6 Moore, 331.

(a) 2 Blac. Rep. 746, 7. Ad. Eject. 2 Ed. 153.

(b) 4 Taunt. 883.

(c) 1 Str. 413.

(d) 2 Str. 1107. Andr. 341, S. C. Barnes, 182; but see *id.* 177. Ad. Eject. 2 Ed. 324, 5.

for delivering up a mortgage deed to the mortgagor, on payment of principal, interest and costs, in an action of *covenant*.^(e)

If there be any doubt as to the amount of what is due, the court of King's Bench will refer it to the master,^(f) or the court of Common Pleas to one of the prothonotaries, who taxes the costs: And where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession, (the ejectment being brought for the residue,) and it was prayed that the prothonotary might be directed to make allowance for such repairs; the court said, that the rule must follow the words of the statute, and that the prothonotary would make just deductions and allowances.^(g) If the title deeds are not delivered up, the money must be paid into court, unless the plaintiff or his attorney will undertake to deliver them.^(h) But the courts will not stay the proceedings in an ejectment brought by a mortgagee, against a mortgagor, on payment of the principal, interests and costs, if the latter has agreed to convey the equity of redemption to the mortgagee.⁽ⁱ⁾ And the court of Exchequer would not interfere, under the above statute, upon an application by the mortgagor to compel the mortgagee to re-convey the mortgaged premises, where the right to redeem was disputed upon the *affidavits.^(a) Where [*1236] there are two or more mortgages, the court of Common Pleas will not compel a redemption of one, without the rest.^(b) And if a mortgagee recover possession of the mortgaged premises, under a judgment in an undefended ejectment, the court has no jurisdiction to restore the possession to the mortgagor, who has not appeared, on payment of the principal, interest and costs.^(c) But if the recovery be had against a tenant of the mortgagor, the court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to stay proceedings, on the terms of the statute.^(d)

The plaintiff in ejectment being a mere nominal person, and trustee for the lessor, if he release the action, or if an action be brought in his name for the mesne profits and he release it, the court will commit him for a contempt.^(ee) It has also been determined, that the lessor of the plaintiff in ejectment, not being a party to the action, cannot release it.^(ff) And where a landlord defrayed the costs of defending an ejectment in the name of an illiterate tenant, who gave a *retraxit* of the plea, and *cognovit* of the action, the court of Common Pleas set aside the *retraxit* and *cognovit*, and permitted the lessor to defend as landlord.^(gg)

The *issue* in *ejectment* is made up of the term it is joined, as in other cases; and in making it up, the name of the tenant or landlord is substituted for that of the casual ejector: and, instead of the notice at the end

(e) 2 Chit. Rep. 264. 2 Barn. & Cres. 493. 4 Dowl. & Ry. 50, S. C.

(f) 8 Durnf. & East, 326.

(g) Barnes, 176. Ad. Eject. 2 Ed. 325, 6.

(h) *Dambon v. Jacob*, T. 27 Geo. III. K. B.

(i) 7 Durnf. & East, 185; but see 1 Wils. 30, *semb. contra*.

(a) 1 Younge & J. 344.

(b) 2 Blac. Rep. 726; and see Ad. Eject. 2 Ed. 325, (l).

(c) 4 Taunt. 887. *Per Cur.* T. 41 Geo. III. K. B.

(d) 4 Taunt. 887.

(ee) 1 Salk. 260, *per Holt*, C. J.; but, as was observed by *Lawrence, J.*, in the case of *Baerman v. Radenius*, 7 Durnf. & East, 670, Lord *Holt* did not say that the release would not defeat the action; this, therefore, appears to be the most that a court of law can do, in cases of this kind: and see 2 Str. 899. 1 Bos. & Pul. 448, (a). Ad. Eject. 2 Ed. 177, 8; 244, 5.

(ff) 4 Maule & Sel. 300. 2 Chit. Rep. 323, S. C.; and see 7 Taunt. 9. *Ante*, 848.

(gg) 7 Taunt. 9.

of the declaration, for the tenant to appear, the plea of not guilty is added with a *similiter* thereto, and an award of the *venire facias*.^(h) When there are several defendants, who appear by different attorneys, or even if they appear by the same attorney, it is usual for them to plead separately; and their pleas should be stated accordingly, in making up the issue.

Notice of *trial* is given in *ejectment*, as in other actions; and a rule may be obtained, in like manner, for costs for not proceeding to trial according to notice; and after the issue is entered of record, the defendant may proceed to trial by *proviso*, or move the court for judgment as in case of a nonsuit, or to put off the trial. The record of *nisi prius*, jury process, and process for *subpœnaing* witnesses, are also similar to those in other cases; except that, in the description of the plea or action, it is stated to be "a plea of *trespass* and *ejectment* of farm."

[*1237] *The *trial* in *ejectment*, as in other actions, is either at *bar*, or at *nisi prius*. The rule, with regard to the former, is said to have been not to allow a trial at *bar*, except where the yearly value of the land is *one hundred pounds*; ^(a) and *value* alone, ^(b) or the probable length of the inquiry, is not a sufficient ground for it; but *difficulty* must concur: and, in order to obtain it upon that ground, it is not sufficient to state generally, in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise, ought to be pointed out, that the court may judge whether it is sufficient: ^(c) and the court of King's Bench refused a trial at *bar* in *ejectment*, on the mere allegation of length and probable questions of difficulty, in a cause respecting a pedigree. ^(d) So it was refused, in the Common Pleas, on a question of sanity, where it would have occasioned delay, and some of the witnesses were old and infirm, and not able to travel to *Westminster*. ^(e) So, in a cause concerning rights of chase, involving documentary evidence of great length and antiquity, together with much oral testimony, that court would not grant the plaintiff a trial at *bar*; a new trial having recently been refused in the King's Bench, where another defendant, who had contested the same rights, had obtained a verdict. ^(f)

A trial at *bar* may be moved for in *ejectment*, before issue joined; for otherwise, as it is seldom joined till the term is over, it would afterwards be too late to make the application. ^(g) But where it is fit that a trial at *bar* should be granted, as it is a favour asked by the party applying for it, they will lay him under reasonable terms: And therefore, where the defendant in *ejectment* applied for a trial at *bar*, and it appeared that the lessor of the plaintiff was in such indigent circumstances as not to be able to bear the expense, and that one of his witnesses was a woman above *eighty* years of age, who might die before a trial at *bar* could be had, the court of King's Bench required the defendant to consent, that if he succeeded, he should only have *nisi prius* costs, but that if the lessor of the plaintiff were to succeed, *he* he should have *bar* costs: and that the old witness should be exa-

(h) 2 Sel. Pr. 112. Ad. Eject. 2 Ed. 240, &c. Imp. K. B. 10 Ed. 588, 9. Imp. C. P. 7 Ed. 641, 2. Append. Chap. LXVI. § 92.

(a) 1 Barnard. K. B. 141. Barnes, 447; but see 1 Str. 479.

(b) 2 Salk. 648. Barnes, 447.

(c) Say. Rep. 79; and see 2 Lil. Pr. Reg. 604. 1 Barnard. K. B. 141.

(d) *Doe ex dim. Angell v. Angell*, T. 36 Geo. III. K. B.

(e) Barnes, 447.

(f) 1 Brod. & Bing. 265. 3 Moore, 582, S. C.

(g) Say. Rep. 155. Barnes, 455. *Ante*, 749.

mined upon interrogatories, and her depositions read, if she should die before trial: (hh) It was also, by consent, made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated. (i)

On the trial of an ejectment cause, the defendant is called in the first instance, upon the consent rule, to confess lease, entry and ouster; and on his non-appearance, or refusal to comply with the rule, the practice is to call the plaintiff, and nonsuit him; and then, at the instance of the lessor of the plaintiff, the cause of nonsuit is indorsed on the *postea* which *entitles him, by the terms of the rule, to have judgment entered for the plaintiff against the casual ejector, when the *postea* is returned into court. (a) If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who appear, and enter a verdict for those who do not, indorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector, for the lands in their possession. (b) But, in ejectment by landlord against tenant, on the statute 1 Geo. IV. c. 87, § 2, "wherever it shall appear, on the trial, that the tenant or his attorney, hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry and ouster; but the production of the consent rule, and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry and ouster, so as to enable the plaintiff to go into evidence of the mesne profits."

If the defendant appear at the trial, and confess lease, entry and ouster, the cause proceeds; and the parties should be prepared with evidence (c) in support of their respective cases. In general, after the pleadings are opened, by the *junior* counsel for the lessor of the plaintiff, the *senior* or leading counsel states his case to the jury; and after calling and examining witnesses in support of it, the counsel for the defendant are heard; and if they call any witnesses, the lessor of the plaintiff's counsel have the general reply. (d) But, in ejectment by the heir at law against a devisee, if the defendant will admit the lessor of the plaintiff to be heir, the defendant's counsel begin, after the pleadings are opened, and have the general reply. (e) So, if the lessor of the plaintiff prove his pedigree, and there stop, and the defendant set up a new case in his defence, which is answered by evidence on the part of the lessor of the plaintiff, the defendant is entitled to the reply: (f) which is also the case, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will. (g)

(hh) Doug. 437.

(i) *Id. ibid.*; and see Ad. Eject. 2 Ed. 286, &c.

(a) 1 Salk. 259. Sty. Pr. Reg. 442; and see Run. Eject. 2 Ed. 281. Ad. Eject. 2 Ed. 284.

(b) 1 Ld. Raym. 729. Bul. Ni. Pri. 98; and see Run. Eject. 2 Ed. 283, 4. Ad. Eject. 2 Ed. 285.

(c) For the evidence in ejectment, see Run. Eject. 2 Ed. 291, &c. Ad. Eject. 2 Ed. Chap. X. p. 246, &c. 2 Esp. Ni. Pri. 3 Ed. 455, &c. Esp. Evid. Chap. IX. p. 232, &c. 2 Sel. Ni. Pri. 5 Ed. 726, &c. Peake's Evid. 2 Ed. Chap. XI. p. 304, &c. 2 Phil. Evid. Chap. XIV. p. 169, &c. 2 Stark. Evid. 505, &c.

(d) *Ante*, 858.

(e) 2 Stark. Ni. Pri. 519. *Ante*, 859.

(f) 4 Durnf. & East, 497. *Ante*, 859.

(g) 3 Campb. 368, 2 Stark. Ni. Pri. 520. *Ante*, 859.

If the lessor of the plaintiff fail in making out his case at the trial, the plaintiff may be *non-suited* on the merits, in this as in other actions; or, if the case be left to the jury, they find their verdict for the plain- [*1239] tiff or defendant; which verdict is either *general* or *special*. [A]

In finding **special* verdicts, when the points are single, and not complicated, and no special conclusion, the counsel (if required), are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment: (a) And unnecessary finding of deeds in *hæc verba*, where the question rests not upon them, but which are only derivation of title, ought to be spared, and stated shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. (b) It is also a general rule, that in a special verdict, (as nothing is to be intended,) (c) the jury must find facts, and not merely the evidence of facts: (d) And it must appear, on the face of the verdict, that the lessor of the plaintiff had a right of entry at the time of the demise. (e)

On a verdict for the plaintiff in *ejectment*, the jury should assess the *damages*; which are, for the most part, merely *nominal*, the damages actually sustained by withholding the possession, &c. being usually recovered in an action of *trespass* for the mesne profits. (f) But, by the statute 1 Geo. IV. c. 87, § 2, "in *ejectment* by landlord against tenant, the judge before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the

(a) R. M. 1654, § 20. K. B. R. M. 1654, § 23, C. P.; but see 2 Wms. Saund. 97, (3).

(b) *Ante*, 897.

(c) 4 Durnf. & East, 646. 4 Price, 240; and see O. Bridg. 188.

(d) 2 Ld. Raym. 1581, 2. 2 Str. 835, 6, S. C. 1 Wils. 48. 2 Str. 1185, S. C. 1 East, 111.

(e) 2 Archb. K. B. 51. *Ante*, 1194, 5.

(f) *Ante*, 869, 90.

[A] If in *ejectment* the jury "find for the plaintiff one cent damages," the clerk, in the order, may extend the verdict as if it were, "we, of the jury, find for the plaintiff the lands in the declaration mentioned, and one cent damages." *Murray v. O'Neil*, 1 Call, Rep. 246. In Pennsylvania, a conditional verdict in *ejectment* is good. *Coolbaugh et al. v. Peirce*, 3 S. & R. Rep. 418. *Moyer v. Germantown Railroad*, 3 W. & S. 91. After the plaintiff in *ejectment* has proved his title to a verdict, the court will not try the question of the precise extent of the plaintiff's claim, as defended by particular metes and bounds. *Doe v. Wilson*, 2 Starkie's Rep. 477. Plaintiff may take a verdict for certain described premises, and as to other described premises enter a verdict for the defendant. *Per Spencer, Senator, Seward v. Jackson*, 8 Cow. Rep. 406. A verdict may be for a part of the premises claimed; and this rule applies as well to the quantity of interest as to the extent of the premises. *Bear v. Snyder*, 11 Wend. 592. *Lenoir v. South*, 10 Iredell, 237. *Vrooman v. Weed*, 2 Barb. Supr. Ct. Rep. 330. *Truax v. Thorn*, 2 Barb. Supr. Ct. Rep. 156. *Hutchinson v. Horn, Smith*, 242. A verdict for the whole of the premises claimed, where the plaintiff is entitled to only a part, will not be set aside, but will be amended according to the right of the case. *Id.* And if he claim an undivided share of a specified quantity of acres, he may recover such share in less quantity; but it seems if he claims an undivided half of certain premises, he cannot recover an undivided third or an undivided fourth or the whole of the premises; nor if he claim the whole can he recover an undivided half, an undivided fourth, or an undivided third of the premises. *Holmes v. Seely*, 17 Wend. 75. But see *Jackson v. Goodtitle*, 7 Blackf. Rep. *Vrooman v. Weed*, 2 Barb. Rep. 330. *Truax v. Thorn*, *Id.* 156. On the trial of an *ejectment*, the court cannot take notice of equitable circumstances, which do not constitute a complete title. *Den v. Micheal*, Cam. & Norw. Rep. 77. The verdict must be certain as to the land to be recovered. *O'Keon v. Silverthorn*, 7 Watts & Serg. 247. *Harriburg v. Crangle*, 3 Watts & Serg. 462. *Tyson v. Passmore*, 7 Barr, 274. Whenever the verdict is sufficiently certain to enable the court to give judgment, and the sheriff to deliver the possession, where that is required, in an *habere*, it will not be disturbed. *Tyson v. Passmore*, 7 Barr, 273. *Green v. Watrous*, 17 Serg. & R. 400. See 2 Troub. & Hal's Pract. 282, 3d Ed. Adams on Eject., p. 391, and notes to 4th Am. Ed.

trial, after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein: and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: (g) Provided always, that nothing therein contained shall be construed to bar any such landlord from bringing an action of *trespass* for the mesne profits, which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

The verdict, whether general or special, or nonsuit, &c. is entered on the back of the record of *nisi prius*; which entry is called the *postea*: And, after verdict in ejectment for a *messuage* and *tenement*, the court gave leave to enter the verdict, according to the judge's notes, for the *messuage* only, pending a rule to arrest the judgment, without obliging the lessor of the plaintiff to release the damages. (h) So, where the plaintiff in *ejectment* declared for twenty messuages, twenty *tenements*, &c. the court of Common Pleas, after verdict, and a writ of error brought in the King's Bench, allowed the record to be amended, by striking out the words "twenty *tenements*." 1 Moore & P. 880.

After a *general* verdict, it is incumbent on the prevailing party, in the King's Bench, to give a *rule* for judgment, on the day in bank, with the *clerk of the rules; which expires in *four* days: after [*1240] which, if no sufficient cause be shown to the contrary, final judgment may be signed. In the Common Pleas, we have seen, (a) there is no rule for judgment; but the prevailing party waits till after the appearance day, or *quarto die post* of the return of the *habeas corpora juratorum*, before he signs final judgment; unless the *habeas corpora* be returnable on the *first* or *last* general return day: In the former case, final judgment cannot be signed till the expiration of the first *four* days in full term; in the latter, it may, it seems, be signed in the evening of the last day of term, being the appearance day of the return of the writ. (b) It was not formerly usual to grant a *new trial* in *ejectment*; (c) but, for the sake of obtaining justice, it may now be had in this, as in other actions. (d)

The *judgment* in *ejectment* is for the plaintiff, or defendant; for the former, that he recover his term in the tenements demised, with or without damages and costs: and it is either for the actual lessee, against the person who ejects him, on a *vacant* possession; or for the *nominal* plaintiff against the *casual* ejector, on the non-appearance of the tenant or landlord in the first instance, or afterwards, for not appearing at the trial, and confessing lease, entry and ouster; or judgment may be given against the tenant or landlord, on a verdict for the plaintiff. The judgment, in case of a *vacant* possession, is signed on the expiration of the rule for judg-

(g) Append. Chap. XLVI. § 97. *Post*, 1240, 41.

(h) 8 East, 357. *Ante*, 1191.

(a) *Ante*, 903, 4.

(b) 2 Bos. & Pul. 393. *Ante*, 904.

(c) 2 Salk. 648. Pr. Reg. C. P. 408. *Ante*, 905.

(d) 2 Str. 1105. 4 Bur. 2224. *Ante*, 905.

ment, in the King's Bench; (e) or of the time for pleading, in the Common Pleas; (f) and, in both courts, the judgment against the casual ejector, for non-appearance of the tenant or landlord, is signed on the expiration of the rule for judgment. (g) But as this judgment is only interlocutory, and damages and costs cannot be recovered thereon against the casual ejector, it is usual for the plaintiff to enter a *remittitur* thereof on the roll, and proceed for the recovery of them, in an action for the mesne profits. (h) When the plaintiff has been nonsuited at the assizes, or sittings after term, on account of the tenant or landlord's not appearing at the trial, and confessing lease entry and ouster, he is allowed, in the Common Pleas, to sign judgment and take out execution immediately after the trial: (i) But, in the King's Bench, he is not entitled to sign judgment against the casual ejector, till the day in bank, or first day of the ensuing term. (k) In such case, however, the judgment may be regularly signed on the first day of the ensuing term, and a writ of possession issued on the same day, although the *postea* be not delivered over at the time by the associate, to the attorney for the plaintiff. (l) On a verdict for the plaintiff, he is entitled to tax his costs, and sign final judgment, as in other cases, on the expiration of the rule for judgment, in the King's Bench; or, in the Common Pleas, at any time after the appearance day, or *quarto die post* of the return of the *habeas corpora juratorum*.

The judgment for the *defendant* is, that the plaintiff take nothing by his writ, or bill, but that he and his pledges to prosecute be in mercy, &c.; and that the defendant do go thereof without day, &c.: And it is either on a *nonpros* for not replying, or entering the issue; or as in case of a nonsuit; or on a verdict, or nonsuit on the merits. This judgment may be signed on the expiration of the rule for judgment in the King's Bench, or time allowed by the practice of the Common Pleas, as in other cases.

Incident to the judgment, are the *costs*, or expenses of the suit; which are given to the plaintiff, by the statute of *Gloucester*, (6 Edw. I.) c. 1, § 2, (a) and to the defendant, on a nonsuit or verdict, by the statute 4 Jac. I. c. 3. (b) And by the statute 8 & 9 W. III. c. 11, § 1, "where several persons shall be made defendants to any action of *ejectione firmae*, &c., and any one or more of them shall be, upon trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall, immediately after the trial thereof, in open court, certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant." When there are several defendants, who succeed in the action, the plaintiff, we have seen, (c) may pay costs to which of them he pleases; (d) and if they fail, each of them is answerable for the whole costs: Thus, where an *ejectment* was brought against several defendants, who defended severally, and at the assizes one of them confessed lease, entry and ouster, and had a verdict against him, but the others did not

(c) *Ante*, 1202.

(g) *Ante*, 1224.

(i) *Throgmorton ex dem. Fairfax v. Bentley*, H. 27 Geo. III. C. P. 2 Durnf. & East, 780, (a); and see *Ad. Eject.* 2 Ed. 284. *Post*, 1244.

(k) 2 Durnf. & East, 779. *Post*, 1244.

(l) 1 Barn. & Cres. 118. 2 Dowl. & Ry. 229, S. C.

(a) *Ante*, 945.

(d) 1 Str. 516; and see 2 Str. 1203.

(f) *Id. ibid.*

(h) *Ante*, 1239. *Post*, 1243.

(b) *Id.* 980, 81.

(c) *Ante*, 985.

confess; the court upon application said, that the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court.(e)

The means of recovering the costs of the *lessor* of the plaintiff in ejectment are first, as consequential damages, in an action of *trespass* for the mesne profits;[A] secondly, by *attachment*, on the consent rule; or thirdly, by *execution*, or action of *debt*, on the judgment. If the tenant, on being served with a copy of the declaration, do not appear, and judgment is consequently entered against the casual ejector by default, the lessor of the plaintiff has no other remedy for his costs than by action for the mesne profits, in which they are recoverable against the tenant as consequential damages. But where, after a recovery in ejectment, and before an action of *trespass* for the mesne profits, the defendant became bankrupt, and the jury did not include the costs of the ejectment in their verdict, on executing a writ of inquiry in the action for mesne profits, the court refused to set aside the inquisition; because the plaintiff might have proved the *costs as a debt, under the defendant's commission of [*1242] bankrupt.(aa) And it seems that where an ejectment has been defended, and the plaintiff has recovered and taxed his costs, he cannot recover the *extra* costs, in an action for the mesne profits.(bb)

When the tenant or landlord appears, and enters into the consent rule, and afterwards at the trial does not confess lease, entry and ouster, he is liable, upon such rule, to the payment of costs; and an *attachment* may be issued against him, if he refuse to pay them:(cc) but no writ of *fleri facias* or *capias ad satisfaciendum* can be had for these costs, the tenant or landlord being no party to the judgment in ejectment, which is against the casual ejector.(d) Where the tenant or landlord appears at the trial and confesses lease, entry and ouster, and there is a verdict and judgment against him on the merits, execution may be taken out thereon for the costs, as in ordinary cases;(ee) or an action of *debt* may be maintained for them on the judgment. So, where the landlord is made defendant without the tenant, though the judgment to recover the possession is against the casual ejector, yet as there is also a judgment against the landlord, execution may be taken out thereon for the costs.(f)

The means of recovering the *defendant's* costs in ejectment, when the lessor of the plaintiff joins in the consent rule, is by *attachment* only, whether the lessor of the plaintiff be nonprossed for not replying, or entering the issue, or there is judgment against him as in case of nonsuit, or he be nonsuited upon the merits, or has a verdict and judgment against him; for the plaintiff in ejectment is merely *nominal*, and the defendant cannot proceed by execution, or action upon the judgment, for the recovery of his costs, against the lessor of the plaintiff, who is no party to the judgment. In the King's Bench, when a verdict is found for the defend-

(e) Bul. Ni. Pri. 335, 6. *Ante*, 985.

(au) 2 Durnf. & East, 261.

(bb) 1 Esp. Rep. 358; and see Ry. & Mo. 419. 4 Bing. 160; but see 1 Stark. Ni. Pri. 366. *Ante*, 890.

(cc) 1 Salk. 259; and see Run. Eject. 2 Ed. 463. Ad. Eject. 2 Ed. 296.

(d) Barnes, 182; and see Ad. Eject. 2 Ed. 296.

(ee) Run. Eject. 2 Ed. 463, 4. Ad. Eject. 2 Ed. 297.

(f) Ad. Eject. 2 Ed. 298.

[A] See Adams on Ejectment, 443, 4, Am. ed., and notes by American editors.

ant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, entry and ouster, the defendant must tax his costs on the *postea*, as in other actions, and sue out a writ of *feri facias* or *capias ad satisfaciendum* for the same, against the plaintiff; and if, upon showing this writ under seal to the lessor, serving him with a copy of the consent rule, and demanding the costs, the lessor do not pay them, the court, on an affidavit of facts, will grant an attachment against him.^(g) In the Common Pleas, it is not necessary to sue out a *capias ad satisfaciendum*, or *feri facias*, against the nominal plaintiff;^(h) but it is the practice, in that court, for the prothonotary to tax the costs, and mark them upon the consent rule. A copy of this rule, with the prothonotary's *allocatur* thereon, is then served on the plaintiff's lessor, the original being [*1243] at the same time *shown to him, and the costs demanded of him by the defendant personally, or by his attorney named in the rule; and upon an affidavit of such service, and demand of the costs, and of the lessor's refusal to pay them, the court will grant a rule for an attachment, which is absolute in the first instance.^(a) In the Exchequer, the defendant, after a personal demand and refusal, may proceed against the lessor of the plaintiff by *subpoena* and attachment, for non-payment of costs for not proceeding to trial, or after verdict for the defendant, or nonsuit on the merits.^(b)

If the lessor of the plaintiff die, before the commission day of the assizes, and the plaintiff be nonsuited, by reason of the defendant's refusal to confess lease, entry and ouster, the lessor's representative cannot recover any costs; because the consent rule is merely personal, and does not extend to the representative.^(c) So, where the lessor of the plaintiff died between the commission day and the trial, and the plaintiff was nonsuited on the merits, the court held that the executor of the lessor was not liable to the payment of costs.^(dd) But where the lessor died after the trial, the defendant was compelled by the court to pay to his representative the costs, which had been taxed on the consent rule.^(e) It has been doubted, whether an infant lessor is liable to the payment of costs, where his *prochein ami* dies pending the ejectment.^(f) And where *baron* and *feme* were lessors in ejectment, and the baron died after entering into the rule, the feme was holden liable to the payment of the costs; because they were to be paid by the lessors of the plaintiff, and both of them were in the lease.^(gg) When the lessor of the plaintiff is a *peer*, there can be no attachment against his person; but the court will it seems grant a rule for an attachment against his goods and chattels.^(hh)

After judgment in ejectment, the *execution* for the plaintiff is a writ of *habere facias possessionem*, (or, as it is commonly called, a writ of *possession*,) with or without a *feri facias*, or *capias ad satisfaciendum*, for the damages and costs. On a judgment against the casual ejector, when the tenant or landlord does not appear, or, having appeared, does not confess

(g) *Tilly v. Baily*, M. 6 Geo. II. Run. Eject. 2 Ed. 465, 6.

(h) 3 Taunt. 485; but see Pr. Reg. C. P. 171, 2; by which it appears, that formerly it was usual to sue out a *capias ad satisfaciendum* against the plaintiff, and demand the costs of the plaintiff's lessor, as well in the Common Pleas, as in the King's Bench.

(a) Imp. C. P. 6 Ed. 613.

(b) Append. Chap. XLVI. § 127, 8.

(c) 2 Wils. 7.

(dd) 1 Barn. & Cres. 284. 2 Dowl. & Ryl. 437, S. C.

(e) Barnes, 119; and see Ad. Eject. 2 Ed. 299, 300.

(f) 1 Freem. 373.

(gg) 1 Keb. 827.

(hh) Cas. Pr. C. P. 7.

lease, entry and ouster at the trial, the execution for the plaintiff is a writ of *habere facias possessionem* only; the lessor of the plaintiff in such case having no other remedy for the recovery of his costs, than by action for the mesne profits: But when the tenant or landlord appears, and there is a verdict and judgment against him, the lessor of the plaintiff may sue out an *habere facias possessionem* for the possession, and a *feri facias*, or *capias ad satisfaciendum*, for the damages and costs, or for the costs only where the damages are remitted, either separately or in one writ, at his election. The defendant, we have seen,⁽¹⁾ cannot *pro- [*1244] ceed by execution for his costs, against the lessor of the plaintiff, on a *nonpros*, nonsuit, or verdict; but his only remedy for the recovery of them, is by *attachment*, on the consent rule.

The writ of *habere facias possessionem* is a *judicial writ*, issuing out of the court in which the action is brought, and directed to the sheriff of the county wherein the venue was laid; [A] and, after reciting the judgment, commands him, without delay, to cause the plaintiff to have possession of his term, (or, if there be more than one demise, his *several terms*,) yet to come of and in the tenements recovered.^(a) [B] This writ, for which there is a *præcipe* in the King's Bench,^(b) but not in the Common Pleas,^(c) is made returnable on a *general return day* or day *certain*, according to the nature of the proceedings; if by *original*, on the former, if by *bill*, on the latter: And, after verdict and judgment against the tenant or landlord, a

(1) *Ante*, 1242.

(a) Append. Chap. XLVI. § 112, &c.

(b) Imp. K. B. 10 Ed. 596.

(c) 2 Sel. Pr. 2 Ed. 100, 121. Imp. C. P. 7 Ed. 631.

[A] A writ of *habere facias possessionem*, under the Maryland act of 1825, c. 103, ought not to issue unless it appears that, after the return of the *feri facias*, notice was given to the tenants in possession, to show cause why the writ of *habere* should not issue. *Waters v. Duvall*, 6 Gill & Johns. 26. Where the tenant has been ejected by such writ, he may, upon its return, move the court to quash it for the purpose of awarding him restitution. He is not bound to object to its validity, or the legality of the proceedings under it, before that time. *Ib.* The fact that an application has been made to a court of chancery for an injunction, founded upon a defect in the writ, which injunction was granted and afterwards dissolved on answer, will not prevent the tenant from moving to quash the writ at its return. *Ib.* The right of a party to obtain a writ of *habere facias possessionem* under the New Jersey act of 1825, c. 103, does not relate to the time the execution was issued, but to the time when the lands were sold. *Clarke v. Belmear*, 1 Gill & Johns. 443. After a *habere facias possessionem* has been duly executed and returned, it is error to award an *alias*. *Dent v. Simmons*, 7 J. J. Marshall, 42. The purchaser of lands sold under a *feri facias*, in Maryland, applied to the county court for a writ of *habere facias possessionem* under the act of 1825, c. 103, against one in possession under a title subsequent to the rendition of the judgment on which the *feri facias* issued. It appeared, that the judgment debtor had only an equitable interest in the land levied on, holding a bond of conveyance from the owner of the fee, which bond he had assigned to the tenant in possession before the *feri facias* issued: it was held that he was entitled to the writ. *M'Meehan v. Marmam*, 8 Gill & Johns. 57. An *habere facias*, in Kentucky, was issued after the date of a certificate of *supersedeas*, but was issued and executed before the certificate was filed in the Circuit Court office, and notice to the officer or to the plaintiff in the *habere facias*. Held, that the proceeding was valid, and that a judgment of the Circuit Court quashing the *habere facias* and return, and awarding restitution, should be reversed. *Runyon v. Bennett*, 4 Dana, 598.

[B] If a plaintiff, who has recovered in ejectment an undivided proportion of land, and received possession thereof from the sheriff, ousts the defendant of the whole after the return day of the *habere facias*, the court will not restore the defendant in a summary way. *Gardner v. Schuylkill Bridge Co.*, 2 Binn. Rep. 450. *Aliter*, if there is an ouster in fact before the return day. *Ib.* If a plaintiff is dispossessed by a person claiming under the defendant's title after he has been put into possession under a writ of *habere facias possessionem*, an *alias* will be awarded, provided there is no pretence of a collusion between the plaintiff and defendant as to the judgment, although the return day of the *habere facias* has not arrived. *Jackson v. Hanley*, 11 Wend. 182.

feri facias, or *capias ad satisfaciendum*, for the damages and costs, may be included in the same writ.(d) In *ejectment* against a *feme sole*, who married before trial, verdict and judgment having been given against her by her original name, the court held that it was regular to issue an *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was inoperative.(ee)

The writ of possession lies upon all judgments in ejectment for the plaintiff, whether against the casual ejector, tenant, or landlord; and may be issued at any time within a year and a day after signing judgment, without a *scire facias*. On a judgment by default against the casual ejector, the writ may be issued immediately after judgment is signed: And, in the Common Pleas, we have seen,(f) where the plaintiff is nonsuited at the assizes, or sittings after term, on account of the tenant or landlord's not confessing lease, entry and ouster, it has been usual for the plaintiff to sign judgment, and take out execution immediately: But, in the King's Bench, he is not entitled to sign judgment, nor consequently to issue execution, till the day in bank, or first day of the ensuing term.(g) After verdict against the tenant or landlord, the writ of *habere facias possessionem* is not in general issued, until after the plaintiff has taxed his costs: but if he sue it out without waiting to tax them, the defendant's writ of error, we have seen,(h) will not operate as a *supersedeas*.(i)

In ejectment by *landlord* against *tenant*, on the statute 1 Geo. IV. c. 87,(k) "in all cases, in which undertaking shall have been given, and security found, as required by that act, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall

have been had, that the finding of the jury was contrary to the [*1245] evidence or that the damages given were excessive, it shall *be lawful for the judge to order the execution of the judgment to be stayed absolutely, till the *fifth* day of the term then next following, or till the next session, assizes, or court day, (as the case may be;) which order the judge shall in all other cases make, upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within *four* days from the day of the trial he shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure, produced or made (if any,) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be."

When the landlord is admitted to defend, instead of the tenant, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, and the plaintiff is afterwards nonsuited at the trial, on account of the landlord's not confessing lease, entry and ouster, the lessor of the plaintiff must apply to the court, for leave to take out

(d) Append. Chap. XLVI. § 118, &c.; and see Ad. Eject. 2 Ed. 297.

(ee) 3 Maule & Sel. 557. *Ante*, 1011.

(f) *Ante*, 1240.

(g) 2 Durnf. & East, 779.

(h) *Ante*, 994.

(i) 4 Taunt. 289; and see Barnes, 212, 13. 8 Taunt. 538. 2 Moore, 581, S. C.

(k) § 3.

execution against the casual ejector. (a) The rule for this purpose is a rule to show cause, in the King's Bench; (b) but, in the Common Pleas, it is absolute in the first instance: (c) And if a writ of error be brought by the landlord, it may be shown for cause, and will be a sufficient reason against taking out execution; (d) but if the landlord omit the opportunity of showing it for cause, the execution is regular, and cannot be set aside. (e) In the King's Bench, when there is a verdict against the landlord, on his appearing at the trial, and confessing lease, entry and ouster, judgment may be entered up thereon, and execution issued against him, without applying to the court. (ff)

The writ of *habere facias possessionem* being sued out, signed, (g) and sealed, is delivered to the sheriff, who makes out a warrant thereon, directed to his officer: And it is usual for the lessor of the plaintiff to give the sheriff an indemnity for executing it. (h) If the defendant die, after the writ of possession taken out, it may still be executed by the sheriff. (h) And where a writ of possession was *tested* in the lifetime of the lessor of the plaintiff, though it was not actually sued out till after his death, the court of King's Bench held the execution to be regular. (i)

Under this writ, the sheriff or his officer, by the direction of the lessor of the plaintiff or his attorney, delivers possession of the premises **recovered*: and as the words of the writ are, "that he [*1246] cause him to have possession, &c." there must be a full and actual possession given by the sheriff; and consequently, all power necessary for this end must be given him: therefore, if the recovery be of a house, the sheriff may justify breaking open a door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed. (aa) If the plaintiff recover *several* messuages, or lands in the occupation of *different* persons, the sheriff must go to each house, or the land occupied by each tenant, and deliver the possession thereof, by turning out the tenants; for the delivery of one messuage or parcel of land, in the name of all, is not in that case a good execution of the writ; because the possession of one tenant is not the possession of the other, each having a *several* possession. (bb) But it seems that if all the messuages or lands be in the occupation of *one* tenant, it is sufficient to give possession of *one* messuage or parcel of land, in the name of all: (cc) and this indeed seems to be the safest way for the sheriff, because he executes the writ at his peril: and therefore if he give possession of any messuage or land not recovered, and not included in the *habere facias possessionem*, he is a trespasser. (dd) But the surest and best way is said to be, for the sheriff to remove all the tenants entirely out of each house or parcel of land, and when the possession is quitted, to deliver it to the plaintiff: for if the sheriff turn out all the persons he can find in

(a) 2 Str. 1241. 2 Bur. 756, 7. Barnes, 182, 185, 208. 1 Chit. Rep. 47, 233. Append. Chap. LLVI. § 109, 10.

(b) 1 Chit. Rep. 47, 233. Append. Chap. XLVI. § 109, 10.

(c) Barnes, 182, 3; 185. 1 Chit. Rep. 47; but see *id.* 233.

(d) 2 Str. 1241. Barnes, 208.

(ff) *Per Cur. H.* 56 Geo. III. K. B. 4 Barn. & Cres. 897. 7 Dowl. & Ryl. 261, S. C.; but see Barnes, 185, *semb. contra.* in C. P.

(g) In the King's Bench, the writ is signed by the signer of the writs; in the Common Pleas, by the prothonotaries.

(h) Run. Eject. 2 Ed. 487.

(i) O. Bridg. 468, 9. *Ante*, 1243.

(aa) 5 Co. 91, b. Run. Eject. 2 Ed. 485.

(bb) 1 Rol. Abr. 886. Run. Eject. 2 Ed. 485, 6.

(cc) *Id. ibid.* 1 Rol. Rep. 421.

(dd) Run. Eject. 2 Ed. 486.

the house, and give the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, there appear to be some persons lurking in the house, this is no good execution, and the plaintiff may have a new writ of *habere facias*.(e) If the execution be for 20 acres, it seems the sheriff must give 20 acres in quantity, according to the common estimation of the county where the land lies:(f) And on a recovery of land, being part of a highway, the sheriff should deliver possession, subject to the right of passage over it, for the king and his people.(gg)

But it is at the lessor of the plaintiff's peril to take more, under the writ of possession, than he is strictly entitled to,(hh) and if he take more, the court on motion will order it to be restored.(ii) Thus, where the plaintiff in ejectment, as tenant in common, recovered possession of five eighths of a cottage with the appurtenances, and a writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and locked up the door, the court of Common Pleas made a rule upon the sheriff and lessor of the plaintiff, to restore the tenant to the possession of three-eighth parts of the premises; otherwise he would be obliged to bring another ejectment for the same.(k) But where a tenant having held over after the expiration of his term, the landlord took (amongst other things,) some [*1247] severed crops, under a writ of *habere facias possessionem*, issued on a judgment obtained against the former, in an action of ejectment; the court of Common Pleas refused to grant a rule to refer it to the prothonotary, to ascertain the value of such crops, or to order the landlord to pay over the balance to the tenant, after deducting the amount of rent due.(a)

If the officer be disturbed in the execution of the writ, the court, on an affidavit, will grant an *attachment* against the party, whether he be the defendant or a stranger; because the writ is the process of the court, and any disturbance given to the execution of it, is a contempt of the authority of the court from whence it issues, and as such will be punished by the court:(b) And the process is not understood to be executed, nor the execution complete, until the sheriff and officer are gone, and the plaintiff left in quiet possession.(c) But after possession given, either on the *habere facias* or by agreement of the parties,(d) the law seems to make a difference, where the plaintiff is turned out of possession by the *defendant*, and where by a *stranger*. When it is done by the *defendant*, immediately or soon after the possession is delivered, the plaintiff it seems may have a new *habere facias*, before the former writ is returned;(ee) because the defendant himself shall never by his own act keep the possession, which the plaintiff hath recovered from him by due course of law:(ff) And if the sheriff give possession of part only, he may have a new *habere facias* for the rest.(gg) But if the writ be returned by the sheriff, though not filed, it seems no new

(e) 1 Leon. 154. Run. Eject. 2 Ed. 486.

(f) 1 Rol. Abr. 886. 1 Rol. Rep. 420. Run. Eject. 2 Ed. 487.

(gg) 1 Bur. 133.

(hh) *Id.* 627, 629. 5 Bur. 2673.

(ii) *Id. ibid.* Run. Eject. 2 Ed. 485, 487.

(k) 3 Wils. 49; and see Barnes, 191.

(a) 10 Moore, 267. 3 Bing. 11, S. C.

(b) 6 Mod. 27. 1 Salk. 321, S. C.; and see 2 Brownl. 253. 1 Keb. 779. 2 Keb. 245. 2 Blac. Rep. 892.

(c) Run. Eject. 2 Ed. 489. *Ante*, 1246.

(d) 1 Keb. 779, 785.

(ee) 2 Brownl. 216, 253. 1 Rol. Rep. 353. Palm. 289. 1 Keb. 779, 785, 6. 6 Mod. 27. 1 Salk. 321, S. C.

(ff) Run. Eject. 2 Ed. 489.

(gg) 2 Keb. 245.

habere facias can issue; because when the return is made, it becomes a record which the court is entitled to :^(h) And where the landlord, after the possession had been delivered above a month, went down into the country, and prevailed with the tenants, on giving them security, to attorn to him, and then the plaintiff in ejectment came and complained to the court, and moved for a new writ of possession, the court refused to relieve him, there having been a regular execution of the first writ; and said, the distinction was, that if immediately after the writ had been executed, the tenants had attorned, there should have been a new writ, but not where the possession had continued as delivered so long as it had in this case.⁽ⁱ⁾ So, where the lessor of the plaintiff had been put into possession, by virtue of a writ of *habere facias possessionem*, on the 22d of February, 1806, which writ had never been returned by the sheriff, and on the 10th of October, 1807, while he continued in possession, the person against whom he had recovered, entered into the house by force, and resisted with violence all attempts to regain the possession, upon which a new *habere facias* was moved for, and an attachment against the party in possession; *the court [*1248] denied the authority of the case in *Keble*,^(a) and held, that possession having been given under the first writ, the sheriff ought to have returned that he had given possession, and that the plaintiff could not afterwards have had another writ: An *alias*, they said, cannot issue after a writ is executed; if it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habeas facias possessionem*, as a remedy for any trespass the tenant might commit within twenty years after the judgment: and upon these grounds, the rule was refused.^(b)

When a *stranger* turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to a new action, or an indictment for a forcible entry, where the force will be punished:^(c) "The reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount to that of the plaintiff, or he may come in under him; and then the recovery and execution in the former action, ought not to hinder the stranger from keeping that possession which he may have a right to: If the law were otherwise, the plaintiff might, by virtue of a new *habere facias*, turn out even his own tenants, who come in after the execution; whereas the possession was given him only against the defendant in the action, and not against others who were not parties to the suit."^(d)

On executing a writ of *habere facias possessionem*, the sheriff is entitled, by the statute 3 Geo. I. c. 15, § 16, to have for poundage, *twelve* pence for every *twenty* shillings of the yearly value of the lands whereof possession is given, where the whole exceedeth not the yearly value of a *hundred* pounds, and *six* pence only for every *twenty* shillings *per annum*, above that value.

It was formerly doubted, whether a *scire facias* lay to revive a judgment in *ejectment*, after a year and a day, either by the common law, or by force

(h) 2 Brownl. 216, 253; and see 1 Keb. 785.

(a) 1 Keb. 779.

(c) Sty. Rep. 318; and see *id.* 408. 1 Keb. 779, 785.

(i) 2 Str. 830.

(b) 1 Taunt. 55.

(d) Run. Eject. 2 Ed. 489.

of the statute Westm. II. (13 Edw. I.) stat. 1, c. 45; (e) for at common law, this was looked upon as a personal action, and it was thought that the statute extended only to such personal actions in which debt or damages were recovered, and not to provide a remedy in this case; since, at the time of making the act, the possession was not recovered in this action: But it seems to be now settled, and is confirmed by daily practice, that a *scire facias* lies on a judgment in *ejectment*; for the words of the act are, "whether they be contracts, &c., or other things whatsoever enrolled," which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a *real* action at common law. (f) In a late [*1249] case, however, where it appeared *that the lessor of the plaintiff had neglected to sue out a writ of possession for more than twenty years after the recovery in *ejectment*, and in the mean time there had been several changes of the property and possession, the court of King's Bench refused to grant a rule for issuing a *scire facias*, to revive the judgment. (aa) The *scire facias*, after judgment by default against the casual ejector, should go against the *tertenants*, as well as the defendant. (b) And where the judgment in *ejectment* is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* against the defendant in her maiden name, for the land, and then proceed by *scire facias* against the husband and wife, for the costs. (c)

There is no occasion for a *scire facias*, after the death of the original plaintiff or defendant in *ejectment*; and if the death of the plaintiff be assigned for error, it is a contempt, for which the court will grant an attachment. (d) A *scire facias* also seems to be unnecessary, in case of the death of the lessor of the plaintiff before execution; for he is not a party to the judgment. (ee) And where the writ of possession was *tested* in his lifetime, though it was not actually sued out till after his death, the court of King's Bench, we have seen, (ff) held the execution to be regular. (g) Where there are several plaintiffs or defendants, and one of them dies, execution may be sued by or against the survivors, upon making a suggestion of the death upon the roll. (h) But where there is only one defendant, who dies, it has been questioned whether execution may be sued without a *scire facias*: In *personal* actions it cannot, because a new person would be charged; but in *ejectment*, the plaintiff ought to have execution only of the land recovered. (g) In practice, however, it is usual to sue out a *scire facias*, after the death of the real defendant in *ejectment*; and the writ in such case must be against the *tertenants* of the land, (and the heir may come in as *tertenant*,) and not against the executor, without naming him *tertenant*. (i)

After verdict and judgment in *ejectment*, for the plaintiff against the tenant, or *vice versâ*, (k) the unsuccessful party may bring a writ of *error*,

(e) *Ante*, 1102, 3.

(f) 1 Salk. 258. 2 Salk. 600. 2 Ld. Raym. 806, S. C. 3 Salk. 319. 1 Ld. Raym. 669, S. C. Bac. Abr. tit. *Execution*, H. Lil. Pr. Reg. 500.

(aa) 2 Barn. & Ald. 773. 1 Chit. Rep. 535, S. C.

(b) 1 Salk. 258. 2 Salk. 600. 2 Ld. Raym. 806, S. C.; and see Carth. 2. 1 Ld. Raym. 669. 2 Salk. 600. 3 Salk. 319, S. C. Run. Eject. 2 Ed. 477, &c. Ad. Eject. 2 Ed. 307. Append. Chap. XLVI. § 120, 30.

(c) 3 Maule & Sel. 557. Ad. Eject. 2 Ed. 297, 307. *Ante*, 1244.

(d) 2 Str. 899, 900.

(ee) *Id.* 1056; and see 2 Wils. 7.

(ff) *Ante*, 1245.

(g) 4 Bur. 1970.

(h) *Per Holt*, Ch. J. 2 Ld. Raym. 808; 3 Salk. 319, S. P.

(i) Cro. Car. 295, 312. Carth. 2. 2 Salk. 600. 1 Ld. Raym. 669, S. C.

(k) 5 Barn. & Cres. 720. 8 Dowl. & Ryl. 514, S. C.

as in other cases, to reverse the judgment, for any error or defect in substance, that is not aided, amendable, or cured at common law, or by some of the statutes of amendments or jeofails.^(l) And so, where the landlord defends alone, and a verdict is found against him, error may be brought; notwithstanding the judgment, upon which the execution issues, is entered against the casual ejector: for there is also, in such case a *judgment against the landlord, upon which the writ of error [*1250] may be taken out in the landlord's name.^(a) And if a writ of error be brought by the landlord, it may we have seen,^(bb) be shown for cause, and will be a sufficient reason against taking out execution:^(cc) though if the landlord omit the opportunity of showing it for cause, the execution is regular, and cannot be set aside.^(dd) But after judgment by default against the casual ejector, for non-appearance of the tenant, or for not confessing lease, entry and ouster, the tenant not being party to the record, cannot bring a writ of error.^(ee) And where the writ of error is brought by the tenant, after a verdict and judgment against him, he is not allowed to assign for error the death of the nominal plaintiff.^(f)

To reverse a judgment in *ejectment*, in an inferior court of record, the writ of error must be returnable in the King's Bench, and not in the Common Pleas.^(g) And from the latter court, a writ of error lies to the King's Bench, and thence after affirmance or reversal, to the House of Lords.^(h) From proceedings on the law side of the Exchequer, a writ of error lies into the court of Exchequer Chamber, before the Lord Chancellor, Lord Treasurer, and judges of the courts of King's Bench and Common Pleas; and thence to the House of Lords.⁽ⁱ⁾ From proceedings in the King's Bench, originally begun there by *bill*, (except where the king is a party,) a writ of error lies, by the statute 27 Eliz. c. 8, to the Exchequer chamber, before the justices of the Common Pleas and barons of the Exchequer; and thence to the House of Lords:^(k) But upon a judgment in *ejectment* in the King's Bench, in an action commenced by *original* writ, a writ of error we have seen,^(l) does not lie to the Exchequer Chamber; because it is not *first* commenced in the King's Bench, but is founded upon the original writ, issuing out of Chancery.^(ll) And on that account, the action of *ejectment* is generally commenced by original writ, in the King's Bench: For a similar reason, a writ of error lies not in the Exchequer Chamber, upon a judgment affirmed on error in the King's Bench, but must be brought in the House of Lords.^(mm)

A writ of error should regularly be sued out after judgment, or at least it should be returnable in or after the term of which the judgment was given; and therefore it will not remove a judgment given after the term in which the writ of error is returnable: And though the record be transcribed after the judgment given, and carried into the court in which the

(l) *Ante*, 919, &c., 1136.

(a) *Ad. Eject.* 2 Ed. 308. *Ante*, 1242.

(cc) 2 Str. 1241. Barnes, 208.

(dd) 2 Bur. 756, 7. *Ante*, 1245.

(ee) Barnes, 181; and see *Ad. Eject.* 2 Ed. 308.

(f) 2 Str. 899; but see 1 Sid. 93. T. Raym. 59, S. C.

(g) Finch. L. 480. Dyer, 250. Cro. Eliz. 26. *Ante*, 1137, 8.

(h) *Ante*, 1137, 8.

(i) *Ante*, 1140.

(k) 3 Blac. Com. 410. *Ante*, 102, 1138, 9.

(ll) *Ante*, 102, 1139; and see 1 Wms. Saund. 5 Ed. 346, (4).

(mm) 2 Bulst. 162; and see 1 Rol. Rep. 264. *Ante*, 1139.

writ of error is returnable, the judgment is not to be considered [*1251] as *removed; (a) nor will the court alter the writ of error, so as to make the removal good. (b) But where the writ of error, on a judgment in ejectment on the Common Pleas, was returnable in *Easter* term, and the costs were not taxed and final judgment signed until *Trinity* term, after which the defendants in *Michaelmas* term, served the plaintiff with a rule to assign errors; and the plaintiff having assigned them, the defendants, in the same term, joined in error, and the case being afterwards argued, the judgment of the court of Common Pleas was reversed; the court of King's Bench, we have seen, (c) under these circumstances, refused to quash the writ of error, on the ground that it was returnable before costs were taxed in the Common Pleas, and consequently before any judgment was given in that court; as the defendant ought to have applied to quash it, in an earlier stage of the proceedings. (d)

A writ of error, we have seen, (e) is generally speaking a *supersedeas* of execution, from the time of its allowance, provided bail be put in and perfected in due time; and the allowance is notice of itself: Or if the plaintiff, before the allowance, have notice of the writ of error being sued out, and delivered to the clerk of the errors, it is from the time of that notice a *supersedeas*. But a writ of error is no *supersedeas* of execution, unless bail in error be put in, and notice thereof given, within the time limited by the rules of the court. (f) And if the plaintiff, after obtaining a verdict in ejectment, sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error, we have seen, (g) will not operate as a *supersedeas*.

By the statute 16 & 17 *Car. II. c. 8, § 3*, (made perpetual by the 22 & 23 *Car. II. c. 4*.) it is enacted, that "in writs of error to be brought upon any judgment after verdict, in any action of *ejectione firmæ*, no execution shall be stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit."

And to the end that the same sum and sums and damages may be ascertained, it is further enacted, that "the court wherein such execution ought to be granted upon such affirmation, discontinuance or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in *ejectione firmæ* ; [*1252] *and upon the return thereof, judgment shall be given, an execution awarded, for such mesne profits and damages, and also for costs of suit." (aa) Accordingly, where the defendant in *ejectment* brought a writ of error in parliament, the court obliged him to enter into a rule not to commit waste, during the pendency of the writ of error. (bb)

(a) 2 *Ld. Raym.* 1179.

(b) *Id.* 1531. 2 *Str.* 807, *S. C.*; and see 2 *Str.* 834, 891. 1 *Durnf. & East.* 280.

(c) *Ante*, 1162.

(d) 5 *Barn. & Cres.* 735, (a); and see 1 *Man. & Ryl.* 170.

(e) *Ante*, 1145.

(g) *Ante*, 994, 1244.

(f) 2 *Dowl. & Ryl.* 85.

(aa) § 4.

(bb) 3 *Bur.* 1823.

The plaintiff in error may either enter into recognizance himself, without any bail, (c) pursuant to the statute 16 & 17 *Car.* II. c. 8, § 3; (d) or he may procure *two* responsible persons to become bail: For though the words of the statute seem to require a recognizance by the plaintiff in error, yet in the construction of this statute, it is deemed sufficient, if he procure proper sureties to become bound for him. (e) And one reason for this construction seems to be, that an *infant* plaintiff could not enter into such recognizance, nor a plaintiff who had become a *feme covert* after the action brought; and as the legislature could not have meant to exclude *infants* and *femes covert* from the benefit of the act, they must put such a construction upon it as would apply to all the plaintiffs in error. (ff) Besides, bail in error cannot be taken by a commissioner in the country; (gg) and it would be very hard to oblige a plaintiff in error, who may live at a great distance from *London*, to come into court, to enter into a recognizance: And this construction may, in some cases, give the defendant in error a better security than he could have had, if the plaintiff alone were to become bound. (gg)

In the King's Bench, the practice is said to be, for the plaintiff in error, or his bail, to enter into a recognizance, in *double* the improved rent, or yearly value of the premises, and *single* amount of the costs. (h) In the Common Pleas, the clerk of the errors governs himself, in fixing the penalty of the recognizance, by the amount of the rent of the premises; and takes the recognizance in *two* years' rent or profits, and *double* costs. (i) And where the plaintiff in error enters into the recognizance, it is not necessary for him, in that court, to give the defendant in error notice thereof: (k) nor can he be examined, in the King's Bench, as to his sufficiency: (l) though, when bail in error is put in, notice thereof should, it seems, be given, and they may be examined, (l) as in other cases. In the Exchequer, we have seen, (m) the bail must justify in *double* the improved *annual* rent, or value of the premises recovered. [*1253] But bail in error are not chargeable for the mesne profits, in an action upon the recognizance, until they have been ascertained by writ of inquiry, pursuant to the statute 16 & 17 *Car.* II. c. 8, § 3. (a)

In *ejectment* by landlord against tenant, where a recognizance has been entered into, not to commit any waste, &c., it is provided by the statute 1 Geo. IV. c. 87, § 3, that "such recognizance shall immediately stand discharged, and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound, with two sufficient sureties, unto the defendant in the same, in such sum, and with such condition, as may be conformable to the provisions respectively made

(c) *Per Cur.* T. 21 Geo. III. K. B. 7 Taunt. 427. 1 Moore, 118, S. C.

(d) *Ante*, 1152, 3; 1251.

(e) Carth. 121. Barnes, 75. Cas. Pr. C. P. 142. Pr. Reg. 179, S. C. Barnes, 78. Cas. Pr. C. P. 152. Pr. Reg. 180, S. C. Barnes, 212. 2 Bos. & Pul. 443, 4. 8 East, 298.

(ff) 8 East, 299.

(gg) Barnes, 78. Cas. Pr. C. P. 152. Pr. Reg. 180, S. C. *Ante*, 1155.

(h) 8 East, 298; and see Cas. temp. Hardw. 374. But in the case of *Thomas v. Goodtitle*, 4 Bur. 2502, the recognizance, it seems, was taken in double the rent only, without the addition of costs: and, in a subsequent case, the court said, "It is sufficient that the plaintiff in error be bound in a recognizance for two years' rent." *Per Cur.* T. 21 Geo. III. K. B.

(i) 7 Taunt. 428. 1 Moore, 119, 20, S. C.; and see Barnes, 103, *accord*.

(k) 7 Taunt. 427. 1 Moore, 118, S. C.

(l) 8 East, 299.

(m) *Ante*, 1156.

(a) 1 Maule & Sel. 247; and see Cas. temp. Hardw. 374. 2 H. Blac. 286, 7.

for staying execution, on bringing writs of error upon judgments in actions of ejectment, by an act passed in *England*, in the 16th and 17th years of the reign of King *Charles* the Second, and by an act passed in *Ireland*, in the 17th and 18th years of the reign of the same king ; which acts are respectively intituled, *An Act to prevent Arrests of Judgment, and superseding Executions.*" The subsequent proceedings on a writ of error in *ejectment*, are similar to those in other cases.

AN
INDEX
TO
THE PRINCIPAL MATTERS.

[THE FOLIOS IN THIS INDEX REFER TO THOSE IN THE MARGIN.]

A.

ABATEMENT, 129, 866.

of part of writ, 643.

suit, by death of parties, 763, 932, &c., 1114, 1116, &c. See tit. *Death*.

or removal of assignees of bankrupts, 934.
insolvent debtors, id. 935.

writs of error, 1161, 1163, 4, 5.

pleas in; see tit. *Pleas and Pleading*.

time for pleading, 463, 465, 6; 639, 711.

after imparlance, 462, 3, 4; 476, 639, 677.

cannot be pleaded before declaration, nor until defendant has appeared,
and perfected bail, 465, 6; 639.

affidavit of truth of. See tit. *Affidavits*.

not amendable, 638.

discountenanced, 304, 591, 770.

need not be demurred to specially, 638, 695.

may be waived, in order to plead in bar, 673.

quashing, 641.

scire facias after, 947, 8.

amendments after, 697.

calling for residences, and additions, of persons jointly liable with defendant, 534, 636.

replication to plea of *misnomer* in, 636. (n.)

nonjoinder of parties, 636.

verdict on plea in, 641.

judgment for want of plea in due time, 463, 4; 476, 566, 640, 41.

affidavit of truth of plea, 566, 640, 41.

defective affidavit, 640.

of *casseter billa, vel breve*, 424, 677, 683.

on *nul tiel record*, 746.

ABATEMENT, *continued.*

entering proceedings, after judgment of *respondeat ouster*, 721.

suggestion for costs, on court of conscience act, after verdict on plea in, 962.

matter pleadable in, cannot be moved in arrest of judgment, 918.

costs in. See tit. *Costs*.

ABBREVIATIONS,

when allowed, in bills of costs, 827.

ABIDING by Pleas. See tit. *Pleas and Pleading*.

ACCEDAS AD CURIAM,

what, and when it lies, 38, 414, 15, 16; 1187.

when not, 414.

form of, 415.

fee on issuing, 105. (*f.*)

what the sheriff must do under it, 415, 16.

cannot be had without showing cause, 415.

effect of, *id.*

receipt and allowance of, *id.*

return of, and proceedings on, the same as on a *recordari facias loquelam*, for which see that title.

ACCORD AND SATISFACTION,

plea of, 643, 4; 646, 651.

when pleaded, or given in evidence, 647, 651, 653.

ACCOUNT,

action of, 1, 2.

for balance of merchant's accounts, &c. 2.

limitation of, 15.

appointment of auditors in, 2. (*c.*)

process in, 109, 128.

of outlawry, 131.

declaration in, 433.

damages in, 878, 9.

judgment in, 1179.

costs in, 977, 8.

ACCOUNT STATED,

by or with executors or administrators, joinder of counts on, with other causes of action, 13.

plea of, bad, 699. (*c.*)

may be given in evidence on general issue, 663.

money awarded on submission without deed, may be recovered under count on, 834.

interest not recoverable on, 872.

bail in error not required in *debt* on, 1151, 2.

AC ETIAM, 150, &c.

unnecessary, for sum not exceeding *forty* pounds, 149, 153.

must specify sum, when more, 150.

necessary, in process against bail, *id.* 151, 1099.

writ, good continuance of process, to avoid statute of limitations, 151.

against several defendants, 148, 9.

on process in C. P. 153.

declaring by the bye on, in C. P. 425.

variance from, in declaration, 294, 450.

ACKNOWLEDGMENT,

of debt, when sufficient or not, to take case out of statute of limitations, 19, 22, &c. 27.

not sufficient to warrant execution, pending error, 581.

trespass, will not take case out of statute of limitations, 22.

party to fine or recovery, before commissioners, 494.

ACQUITTAL,

plea of former, 644.

of one of several defendants, on trial, 861.

new trial after, in criminal cases, 911, 12.

costs on, 986, 991.

ACTIONS,

criminal, 1.

civil, *id.*

real, *id.* See tit. *Real Actions.*

personal;

upon contracts, 1.

account, *id.* 2.

assumpsit. See tit. *Assumpsit.*

covenant, 8.

debt, *id.*

annuity, 8, 4.

scire facias, 4. See tit. *Scire Facias.*

for wrongs, 4.

case, *id.* 5.

for torts to persons, 4.

individually, *id.*

relatively, *id.*

crim. con. *id.* 659.

personal property, 5.

for torts to real property, 5.

corporeal, *id.*

incorporeal, *id.*

detinue, *id.*

replevin, *id.*

trespass *vi et armis*, *id.*

by and against whom brought;

upon contracts, 6.

by parish officers, 7, 8.

or against trustees of friendly societies, 8.

public companies, *id.*

trustees, and commissioners of turnpike roads, *id.* 9.

societies, or partnerships, in *Ireland*, 9.
Scotland, *id.*

for wrongs, *id.*

election of, *id.* 10.

circuitry of, 10.

joinder in. See tit. *Joinder.*

limitation of, 14, &c.

notice of, 28, &c.

ACTIONS, *continued.*civil, *continued.*for wrongs, *continued.*

means of commencing ;

in King's Bench, 91.

Common Pleas, *id.*

Exchequer, 92.

mixed, 1, 38.

penal. See tit. *Penal Actions.*

trifling, 516, &c.

for costs, 325, &c.

upon attorney's bill, pending taxation, 336.

evidence in, 334, 5.

awards, 571, 833, &c.

bail bonds, 297, 8 ; 300, 584.

against principal and bail separately, not in general allowed,
300.

by assignees of choses in action, 6, 7.

bankrupts, and insolvent debtors, 7.

not abated by their death or removal, 934, 5.

against insolvent debtors. See tit. *Insolvent Debtors.*bankrupts. See tit. *Bankrupts.*commissioners of bankrupt. *Same title.*

by sheriffs, &c. ;

on bail bond, taken on attachment, 222, (*d.*) 223.

must be brought in same court, in K. B. 300.

aliter, in C. P. and Exchequer, *id.*

of debt, for poundage, 1039, 40.

trespass or *trover*, for goods taken in execution, 1005, 1013.

lie not for money paid, after escape, 224.

expenses of execution, when goods are unsold, 1040.

against sheriffs, &c. ;

assumpsit, *debt*, or *account*, for money levied, 1019.

staying proceedings in, 529, 1018.

case, for not taking bail bond, 223.evidence in, *id.*

replevin bond, 1039.

assigning bail bond, 236.

extortion, 232, 3 ; 987, 1040.

escapes, 5.

on mesne process, 224, 235, 6 ; 282, 3 ; 309, 10 ;
368, 481.evidence in, 236, *id.* (*f.*)

final process, 230, 31 ; 1029, 1031.

false returns, 5, 309, 864, 1021.

taking insufficient pledges, &c. 5, 315, (*d.*) 1039.*case*, for removing goods, without paying landlord, on execution,
1010.

by whom brought, 1015, 16.

declaration in, 1016.

evidence in, *id.*

ACTIONS, continued.

against sheriffs, &c., *continued.*

case, for removing goods, &c., *continued.*

variance between declaration and evidence, 484,
5. (f.)

trover, by assignees of bankrupt, 1010.

damages in, 886.

trespass, for arresting plaintiff, or taking his goods, by a wrong
name, 110, 447.

entry, under sale by bailiff, 1008.

giving possession of more than is recovered in *eject-*
ment, 1246.

lie not, for arresting peer, 192.

witness, 196.

certificated bankrupt, or person dis-
charged under insolvent act, 213,
215.

clergyman, attending divine service,
219. (m.)

for selling goods, after bankruptcy, 1008, 9.

for penalties, on Lord's act, 283.

relating to *customs* and *excise*, by whom brought, 519.

concerning *lotteries*, id. 520.

stamp duties, 520.

staying proceedings in. See tit. *Staying Proceedings.*

consolidating. See tit. *Consolidating Actions.*

scire facias, and *error*, considered as actions, 1090, 1139, 1153.

ACTS OF PARLIAMENT, 800.

public, id.

private, id.

evidence of, id.

ACTUAL ENTRY. See tits. *Ejectment*, and *Entry*.

ADDING PLEAS. See tit. *Pleas and Pleading*.

ADDITIONS.

of parties, calling for, 584, 636.

statute of;

when it may be pleaded, 636.

when not, 140, 687.

plea of, a nullity, in C. P. 564.

amendment after, 697.

ADJOURNMENT,

of *essoins*, 109, 460.

last examination of bankrupt, by commissioners, 202.

privilege of bankrupt from arrest on, id.

execution of inquiry, 580.

ADJOURNMENT DAY,

notice of trial for, 755.

entering causes for, 817.

in Exchequer Chamber, 1176.

ADJUDICATION,

of discharge, on insolvent debtors' act, 392.

ADMINISTRATORS. See tit. *Executors and Administrators.*

de bonis non ;

scire facias by or against, 1119.

ADMIRALTY COURT,

limitation of suits in, 16.

sentences in, 801.

ADMISSION,

of trespass, will not take case out of statute of limitations, 22.

effect of, by attorney's clerk, 531, 990.

agent, 860. (*h.*)

ADVERSE POSSESSION, 1195.

how negatived, *id.* 1196.

ADVOCATES, or Counsel, 41.

requisites previously to being called to the bar, *id.* 42.

taking oaths of allegiance, &c., 42.

of civil law ;

precedence of, 42.

exemption of, from serving on juries, 784.

ADVOWSON,

amendments in recovery of, 704.

in gross, not extendible on *elegit*, 1035.

ejectment will not lie for, 1193.

AFFIDAVITS,

of cause of action ;

in what cases requisite, 164, 5.

in actions against prisoners, 856, 7, 8, 9.

by whom made, 178, 9.

by third person, cannot be answered by affidavit that plaintiff is a transported felon, 179.

before whom made, 149, 154, 179, 80 ; 491.

must contain deponent's place of abode, and addition, 179.

aliter, of defendant's, *id.*

what a sufficient description of place of abode, or addition, *id.*

when made, 149, 154.

where, 154, 179, 80.

title of, as to court, 180, 81 ; 492.

names of parties, &c., 492, 3.

purporting to have been sworn before deputy filacer, sufficient, 181.

jurat of, when sworn in court, 180, 81.

before a judge, 181.

commissioner, 179, 492.

made by foreigner, 180.

common, 171, 2.

special, 172, 3, 4.

made abroad, 166, 181, 2.

in *Scotland*, or *Ireland*, 166, 181.

form of, on *Irish* judgment, 181.

in *England*, to arrest in *Ireland*, *id.* (*e.*)

must be direct and positive, 182, 3.

certain and explicit, 183.

single, 188.

swearing to belief, when sufficient, 182.

AFFIDAVITS, *continued.*

of cause of action, *continued.*

swearing to belief, *continued.*

by executor or administrator, 182.

assignee of bankrupt, id.

co-assignee of debt, id.

assignee of bond, id. 183.

debt in *Holland*, 183.

in trover, 171, 2; 186, 7; 186. (i.)

detinue, 171, 2.

on lottery act, &c. 173, 187.

bills of exchange, 183, 4.

money bond, &c. 184, 5.

promissory notes, 184.

marriage contract, 185, 6.

charter-party of affreightment, 186.

for use and occupation, 183.

goods bargained and sold, 173.

sold, id.

and delivered, 183.

hire of carriages, id. 184.

wages, &c. 183.

work and labour, &c. id.

money lent, by a married woman, 184.

paid, &c. 171, (c.) 183, 4.

had and received, 184.

won at play, 172. (k.)

principal and interest, on bond, 182, 3, 4, 5.

stipulated damages, &c. 173, 4; 185, 6.

subscription to reading club, 185.

misnaming defendant, 184.

negating tender, in bank notes, 187.

defect in, remedied by stat. 43 Geo. III. c. 18, p. 188.

no longer necessary, id.

supplemental, or contradictory, in K. B. 189.

C. P. id. 179.

how long they continue in force, 190.

more than a year old, id.

want of, or defect in, 188.

how cured, id. 189.

must correspond in substance with process, 294.

materially different from process or declaration, or not duly filed,
&c. 188.

court will not go out of, 189.

need not be made before outlawry, 186, 7.

with whom filed, 496, 7.

effect of charge for by attorney, in rendering his bill taxable, 328.
being under 40s. 516.

arising in a particular county, &c. 518.

not necessary, to move for interest, on affirmance of judgment in
Exchequer Chamber, 1184.

of execution of articles of clerkship, 64, 5; 70, 497.

AFFIDAVITS, continued.

- of service under same, 70, 497.
- payment of duty, 70.
- service of summons, or attachment, 114, 243.
- execution of *distringas*, id.
- debt, &c., to found proceedings on stat. 6 Geo. IV. c. 16, p. 116, &c.
- death, &c., for reversing outlawry, 139, 144.
- service of *subpoena*, in Exchequer, 156, 7.
 - common process, 241, 2; 491, 494.
 - before whom made, 491, 494.
 - with whom filed, 496, 7.
- notice of bail, 255.
 - justification, 263, 4; 266, 7.
 - render, not necessary to complete it, in K. B. 288.
 - unnecessary, in C. P. id.
- rule of court, 501.
- declaration in *ejectment*;
 - in ordinary cases, 1218, 14; 1215, &c.
 - on vacant possession, in K. B. 1202.
 - stat. 4 Geo. II. c. 28, pp. 1217, 18.
 - stat. 1 Geo. IV. c. 87, pp. 1221, 2.
- and attendance on summonses, 335, 368, 9; 470.
- caption of bail, by commissioner, 252, 3; 264, 267.
- justification of same, 263, 4; 267.
- delivery of declaration, against prisoners;
 - in custody of sheriff, &c. 344, 5.
 - marshal, unnecessary, 354.
 - warden, 355, 359.
- gaoler's signing certificate, 368, 378.
- notice, &c. on Lord's act, 377.
- signature of note on same, 381.
- title of, id.
- merits, when necessary to stay proceedings on bail bond, in K. B. 302.
 - not necessary, in C. P. id.
 - Exchequer, id.
 - to set aside regular judgments, 488, 567, 8.
 - change venue, 405, 6.
- execution of lease, or agreements, &c. on stat. 1 Geo. IV. c. 87, pp. 1221, 2.
- time of execution of warrant of attorney, and *cognovit*, 555, 561.
- defendant's residence, on claim of conusance, 634.
- truth of pleas in abatement, 640.
 - may be made before declaration, 641. (a.)
 - with whom filed, 497.
- puis darrein continuance*, 850, 51.
- due execution of award, &c. 836, 7.
- service of copy of rule, &c. 832, 837, 8.
- demand and refusal of costs, &c. 500, 758, 837.
- partiality, or misbehaviour, of jurymen, not allowed, 908, 9.
- fresh facts inadmissible, on motion for new trial, in criminal cases, 911.
- increased costs, in K. B. 989.
- C. P. id.

AFFIDAVITS, continued.

- of increased costs in C. P. with whom filed, 497.
 - award of *fiere facias*, 1022. (o.)
 - personal notice of *scire facias*, in C. P. 1106.
 - coverture, &c., for allowance of writ of error *coram nobis*, 1144.
 - service of notice of motion, for interest, on affirmance of judgment in Exchequer Chamber, 1184.
- on motions, 491, 2, 3.
 - before whom made, 491.
 - commissions for taking, in K. B. id.
 - great sessions, and counties palatine, id. 492.
 - title of, as to court, 492.
 - names of parties, &c. 304, 400, 492, 3.
 - form of, 498.
 - clerical errors and mistakes in, id. 494.
 - when they may be made, or not, before attorney in cause, 179, 484.
 - jurat* of ;
 - when made in court, 180, 81; 491, 2; 494, 5.
 - before judge, or baron, 491, 2; 494, 5.
 - commissioner, id. 179.
 - by illiterate persons, 495.
 - two or more deponents, id.
 - foreigner, id.
 - marksman, id.
 - interlineation, or erasure in, not allowed, id.
 - erasure over, does not vitiate, id. (h.)
 - defect in, effect of, 495.
 - on indictment for perjury, id. 496.
 - amendment of, 264, 272, 3; 495, 1215.
 - recital in, evidence on indictment for perjury, 496.
 - in *ejectment*, 1215.
 - at what time made, and produced in court, 496.
 - cannot be used, if filed after obtaining rule *nisi*, id.
 - on opening rule, if sworn after it was made absolute, 506.
 - may be referred to, after being used, in support of fresh motion, 496.
 - filing, in K. B. id. 497.
 - C. P. 497.
 - Exchequer, id.
 - supplementary, 493, 501, 506.
 - office copies of, 501.
 - must be examined and signed, in Exchequer, 497.
 - showing cause, 501.
 - party must be prepared with, in support of his whole case, id.
 - how entitled, 492, 3.
 - delivering over, 501.
 - filing, 496, 7; 501, 2, 3.
 - nunc pro tunc*, 501.
 - on enlarged rule, 502, 3.
 - what may be read, id.
 - what not, 496, 506.
 - in criminal cases, 507, 8.

AFFIDAVITS, continued.

- for re-admitting attorney, 79, 80.
 - striking attorney off the roll, at his own instance, 89.
 - admitting plaintiff to sue *in forma pauperis*, 97.
 - obtaining *distringas*, on stat. 7 & 8 Geo. IV. c. 71, pp. 114, 156.
 - setting aside service of writ, in wrong county, 168.
 - opposing discharge of seamen, 198, 9.
 - insolvent debtors, 392.
 - obtaining discharge of seamen, &c., 199, 200.
 - insolvent debtors, 214, 15.
 - further time to justify bail, 272, 3.
 - opposing bail, 264.
 - cannot be amended, 274.
 - when not allowed to be read, *id.*
 - attachment against sheriff;
 - for not returning writ, 307.
 - bringing in body, 311, *id.* (f.)
 - for non-payment of money, 500.
 - additional day rules, 374.
 - removing decree or judgment, from court of requests, to have execution thereon, 402.
 - setting aside, or staying proceedings, on bail bond, 302.
 - how entitled, 304, 493.
 - against sheriff, 316.
 - should be made by defendant, *id.*
 - for irregularity, 512.
 - on the merits, 316, 530.
 - pending error, 530, 31.
 - till security be given for costs, 534, 537, 8.
 - taking acknowledgment of party to fine or recovery, before commissioners, 494.
 - proceeding on stat. 1 Geo. IV. c. 87, § 1, pp. 1209, 1221, 2.
 - leave to enter up judgment, on old warrant of attorney, 548, 552, 3, *id.* (c.) 554.
 - in King's Bench, 552, 3.
 - Common Pleas, 548, 553.
 - sworn in *Scotland*, 553, *id.* (c.)
 - by whom made, 553, 4.
 - when dispensed with, 554.
 - where plaintiff resides in an enemy's country, 548.
 - inspect and take copies of books, court rolls, &c., 594, 5, 6.
 - enter suggestion, on court of conscience acts, 961, 2.
 - compounding penal actions, 556, 7; 556. (i.)
 - referring bills or notes to master, or prothonotaries, 570, 71.
 - changing venue, 609, 10, &c.
 - on special ground, 613.
 - pleading double, not necessary, 657.
 - amending fines or recoveries, 701, 703, 706.
 - judgment as in case of nonsuit, 764, 5, 6, 7.
 - what, if false, 767.
 - putting off trial, in K. B., 770, &c.

AFFIDAVITS, continued.

- for putting off trial, in C. P., 770, &c.
- obtaining view, 797.
- leave to examine witnesses on interrogatories, 810.
- mandamus*, to examine witnesses in *India*, 813, 14. (*g.*)
- making submission to arbitration a rule of court, 836.
- attachment, for not performing award, id. 837, 8.
 - how entitled, 838.
 - non-payment of costs, 990, 91.
- setting aside award, 844.
 - how entitled, id.
- trials at bar, 749, 50; 1237.
- new trials, 914.
 - when made, in K. B., 914.
 - by jurymen, not received, 908, 9.
 - falsifying testimony of witnesses at trial, 907.
- costs, on stat. 48 Geo. III. c. 46, § 3, p. 984.
- reviewing taxation of costs, 990.
- obtaining immediate extent, in chief, 1046, 7, 8; 1058, 9; 1091.
 - in aid, 1063, id. (*i.*)
 - writ of *diem clausit extremum*, 1058.
- leave to issue *scire facias*, on old judgment, 1106.
- computing interest, on affirmance of judgment, in Exchequer Chamber, 1182, 1184.
- rule to answer matters of, 88, 9.
- stamp duty formerly payable on, 496.
 - repealed, by stat. 5 Geo. IV. c. 41, id.
- amending, and re-swearing, 496.
- re-stamping, when necessary, id.
- filing, id. 497.
- when read and filed, matter of record, 800.
- evidence of, id.

AFFIRMANCE DAY, in Exchequer Chamber, 1176.**AFFIRMATION.** See tit. *Quaker*.**AGENT,**

- and attorney, relation of considered, 96, 7.
- appearance by, 97. (*b.*)
- duties of, 85, 6, 7.
- consequence of his not taking out certificate for principal, 79.
- service of clerkship to, 68, 9.
- acting for unqualified persons, 74.
- employment of, and how considered, 96, 7.
- liability of attorney to, 96.
- payment to, not payment to attorney's principal, 97.
- notices to, 97, 576, 753.
- delivering copy of bill to, against principal, 322, id. (*f.*)
- bills of, taxable, 332.
 - not necessary to be signed, or delivered, 328, 331, 2.
- right of retainer by, against client, for debt due from attorney, 97, 339.
- effect of admission by, as to evidence, 800. (*h.*)

AGREEMENT,

- to put in bail, &c. 224.

AGREEMENT, *continued*.

for consent rule, in *ejectment*, 1226, 7; 1230.

staying proceedings, 756.

execution, 560, 1104.

not to bring writ of error, 1096, 1184, 5.

delivering copy of, 592.

when it cannot be made a rule of court, 821.

to refer *quantum* of damages, does not admit defendant's liability, 840.

evidence of. See tit. *Deeds*, &c.

AID PRAYER,

plea of, must be verified by affidavit, 640.

AIEL AND BESAIEL, damages on writs of, 870.**ALDER-CARR**,

ejectment lies for, in *Norfolk*, 1191.

ALIAS,

in declaration, not cause of demurrer, 447.

writs of. See tita. *Attachment*, *Ca. Sa. Fieri Facias*, *Jury Process*, *Process*, and *Scire Facias*.

prout patet, 721.

ALIEN,

not now privileged from arrest, 215.

when formerly privileged, id. 216.

bail of, when formerly discharged, on alien act, 292.

enemy, plea of, in abatement, 634.

bar, 644.

not pleadable with *non assumpsit*, or tender, &c. 655.

proceedings against, cannot be stayed after verdict, 644. (*d.*)

disqualification of, to serve on juries, 783.

ALIEN ACTS, 215, id. (*c.*)

expired, 216.

ALLOCATUR, of Master, or Prothonotaries;

arrest not allowed on, 173.

attorney entitled to possession of, on taxing his bill, in C. P. 337.

attachment for non-payment of costs on, 480, 500.

must be personally served, to ground attachment, 500, 990.

original must be shown, on serving copy of, 480.

indorsement of, on *postea*, not evidence of judgment, 902.

ALLOCATUR EXIGENT, 132.

must be in sheriff's hands, when defendant is demanded, id.

ALLOWANCE,

of bail, rule for, 276.

setting aside, 235, 276, 7.

of writs of *certiorari*, and *habeas corpus*, 404.

pone, and *recordari*, &c. 415.

writ of error, 1144.

may be served before return of inquiry, and final judgment, 1141.

evidence of, 1145. (*e.*)

to prisoners, on Lords' act, 380, 81.

insolvent debtors' act, 372, 3.

AMBASSADORS,

and their servants;

privileges of, 191, 2.

AMBASSADORS, continued.

and their servants, *continued.*

not required to give security for costs, 535.

AMENDMENTS,

at common law, 696, 7; 711, 12.

whilst proceedings are in paper, *id.*

how made, 697, 8.

by judges, on their circuits, 697.

judge at *nisi prius*, *id.*

of mesne process, 130, 148, 155, 161.

returns to, 308, 9.

appearance, in wrong name, 242.

bail-piece, 264, 5; 272.

affidavit of caption of bail, *id.*

justification of bail, 267, 272.

notice of justification, 265, 6, 7.

service of, 266, 274.

jurats of affidavits, 264, 267, 495.

bills, 427, 713.

declarations, 440, 41; 697.

in title, 426, 7; 712, 715.

venue, 602, 8, 4; 607, 8.

nature of action, 698.

before plea, 707.

after plea, 697, 707.

in abatement, of misnomer, 697, 711.

statute of additions, &c., 697.

of *nul tiel record*, *id.*

second term, 698.

issue, 707, 8; 713, 14.

nonsuit, or verdict, 697, 709, 713, 14.

in actions on bail bonds, in C. P. 676.

real, 699.

of *ejectment*, 1207.

penal, 698, 711.

by adding count, in K. B. 698.

C. P. *id.*

alleging new right of action, *id.*

without, or on payment of costs, &c., 707, 8.

time to plead after, 468, 9; 475, 708.

rule to plead after, in K. B. 459, 475, 708.

C. P. *id.*

demand of plea unnecessary after, in K. B. 476.

pleading *de novo*, in C. P. 708.

notice to declaration in *ejectment*, 1208.

rules of court, 506, 910.

particulars of demand, or set-off, 598, 9.

costs on, 599.

pleas, replications, &c., 488, 708, 9.

in abatement, not allowed, 688.

replication to sham plea, without costs, 710. (*k.*)

judgment roll, and *committitur*, 365.

AMENDMENTS, *continued.*

at common law, *continued.*

by withdrawing replication, and replying *de novo*, 709.

after demurrer, or joinder, 710.

argument, *id.*

opinion of court given, 710, 11; 710. (c.)

judgment, and prisoner charged in execution, 865.

by withdrawing demurrer, and pleading or replying *de novo*,
710.

taking judgment of assets,
quando acciderint, 711.

adding *similiter*, 924, 5.

traverse, 925.

by statute, 696.

when proceedings are entered on record, 712, 18, 14; 737, 924, 5.

statutes of, what, 712.

extend to penal actions, 713, 928.

not to criminal cases, 712.

require something to amend by, *id.* 713.

of process in inferior courts, *id.*

after nonsuit, for defect in bill of particulars, 599.

variance, in undefended cause, 697.

in prohibition, *id.*

after verdict for plaintiff, by increasing damages, 697.

cause had been made a *remanet*, 709.

error brought in K. B. 714.

Exchequer Chamber, *id.*

House of Lords, *id.*

of mistake in transcript, *id.*

proceedings in inferior courts, *id.* 715.

costs on, 715.

finer, 699, 700, 701, and see tit. *Fines*.

recoveries, 699, 701, &c., and see tit. *Recovery*.

warrant of attorney for suffering, not allowed, 702, 3.

original writ, 109, 713.

mesne process, 130, 150, 154, 161, 448, 9; 712.

when not allowed, 161, 712.

returns to, 308, 9.

bill, 713.

against attorney, 822, 720.

memorandum of, *id.*

declaration, and pleadings. *Vide ante*, p. 1280.

writ of inquiry, 574.

nisi prius roll, 713.

order of *nisi prius*, 820.

jury process, 926.

postea, 713, 894, 901, 902. (*d.*)

verdict, by notes of arbitrator, refused, 713, (*i.*) 840.

judge's notes, application for, to whom made, *id.*

special verdict, 713, 897.

case, 900.

judgment, 713, 939, 942, 989.

AMENDMENTS, continued.

- of execution, 713, 999, 1020, 1028.
- returns thereto, 1020, 21.
- rolls, &c., 732.
- not allowed in C. P. when it would deface the roll, 707, 8.
- docket, or list of *committiturs*, 364, 5.
- scire facias*, 1123.
- against bail, *id.*
- writs of error, 1161, &c.
- not allowed on appeals, or process on indictments, &c. 1162.
- certiorari*, 1170.
- recognizance of bail in error, 1162.
- not actually made, on stat. 16 & 17 *Car.* II. c. 8, p. 928.
- costs on, 599, 707, &c., and see tit. *Costs*.

AMERCEMENT,

- of sheriff, for not bringing in the body, 390.
- disused, *id.*
- debt* for, 3.
- avowry or cognizance for, 645.
- pro falso clamore*, 867, 976.

AMERCIAMENTS,

- roll of estreats of, in K. B. 728.

AMICABLE CONTEST,

- plea of, 645.

AMOVEAS MANUS,

- judgment of, 144, 1076, 1081.
- writ of, 144, 1074, 1081.
- proceedings on, 1081, &c.

ANCESTOR AND HEIR. See tit. *Heir.***ANCIENT DEMESNE**, 415, 630, 31.**ANNUITY,**

- charged on land ;
- debt* lies not for arrears of, 4.
- payment of, may be pleaded in bar, in *replevin*, 664.
- action of, 3, 4.
- not within statute of limitations, 15.
- process in, 109.
- declaration in, 433.
- damages in, 879, 1107.
- judgment in, 931, 1107.
- execution in, when allowed for arrears only, 997, 1107, 8.
- motion to set aside, 490, 521, &c.
- on stat. 17 Geo. III. c. 26, p. 520, &c.
- by whom made, 522.
- after what time, 527.
- when court will order deeds, &c. to be cancelled, 522, 547.
- on stat. 53 Geo. III. c. 141, pp. 490, 522, 3, 4.
- cases determined on that statute, 524, 5.
- on stat. 3 Geo. IV. c. 92, § 1, 490, 525, 6.
- § 2, 490, 526, *id.* (*d.*)
- 7 Geo. IV. c. 75, p. 526.
- in what cases court will not interfere, 527.

ANNUITY, continued.

motion to set aside, *continued*.

objections must be stated in rule, *nisi*, 527.

bond ;

action on ;

staying proceedings in, 542, 3, 4.

pleadings in, 688.

within stat. 8 & 9 W. III. c. 11, § 8, pp. 584, 1108.

motion for leave to take out execution in, 1108.

reference to master to compute, in *covenant* for arrears of, 570, 71.

scire facias for subsequent arrears, 1102, 1107, 8.

when necessary, and when not, 1104, 1107.

bail in error not required on award of execution in, 1152.

value of, when proveable under commission of bankrupt, and when not,
206, 7, 8, 9.

grantor of, when entitled to copy of deed, &c. 591.

discharged by bankruptcy, 209.

under insolvent act, 393.

surety for payment of. See tit. *Surety*.

defeazance on warrant of attorney, how stated in memorial of, 546.

ANNUITY ACTS, 520, 522, 525, 6.

ANNUITY CREDITORS,

debts proveable by, under commission of bankrupt, 206, 209.

APOTHECARIES,

when exempted from serving on juries, 784.

APPEAL, 1162.

to sessions, hearing counsel on, 508.

re-hearing, *id.* 898, 9.

APPEARANCE,

what, 238.

in person, 60, 92, 3.

by attorney, 92, 3.

at common law, *id.*

of corporations, *id.*

by stat. *Westm.* 2, c. 10, pp. 60, 92.

who may or may not appear, 92, 3, 109.

without warrant, effect of, 93, 529.

for an infant, 241.

by *prochein ami*, 99.

guardian, *id.*

different from bail, 238.

voluntary, or compulsive, *id.*

of what term, and when complete, 459.

common ;

in King's Bench, by original ;

with whom, when, and how entered ;

by defendant, on summons, attachment, or *distringas*, 107,
110, 238, 9.

capias, 240.

prisoner's discharge, 214, 15 ; 343, 368, 9.

by defendant's attorney, 241.

APPEARANCE, continued.common, *continued.*

in Common Pleas;

sufficient, on summons, attachment, or *distringas*, &c. 238.

entered, in cases when special bail is not necessary, 239.

with whom, when, and how entered;

by defendant, on summons, attachment, or *distringas*, 106,
110, 238, 9.*capias*, 240.by defendant's attorney. *id.* 241.

day of, ordered to be entered in filacer's book, 317.

by plaintiff, on stat. 12 Geo. I. c. 29, § 1, pp. 241, 2, 8.

43 Geo. III. c. 46, § 2, pp. 227, 8; 243.

45 Geo. III. c. 124, § 3, pp. 119, 20, 21; 243.

51 Geo. III. c. 124, § 2, pp. 113, 14; 243.

7 & 8 Geo. IV. c. 4, § 180, p. 243.

c. 5, § 71, *id.*c. 71, § 2, *id.*§ 5, *id.*

with whom, when, and how entered, in K. B. 241, 2, 8.

C. P. *id.*

affidavit for, may be sworn before attorney, in C. P. 494.

effect of, in curing irregularity in process, &c. 161.

to attachment of privilege, in C. P. 320, 21.

bill filed against attorney, in C. P. 323.

reverse outlawry, 140.

how triable, 239.

entry of, *id.*on removal by *pone* or *recordari*, &c. 416, 17.

when judgment cannot be signed for want of, 567.

to extents, 1076, 7.

in *scire facias*. See tit. *Scire Facias*.*ejectionment*, by tenant, 1224, 1225, &c.

landlord, 1224, 5; 1227, &c.

for casual ejector, by *original*, unnecessary, 1224.entering, for tenant or landlord, *id.* 1226, 7; 1230.**APPEARANCE DAY, 107.****APPEARANCES,**

note of, 243.

APPOINTMENT,

by master, or prothonotaries;

to compute principal and interest, on bill of exchange;

copy of, need not be served, in K. B. 572.

notice must be given of, in C. P. *id.*

to tax costs, on rule to bring money into court, 626.

discontinue, 680.

nominate special jury, 792, 3.

attendance on, 86, 336.

ARBITRAMENT,

plea of, 643, 4; 644, (b.) 646.

ARBITRATION,

what, 819, 20.

ARBITRATION, *continued.*

submission to ;

when cause is depending, 819, 20.

by rule of court, or judge's order, 819, 834, 836.

order of *nisi prius*, 819 ; and see tit. *Order of Nisi Prius*.

agreement, when it cannot be made a rule of court, 821.

when no cause is depending, 819.

by agreement of parties, 819, 20.

in writing, *id.*

by parol, *id.* 834, 840.

on stat. 9 & 10 W. III. c. 15, pp. 820, 21.

intent of that act, 821.

what submissions are within it, and what not, *id.* 822.

upon inclosure acts, 819, 20 ; 845.

in what manner, and by whom, made, 93, 822.

how far a stay of proceedings, 529, 822.

effect of agreement to refer, 822.

when and how determined, or revoked, 822, 3, 4 ; 838, 933.

consequences of revoking, 824.

arbitrators not proceeding on, 839, 40.

when not revoked by bankruptcy, 824.

effect of filing bill in equity, *id.*

preventing arbitrator from making award, *id.* 825.

swearing witnesses, appointment, &c. 825.

choosing umpire, *id.* 826.

enlarging time for making award, 485, 826, 7.

motion and rule for, when and how made, in K. B. 827.

C. P. *id.*

privilege from arrest, during attendance on, 196.

award, 827 ; and see tit. *Award*.

in form of opinion, sufficient, 828. (i.)

by whom made, on reference to several, 827.

when complete, *id.*

alteration of, *id.* 828.

not vitiated, by improper persons joining in it, 828.

stamp duty on, *id.*

general requisites of, *id.*

must be certain, mutual, and final, *id.*

when sufficiently certain, *id.* 829.

final, and when not, 829.

to pay money to stranger, for one of the parties, 828.

good in part, and bad in part, 829, 30.

in *ejectment*, though it do not find in terms a cause of action, 832.

costs on, 830, &c. 959.

of arbitrators, 833.

not tantamount to judge's certificate, on stat. 22 & 23 Car. II. c. 9,
pp. 965, 6.

sum found by, considered as *recovered*, within 43 Geo. III. c. 46, § 3,
pp. 983, 4.

enforcing ;

by action, 833, 4.

when award is, or is not made within limited time, 834.

ARBITRATION, continued.award, enforcing, *continued.*by action, *continued.*

when award is, for greater sum than verdict, 889, 997.

venue cannot be changed in, 604.

evidence in, of judge's order of reference, 884,

by attachment, 479, 884, &c.

in what cases granted, and what not, 885, &c.

for non-payment of costs, pursuant to award, 480.

costs of reference, 885.

after foreign attachment, in *London*, 886.

against peers, &c. 479, 885.

bankrupts, 210, 885.

femes covert, 885.

executors and administrators, *id.* 886.

assignees of bankrupt, 886.

on copy of award, 884.

against party residing out of jurisdiction of court, *id.* 885.making submission a rule of court, 486, 490, 826, 7; 886,
889, 40.

motion and rule for, in K. B. 486, 886.

C. P. 486.

affidavit for, 886.

personal service of award;

when necessary, 887, 8.

not to be inferred, 887.

when not necessary, 887.

demand of money, &c. 886, 7.

by whom, and how made, *id.*service of copy of rule, &c. *id.*motion and rule for, when and how made, 478, 9; 480, 81;
887, 8.

affidavit in support of, 887.

must state time of executing award, in C. P. *id.*when time for making award has been enlarged, *id.*

how entitled, 888.

quaker's affirmation, sufficient ground for, 888.

rule *nisi* for, must be personally served, *id.*

what may be shown for cause against and why, 845.

illegality of award, *id.*prisoner in custody on, compellable to deliver up effects, on
Lord's act, 885.retaking defendant, on *alias*, 1080.by signing judgment, and taking out execution, 883, 888, 9; 904,
997.

when greater sum is awarded, than amount of verdict, 889.

money awarded on submission without deed, may be recovered on *insimul*
computassent, 884.evidence in action on, *id.* 885.

validity of, cannot be disputed, in action thereon, 842.

setting aside, 821, 824, 840, &c.

at common law, 840.

ARBITRATION, continued.

setting aside, *continued.*

in equity, 841.

on stat. 9 & 10 W. III. c. 15, § 2, pp. 840, 41.

cases not within the statute, *id.*

time allowed for, 839, 840.

grounds of, 841, 2.

generally, *id.*

on the merits, &c. 842, 3.

for misconduct of arbitrator, 844, 5.

in particular cases, 842.

for improper stamp, 844.

on inclosure act, *id.*

mode of, *id.* 845.

motion and rule for, by whom, when, and how made, 489, 498, 844, 5.

affidavit on, 844.

how entitled, *id.*

discharging rule, with costs, 845.

application cannot be made on last day of term, 498, (*h.*) 845.

time allowed for, 845.

when and how to object to illegality of, *id.* 846.

objections to, must be stated in rule *nisi*, in K. B. 844, 5.

Exchequer, 845.

pleadings on, 646, 688, 841.

bail in error not required, in *debt* on bond for performance of, 1150.

costs on, 830, &c.

when submission is silent respecting them, 830, 81.

when they are to abide the event of award, 830, 81, 2; 959.

in discretion of arbitrator, 830, 882, 3.

cause goes off on ineffectual arbitration, 833.

rule to set aside award is discharged, 845.

award was for less than *fifteen* pounds, 984.

taxing, 832.

ARBITRATION BOND,

need not be stamped as an agreement, 821, 2.

ARBITRATOR,

amendment of verdict by notes of, not allowed, 713, (*i.*) 840.

not bound to consider matters of an equitable nature, 829.

charges of, 833.

ARGUMENT,

moving for, in K. B. 508.

C. P. *id.*

of causes, in C. P. 504, 5; 738, 9.

demurrers. See tit. *Demurrers*.

writs of error, 1177.

ARMY,

officers of;

half pay of, not assignable, 381.

on full pay, exempted from serving on juries, 784.

actions against;

limitation of, 20.

notice of, 80, 81.

ARMY, continued.officers of, *continued.*actions against, *continued.*

where laid, 481.

bringing money into court in, 621.

pleading tender of amends in, 646, (a.)

costs in, 988.

ARRAY, challenging. See *tit. Jury.***ARREST,**

at common law, 128.

by statute, *id.*

previous to, and on stat. 12 Geo. I. c. 29, p. 164.

by stat. 51 Geo. III. c. 124, § 1, p. 165.

7 & 8 Geo. IV. c. 71, § 1. *id.*

cases provided for by the above statutes, 166, 7.

changes it has undergone, 165.

when allowed;

in general, 171.

upon proper affidavit, *id.* 172.

by rule of court, or judge's order;

on affidavit made abroad, 166, 181, 2.

in *Scotland*, or *Ireland*, *id.*

in actions for general damages, 166, 172.

money won at play, 172, (k.)

in *assumpsit*, or *covenant*, for payment of money, 171, 2.*debt*, on remedial statute, 172, 8.statute authorizing, *id.*

bond for payment of money, 173, 4.

performance of promise of marriage, 174.

award, 178.

on guarantee, 178.

for stipulated damages, *id.* 174, 185.in *detinue*, 171, 2.*trover*, *id.* 186, 7.

when not;

in general, 145, 167, 172, 853.

assumpsit or *covenant*, to indemnify, &c., 172.

for goods bargained and sold, 173.

on prothonotary's *allocatur*, *id.*policy of assurance, without adjustment, &c., *id.**debt*, on penal statute, 172, 8.

recognizance of bail, 173, 1099.

bail, or replevin bond, 173.

for penalty, 173, 4.

in *case* or *trespass*, 172.

when allowed or not, after former arrest, 174, &c.

pending error, 174.

after *non pros*, 175.discontinuance, *id.*nonsuit, *id.*judgment of *cassetur billa*, on plea in abatement, *id.*bankruptcy of plaintiff, *id.* 176.

ARREST, continued.

when allowed or not, *continued.*

after *supersedas*, 176, 367.

in inferior court, 176.

compromise of former action, *id.*

arrest abroad, 176, 7.

foreign attachment, 177.

detainer in inferior court, *id.*

in *debt* on judgment, 173, 177, &c., 367, 1019, 20.

second action, by assignees of bankrupt, 175, 6.

for costs, on nonsuit, 178.

where cause of action was originally under 20*l.* *id.*

by attorney for fees, after delivery of unsigned bill, 334.

for what sum ;

generally, 164, &c., 171, 178, 239.

in *Wales*, 171.

counties palatine, *id.*

debt on bond, for payment of money, 173.

performance of covenants, &c., *id.* 174.

where there have been mutual dealings, 174.

on common process, allowed for any sum not exceeding 40*l.* 149, 50;
158, 294.

for more than sum due, consequence of, 489.

affidavit in support of. See tit. *Affidavits.*

privileges from, when allowed, and when not ;

of king, and queen *regent*, 190.

servants of king's household, *id.*

gentlemen of king's privy chamber, *id.*

fort *major* of tower of *London*, *id.*

warden of tower, *id.*

yeomen of king's guard, 410.

king's debtor, &c., 190, 91.

ambassadors, and their domestic servants, 191, 2.

peers and peeresses, and their servants, 192.

members of the House of Commons, 192, 3.

convocation, and their servants, 193.

corporations aggregate, *id.*

hundredors, *id.*

attorneys and officers of the court, 80, &c. 193, 195, 6.

barristers, 193.

executors and administrators, *id.* 194.

heirs and devisees, *id.*

married women, 194, 5.

parties to the suit, and their attorneys and witnesses, 195, &c. 219,
773, 4.

persons attending arbitrators, 196, 7, 8.

commissioners of bankrupt, 197, 8.

insolvent debtors' court, 195, 6 ; 389.

execution of inquiry, 196, 7, 8.

witnesses, attending courts martial, 198.

seamen, *id.* 199, 200.

marines, *id.*

ARREST, continued.

privileges from, when allowed, and when not, *continued*.
of soldiers, 199, 200.

bankrupts, 200, &c., and see tit. *Bankrupts*.
on subsequent promises, 211.

insolvent debtors, and fugitives, 212, &c., and see tit. *Insolvent Debtors*.

under occasional acts, 84, 212, 18; 212, (*k*.) 388.

prisoners discharged on stat. 48 Geo. III. c. 123, pp. 386, 7.
53 Geo. III. c. 102, § 29, pp. 388, 9.
1 Geo. IV. c. 119, *id*.
3 Geo. IV. c. 123, p. 388.
5 Geo. IV. c. 61, *id*.
7 Geo. IV. c. 57, pp. 213, 14; 389, &c.

aliens, 215, 16.

insane persons, 216.

sheriff not in general bound to take notice of, 192, 8; 196, 215,
219. (*m*.)

under-sheriff not allowed to discharge persons arrested, when attend-
ing execution of inquiry, 198.

local, 190, 219.

temporary, *id*.

how taken advantage of, 197, 8; 216, 219, (*m*.)

by whom made, 216.

under what authority, *id*.

within a liberty, *id*.

when, 218.

on *Sunday*, *id*.

absolutely void, *id*. (*b*.)

where, 218, 19.

of clergymen, 219.

in what manner, *id*.

fees for, justices at sessions not authorized to fix, 233.

wrongful, will not justify subsequent detainer by plaintiff, 219, 20.

aliter, by a third person, 220.

malicious remedy for, 174, 1183, (*c*.)

consequences of, 221, 341.

upon *exigi facias*, 184.

capias utlagatum, 185, 6.

by virtue of escape warrant, 218, 233, 4, 5.

proceedings on, under stat. 43 Geo. III. c. 46, §. 2, pp. 227, 8.

for more than sum due, consequence of, 174, 982, 3.

on judgment, without process of execution, 1025.

extent, 1049, 50.

indictment for preventing, 237, (*a*.)

ARREST OF JUDGMENT,

ground and mode of taking advantage of, 918, 19.

motion in, when and how made, in K. B. 489, 904, 928.

C. P. 499, 904, 928.

after verdict, 928.

on inquisition, *id*. 929.

Exchequer, 918, 929.

ARREST OF JUDGMENT, *continued.*

motion in, *continued.*

not allowed, after judgment on demurrer, 740, 918.

trial of issue directed by Court of Chancery, 918.

for anything that is aided or amendable, id. 919.

might have been pleaded in abatement,
918.

in *audita querela*, id.

for misjoinder of counts, cured by verdict, id. 919.

apparent error, in copy of declaration, 918.

what might have been pleaded in abatement, id.

after judgment by default, 740, 918, 927.

on extents, 1081.

rule for, in C. P., 928, 9.

making absolute, id.

discharging, 929.

proceedings on, id.

in action for words, 922.

costs on, 985.

limitations of actions after, 15.

ARTICLES OF CLERKSHIP. See tit. *Attorneys.*

ASPORTAVIT, Costs on, 963, 4.

ASSAULT AND BATTERY,

actions for, 5.

limitation of, 15.

declaration in, 442.

venue may be changed in, 604.

damages in, 888.

costs in, 945, 952, 3; 963, 969, 70.

in inferior courts, 967.

ASSETS, 644, 937, 8.

in futuro. See tits. *Executors and Administrators, and Heir.*

ASSIGNEE, of chose in action;

actions by, 6, 7.

debt;

affidavit by, 182.

ASSIGNEES OF BANKRUPTS. See tits. *Bankrupt.*

INSOLVENT DEBTORS,

actions by, 7; and see tit. *Insolvent Debtors.*

ASSIGNMENT,

on insolvent debtor's act. See tit. *Insolvent Debtors.*

of debts to king, 1067.

history of, id.

extent on, id.

errors. See tit. *Error.*

term or reversion, how stated in pleading, 442. (b.)

fraudulent, will not defeat execution, 1004, 5.

ASSIZE,

commission of, 41.

damages in, 870.

ASSUMPSIT,

actions of, 2, 3, 9, 10, 58, 104.

ASSUMPSIT, continued.actions of, *continued.*

upon promises to pay money, 2, 3.

repay money, 3.

do or forbear some other act, *id.*

common, 2.

special, 3.

express, 2, 3.

implied, *id.* 839, 997.

for balance of running accounts, between merchants, &c. 2.

by attorney, for recovery of bill of costs, 325.

lies not by landlord against sheriff, for rent on execution, 1016.

limitation of, 15, &c.

arrest in, 171, 2.

declaration in, 433, &c.

variance between, and evidence, 434, 5. (*f.*)

staying proceedings in, on payment of debts and costs, 540, 41.

particulars of demand in, 596, 7, 8.

bringing money into court in, 619.

pleas in. See tit. *Pleas and Pleading.*

judgment in, 931.

damages in;

how ascertained, 570, &c. 870, &c.

on contracts to pay money. See tit. *Damages.*do or forbear some other act. *Same title.*

when some defendants are acquitted, 894, 5.

costs in, 945, 954, 963, 980.

interest on affirmance of judgment in, 1182, 3.

execution in, 931, 993.

contribution after recovery in, 896, *id.* (*b.*)**ASSURANCE.** See tit. *Policy of Insurance.***ATTACHMENT,**

of goods;

in trespass, 146.

by original, 110, and see tit. *Process.*on *justices*, in county palatine, not within stat. 7 & 8 Geo. IV. c. 17, p. 115.

of the person;

against inferior judges and officers, 478, 9.

parties to the suit, 478.

on *subpoena*, in Exchequer, 156.with clause of proclamation, *id.* 157.for non-payment of costs, on master's or prothonotary's *allocatur*;

when it lies, 478, 480, 503, 626, 7.

when not, 626, 7; 680, 1235.

absolute in the first instance, 480.

may be moved from the last day of term, 497, 8; 991.

Qu. if bailable? 222, (*d.*)

prisoners in custody on, compellable to deliver up effects, 385.

ATTACHMENT, continued.

of the person, *continued.*

for non-payment of money, 478, 9; 80, 81.

in nature of mesne process, 222, (d.) 481.

and costs, 478, 9, 80.

showing cause against, 480.

composition money, in penal action, 557.

costs, on staying proceedings, 540.

bringing money into court, in C.
P. 928, 7.

in *ejectment*, 489, 90; 1242.

of privilege, for attorneys. See tit. *Attorneys.*

against attorneys, 478.

for practising without being admitted, refused, 61.

not performing undertakings, 86, 227, 241, 478.

delivering up deeds, and writings, &c. 86, 478.

paying costs, &c. *id.*

balance due on taxing bill, 388.

practising in another's name, without his consent, 74.

general misbehaviour, 88, 9; 478.

proceedings on, 481, 2.

against officers of the court, 58, 9.

for extortion, or neglect of duty, *id.* 478, 9.

against sheriffs, &c. 479.

for not returning writ, 127, 308, 9; 314, 479, 80; 498.

may be moved for the last day of term, in K. B. 308.

bringing in body, 311, 314, 15; 479, 80; 498.

origin of, 309.

when it lies, and when not, 235, 282, 311, 12, 13, 14.

different writs of, in joint action, 311.

against surviving sheriff, 314.

late sheriff, 312, 13.

in counties palatine, 312.

when moved for, in K. B. 311.

C. P. 257, 311, 12; 498.

Exchequer, 311, 12.

on last day of term, 312, 314, 480, 497.

must be moved for in a reasonable time, 315.

gross laches in plaintiff necessary to excuse them, 316.

how directed, and returnable, 314.

affidavit for, in C. P. 311. (*f.*)

proceedings on, how entitled, 314, 480, 81; 493.

costs on, in action against acceptor of bill, 315.

when a bar to assignment of bail bond, and when not, 297.

for granting or obtaining *replevin*, improperly, 528, (*f.*)

setting aside, for irregularity, 256, 7; 316, 17.

when regular, 235, 316, 17.

affidavit for, 316, 17.

in what cases it shall stand as a security, *id.*

against under-sheriff, on death of sheriff, during his office, 313, 14.

gaolers, &c., on Lords' act, 282, 479.

jurymen, 479.

ATTACHMENT, continued.

against witnesses, for disobedience to *subpoena*;
 in K. B. 479, 807, 8.
 C. P. id.

peer, or members of the House of Commons;
 when it lies, 479, 807.
 when not, 192, 479, 835.

other persons;

 for contempt, in face of court, 479.
 by bail, id.

 for a rescue, 286, 7; 479.

 how returnable, 287, 814.

 speaking contemptuous words of the court, or its
 process, &c. 169, 70; 479.

 disobedience of process, 151, 2; 404, 415, 479.

 using undue means to execute same, 479.

 not performing award. See tit. *Arbitration*.

 resisting execution of *habere facias possessionem*, 489,
 1247, 8,

 not granted, for acting as attorney, without being
 admitted, 61.

 motions and affidavits for, 478, 480; 81, 500.

 how entitled, 314, 480, 81; 493.

 rule for, in K. B. 478, 480.

 C. P. id.

 Exchequer, id.

 when absolute in first instance, and when not, 480.

 how entitled, 314, 480, 81; 493.

 must be personally served, 500.

 opening, in C. P. 506.

 writ of, and proceedings thereon, 814, 481, 2.

 when it may, or cannot be executed on a Sunday, 218, 481,
 499.

 for contempt, not in general bailable, 222, 8; 481.

 form of interrogatories on, in C. P. 481, (c.)

 out of Chancery, bail on. See tit. *Bail*.

 prisoner in custody on, how charged, 845.

 when entitled to benefit of Lords' act,
 875.

 not within stat. 48 Geo. III. c. 123,
 p. 387.

 liable to give security for costs,
 1233.

alias, for retaking defendant, 1030.

 penalties of recognizances of bail to, not applicable to payment
 of debt and costs, 1043.

ATTAINDER,

 of treason or felony, effect of, 644, (c.)

 plea of, in abatement, 684.

 bar, id. 644, id. (c.)

 disqualification of jurors by, 783.

ATTAINT, 896, 7.

writ of, 905.

when it lay, 574.

abolished, by stat. 6 Geo. IV. c. 50, § 60, pp. 574, (*f.*) 896, 7, (*e.*) 905.**ATTORNEY GENERAL,**

pre-audience of, 42.

actions or prosecutions by, 519, 20.

noli prosequi by, on information for penalties, 519, (*g.*)**ATTORNEYS,**

what, 60.

for what purposes appointed, *id.*formerly members of inns of court, or Chancery, *id.* 61.

admission of;

previous qualifications:

articles of clerkship, 60, &c.

affidavit of execution of, 64, 5; 70.

proper officers for filing, in Chancery, &c. 64, (*f.*)

when clerk has taken degree at university, 68, 4.

stamp duty on, 65, 68.

restrictions, 66, 7.

enrolment of, 65, 6.

filing, in C. P. 70.

service;

in general, what is sufficient, and what not, 66, 7.

to agent, 68, 9.

practising barrister, or special pleader, 69.

in case of death, &c. 67, 8.

notice of application to be admitted, 69, 70.

re-admitted, 78, 9; 89, 90.

affidavit of service, 70.

payment of duty, *id.*

examination, 60, 71.

oath, or affirmation, 70, 71.

under special circumstances, in C. P. 61, (*c.*)

enrolment of, 71.

roll of, in K. B. *id.*entry of name and place of abode, *id.* 72.

may be admitted in different courts, 61, 2; 72, 3.

practise in names of other attorneys, 73.

penalty for practising, without being admitted, 61, 2.

not to suffer unqualified persons to use their names, 73, 4.

act as agents for unqualified persons, *id.*

proceedings against, on stat. 22 Geo. II. c. 46, § 11, pp. 74, 5.

in great sessions, and counties palatine, 61, 2, and see *tit. Great Sessions, and County Palatine.*

annual certificate of, 75, &c.

when to be taken out, 75, 6.

duties payable on, 76.

entering, *id.* 77.

penalties for practising without, 77, 8.

actions for, *id.*

ATTORNEYS, continued.

annual certificate of, *continued.*

actions for, *continued.*

evidence in, 163.

consequences of not taking out, 78, 9.

want of, no objection to clerks being admitted, 65.

bail, 77.

no ground for cancelling bail bond, *id.*

setting aside proceedings, *id.*

re-admission of;

on stat. 37 Geo. III. c. 90, § 31.

when necessary, 78.

term's notice, when required for, and when not, *id.* 79.

what notice is deemed sufficient, 79.

payment of fine, and arrears of duty on, *id.*

rule and affidavit for, 80.

form of, 79, (*g.*) 80, (*c.*)

on last day of term, *id.*

after being struck off the roll, 89.

suing defendant by bill as an attorney, who is not so, irregular, 81.

privileges of;

in King's Bench and Common Pleas:

to sue by attachment of privilege, 87, 8; 80, 81, 2, 3.

be sued by bill, *id.*

when sued by bill, jointly with persons having privilege of parliament, 84.

not in general obliged to sue, or liable to be sued in courts of conscience, 960.

not to be arrested, 80, 81, 2, 3; 193, 195, 6,

remedy on arrest, 81.

not to pay for copies of pleadings, 726.

issue money, *id.*

with regard to venue, 80, 82, 602, 3; 606, 7.

trials at bar, 80, 748, 9.

offices, 82.

confined to practising attorneys, *id.*

when of different courts, *id.* 83.

waiver of, 83.

how taken advantage of, 81.

in Exchequer, 88, 9; 81, 2, 3.

exempted from serving on juries, 784.

disabilities and restrictions of;

cannot justify as bail, 84, 247, 267, 273.

be lessees in *ejectment*, &c. 84, 1201.

justices of peace, 84; but see *id.* (*h.*)

commissioners of land tax, 84.

incapable of prosecuting actions, when in prison, 84, 5.

warrant of. See tit. *Warrant of Attorney.*

memorandum of, 96.

and agents, relation of, considered, *id.* 97; and see tit. *Agent.*

appearance by, 60, 92, 3.

without warrant, 98, 529.

ATTORNEYS, continued.

appearance by, *continued.*

to reverse outlawry, 140.

having once appeared, not permitted to withdraw themselves, 86.

bound to proceed, though client do not bring them money, *id.*

not proceeding, cannot bring action for bill, *id.*

defendant having appeared by one attorney, cannot apply to court by another, without changing former attorney, 93.

cannot be changed without leave, 94, 5; 389, 1090, 1141.

exception to this rule, 94, 5.

mode of changing, *id.*

proceedings previous and subsequent thereto, *id.*

dying, 95,

undertaking to appear;

generally does not oblige them to put in special bail, 241.

to reverse outlawry, 136.

in bailable actions, 224, 227.

on common process, 241.

bound by undertaking to pay costs, though client die, 540.

affidavits sworn before, 494.

service of declaration in *ejectment* on, 1212.

when necessary to be present, on execution of warrant of attorney, 548, &c.

duties of;

in general, 85, 6, 7.

to appear in court, 86.

attend on motions, &c. *id.*

at judge's chambers, 509, 10.

not to prosecute action, for sum in gross, 325.

when compellable to deliver up deeds, &c. 87.

when not, *id.*

summary jurisdiction over, *id.* 88.

jury of, 88.

matters inquirable by, *id.*

misbehaviour of, and its consequences;

action for damages, 85, 941.

limitation of, 21.

payment of costs, 85, 6; 707.

attachment, 88, 9; 383, 478.

striking off the roll, 67, 84, 5; 89.

of inferior courts, answerable for misconduct, in C. P. 89.

embezzling client's money, excepted out of insolvent debtors' acts, 84.

fining, for fictitious statement in special case, 899.

striking off the roll, at their own instance, 89.

affidavit required on, *id.*

proceedings in actions by, 319, &c.

in King's Bench;

attachment of privilege, 27, 37, 75, 80, 82, 3; 91, 319, 20.

jurisdiction of court by, 37.

in nature of *latitat*, 319.

entry of, on roll, *id.* (*d.*)

not a continuance of bill of *Middlesex*, 319.

ATTORNEYS, continued.proceedings in actions by, *continued.*in King's Bench, attachment of privilege, *continued.*

how sued out, 319.

indorsement of attorney's name on, id. 320.

arrest on, 320, 21.

time for declaring, 321.

pleading, id.

in Common Pleas ;

attachment of privilege, 27, 38, 80, 91, 320.

jurisdiction of court by, 38.

good commencement of action, though informal, 27.

in nature of original, 320.

teste and return of, id.

amendment of, id.

how replied to statute of limitations, id.

must be signed by clerk of warrants, id.

præcipe for, id.

how sued out, id.

common appearance to ;

præcipe for, 321.

with whom entered, 47, 321.

special bail on ;

how put in and justified, 320, 21.

recognizance of, 47.

ca. sa. in action by, how returnable, 1027. (*n.*)

in Exchequer ;

venire facias, of privilege, 81, 92.*capias* of privilege, id.

holding to bail on, 81.

beginning of declaration, 321.

proceedings in actions against ;

in King's Bench ;

bill, 27, 37, 75, 91, 145, 321, 2.

what, 321, 2.

its commencement, 432, 3.

conclusion, 321, 446.

when and how filed, 321.

to vacation, id. 463.

considered as commencement of suit, 321.

amendment of, 322.

copy of, id.

how written, id.

when delivered, id. 323, 419, 20.

to whom, 322.

sticking up in the office, id.

time for pleading to, id.

staying, 81.

in action for debt under *five* pounds, 960, (*g.*)

in Common Pleas ;

bill, 27, 8 ; 323, 4.

may be filed in vacation, 27, 323.

ATTORNEYS, continued.proceedings in actions against, *continued.*in Common Pleas: bill, *continued.*

formerly entered on record in the first instance, 323.

calling defendant on, *id.*filing, *id.*notice of, *id.*

taking off the file, 484.

rule to appear to, 323, 483.

appearance to, 323.

judgment of forejudger, for non-appearance, 324.

striking off the roll, *id.*may afterwards be proceeded against as common persons, *id.*restoring, *id.*

in Exchequer;

bill, 81, 92.

beginning of, 325.

plea of privilege by, 71, 635, 640.

fees of, 88, (*c.*)

arrest for, after delivery of unsigned bill, 834.

bill of costs of;

in what cases necessary to be signed and delivered, and in what not, 28, 325, &c.

manner of making out, 327.

abbreviations in, *id.*

when, where, to whom, and how delivered, 333, &c.

how far conclusive against further charges, 334.

mistake in, *id.*arrest on, after delivery of unsigned, *id.*

when taxable, at common law, 327, 329, 30; 1082.

statutes relating to taxation of, 325, &c.

in what cases taxable, and in what not, 325, 6; 328, &c.

when due from one attorney to another, 327.

for conveyancing, &c., 328.

for business done at Quarter Sessions, 329.

in insolvent debtor's court, *id.*court of Great Sessions, *id.*in House of Lords, *id.* 330.

Commons, 330.

Chancery, *id.*under commission of bankrupt, *id.* 331.

on extent, 329, 1082, 3.

within what time it may be taxed, 332, 3.

after it is settled and paid, 333.

action brought, and before trial, *id.*verdict, *id.*cannot be taxed at trial, 332, *id.* 335.

after judgment by default, and writ of inquiry executed, 332.

when, to whom, and how delivered, 334.

evidence in action on, *id.* 335.

ATTORNEYS, continued.bill of costs of, *continued.*

delivery of, how compelled, in K. B. 335.

C. P. id.

summons and order for taxation of, in K. B. id.

C. P. id.

rule for attachment for non-delivery of, in Exchequer, id. 336.

taxing, id.

costs of, 827, 336, 7.

interest when not allowed on, for money overpaid, 337.

undertaking to pay, 335.

remedies for balance of;

by action, 825.

lien on deeds, &c., 87, 336.

sum recovered, &c., 337, 8, 9, 40; 991, 2.

after death of plaintiff, 339, 40.

compromise, &c. 338, 9.

setting off debt and costs, &c., 339.

when subject to equitable claims of the parties. id.
340, 992.

interest on, not allowed in error, 1183.

clerks of, 60, 61, &c.

summary jurisdiction over differences between them and their masters,
68, 87, 8.

using name of regular attorney, without his consent, 74.

not allowed to be bail, 247, 267, 8.

except for rendering, 247.

objection to, as bail, how obviated, 248.

affidavits sworn before, 494.

declaration of, as to writ of error being brought for delay, 531.

presence of, not sufficient, on executing warrant of attorney, 549.

may be commissioners to examine witnesses abroad, 811.

residence of, on court of conscience acts for *London*, 956.

admission by, on taxing costs, 990.

ATTORNTMENT, 442, (*b.*) 661, 919.**AVERMENT.** See tit. *Declaration.*

writ of, 111.

AVOWRY. See tit. *Replevin.***AUCTIONEER,**

not liable for interest, on deposit money, 872.

AUDITA QUERELA,remedy by, 212, 291, 518, (*f.*) 1083, 1120, 1128, 1131.

pleas in, 672.

issues and demurrers, 717, 18.

motion in arrest of judgment not allowed in, 918.

AUDITORS,appointment of, in action of account, 2. (*c.*)**AUTHORITY OF LAW,**

justification by, 646.

AUTRE ACTION PENDENT,

plea of, 637.

AUTRE FOIS ACQUIT,

plea of, 911.

AWARD. See tit. *Arbitration*.

bond conditioned to perform, within stat. 8 & 9 W. III. c. 11, § 8, pp. 584, 688.

enforcing performance of, 833, &c. and see tit. *Arbitration*.

setting aside. See tit. *Arbitration*.

when and how to object to illegality of, 845, 6.

venue cannot be changed in action on, 604.

pleaded, after last continuance, 847.

in *ejectment*, 832.

evidence of, 801.

in action on, 834.

interest when recoverable on, 873.

B.**BAIL,**

to sheriff, 221, 244.

not considered as sureties, within stat. 49 Geo. III. c. 121, § 8, pp. 208, 291.

cannot in general be taken, on attachment for contempt, 222, 481.

on attachment out of Chancery, 222.

on mesne process, id.

how taken, id.

after decree, id.

cannot be taken, on indictment for misdemeanor, 222.

extents, 1049.

how far liable, 224, 305.

may put in or justify bail above, by their own attorney, 94, 246.

when let in to try the cause, 305.

execution against, id.

when and how discharged;

by death, id.

bankruptcy, id.

cognovit, 295, 301, 305, 1097.

render, 226, 7; 281, &c., 305.

costs payable by. See tit. *Costs*.

to the action, or bail above, 221, 244.

what, 244, 5.

common or special, 171, 174, &c., 188, 221, 239.

history of, 239.

governed by arrest, id. 240.

necessary to be filed, for supporting the proceedings, 239, 352, 3.

examinable by the court, in C. P. 1151.

common, 239, &c.

history of, 239.

by stat. 7 & 8 Geo. IV. c. 71, id.

governed by arrest, id. 240.

in King's Bench;

in what cases necessary to be filed, 239, 352, 3.

BAIL, continued.common, *continued.*in King's Bench, *continued.*

when and how filed;

by defendant;

originally, or in consequence of rule of court, or judge's order, 240.

in action against baron and feme, id.

by defendant's attorney, 241.

plaintiff, on stat. 12 Geo. I. c. 29, id. 242.

43 Geo. III. c. 46, § 2, pp. 228, 244.

45 Geo. III. c. 124, § 8, pp. 119-21; 243.

51 Geo. III. c. 124, § 2, pp. 114, 243.

7 & 8 Geo. IV. c. 71, § 2, p. 243.

§ 5, id.

cannot be filed for an infant, 99.

when defendant is sued by wrong name, 242.

in action against several defendants, id. 243.

will not entitle a third person to declare by the
bye, 424.

unnecessary, when process is void, 216.

nunc pro tunc, 242.

filing it, formerly, 248.

penalty for not filing it, 240. (c.)

on discharging prisoners, 369.

motion for discharging defendant on, 488.

in *ejectment*, 1224, 1227, 1230.not filed in C. P. but common appearance entered, when special bail
unnecessary, 238, 9.

special, 244, &c.

why so called, 244.

in what cases required, or not, 172, 3, 4; 239, 367.

for what sum, 239, 40.

on attachment of privilege, 320, 21.

to answer interrogatories, 222, 3; 481.

exigi facias, 134.*capias utlagatum*, 135, 6.

reversing outlawry, 140, &c.

for a common law error, 141, 2.

on stat. 31 Eliz. c. 3, § 3, pp. 140, 41, 2.

4 & 5 W. & M. c. 18, § 8, p. 140.

staying proceedings on bail bond, 302, 3.

applying for security for costs, 537.

not considered as sureties, within stat. 49 Geo. III. c. 121, § 8, p.
208.in *ejectment*, on stat. 1 Geo. IV. c. 87, § 1, pp. 489, 1152, 3;
1207, 1209, 1221, 2; 1244, 5; 1251, 2, 3.

when required, 142, id. (h.)

paying money into court, in lieu of, 244, 5.

number of persons required, or allowed to be, 245, 6.

by whom put in, 94, 246.

BAIL, continued.special, *continued.*

qualification of;

must be housekeepers, or freeholders, 246; 268, 9; 274.

worth double the sum sworn to, 246, 269, 70.

in respect of property abroad, 246, 271.

long beneficial leases, 246, 7.

copyhold estate, in right of wife, not sufficient, 246.

persons not allowed to be;

peers, or members of the House of Commons, 247, 267.

servants in king's household, 247.

attorneys, and their clerks, &c., 84, 247, 267, 273.

conveyancers, 247.

sheriff's officers, &c., id. 267.

bankrupts, 247, 269, 273.

insolvent debtors, id.

persons indemnified by defendant's attorney, 268.

before rejected as bail, 275, 6.

foreigners, in respect of property abroad, 270, 71.

putting in;

in general, 244.

by uncertified attorney, 77, 246, 301.

new attorney, without order for changing former one, 246.

for defendant and sheriff, by different attorneys, id.

in wrong court by mistake, 256.

before return of writ, 248.

pending action, id.

after verdict, id.

in what sum, id.

final judgment, id. 278, 9.

time allowed for, in K. B. 248.

C. P. id. 249,

Exchequer, 249.

further time, id.

in what court, on removal before declaration, 246, 356, 408.

before whom;

judge in town, 249, 50.

commissioner in country, id.

judge of assize on circuit, 250.

mode of, in K. B. id.

C. P. 251.

Exchequer, 251.

parties how named on, 252, 3.

effect of misnomer, id.

entry of, in filacer's book, in C. P. 251.

in what sum, 246, 251.

recognizance of. See tit. *Recognizance.*

before commissioner, 249, 50.

how put in, in K. B. 251.

C. P. id. 252.

bail-piece, 251.

affidavit of caption, 252, 3; 264.

BAIL, continued.**special, continued.**before commissioner, *continued.*

amendment of affidavit of caption, 264, 272.

when transmitted, 252.

filed, *id.*absolute, or *de bene esse*, 253.in criminal cases, *id.*origin of, *de bene esse*, *id.* (c.)

notice of, in K. B. 253, 4, 5; 265.

C. P. *id.*

on attachment, 260, 61.

when taken before commissioner, 253.

service of, 255.

affidavit of, in K. B. *id.*

after bail bond forfeited, 303.

costs incurred by two or more notices, 271, 2.

when necessary to give fresh notice, 275.

acceptance of, and filing bail-piece, 255.

exception to, *id.*after assignment of bail bond, in K. B. *id.*C. P. *id.*delivery of declaration in chief, or *de bene esse*, *id.*when necessary to fix sheriff, *id.* 256.

when not, 256.

how made, in K. B. *id.*

C. P. 257.

Exchequer, *id.*

when put in before commissioner, 258.

entering, 301.

notice of, in K. B. 256.

C. P. 257.

Exchequer, *id.*

must be entitled in cause, 256.

entitled in wrong court, a nullity, *id.*

want of, when waived, and when not, 257.

consequences of not justifying, after exception, 258.

adding, *id.*

time allowed for, in K. B. 256.

how done, 258, 264.

to make bail a witness, 259.

justification of, 259, &c.

when put in for defendant and sheriff, by different attorneys, 246.

not necessary, in order to render, 282, 302, 8.

for sheriff to set aside irregular attachment, in C.
P. 257.when proceedings on bail bond are irregular, or
against good faith, 302.

when waived by demand of plea, and when not, 476.

time allowed for, in K. B. 256.

C. P. 257.

Exchequer, *id.*

BAIL, continued.special, *continued.*justification of, *continued.*

notice of, 259, 60.

title of, 259.

form of, id. 265, 6.

when bail put in before commissioner, 259.

in King's Bench, id. 260.

Common Pleas, 260.

in Exchequer, 257, 260, 61.

when time expires on *Midsummer* day, &c. 260.

put in, in vacation, in K. B. id.

C. P. id.

Exchequer, 257, 261.

service of, 261.

affidavit of, 264.

must be made by attorney who served it, id.

amending, 266, 7.

a waiver, as between the parties, in C. P. of want of notice of
exception, 257.*aliter*, with respect to the sheriff, id.want of description in, of bail already put in, waived by pre-
vious exception, 266.

not a waiver of a want of entry of exception, 301.

in King's Bench ;

in bail court, 262.

origin and history of, id.

at what hour, id.

Common Pleas, 263.

not set aside, on account of perjury subsequently disco-
vered, 274.

Exchequer, 263.

in court, or before a judge at chambers, id.

personally, or by affidavit, id. 264.

affidavit of, when taken before commissioner, id. 267, 272.

motion for, 486.

opposing ;

vivâ voce, or upon cross affidavits, 264.

in several actions, id.

when not allowed, in K. B. id.

C. P. id.

affidavits for, 264.

cannot be answered, id. 274.

when not allowed to be read, 274.

grounds of ;

defect in bail-piece, 264, 5.

notice of bail, 265.

justification, id. 266.

affidavit of service of notice of justification,
266.caption, or justification of bail,
before commissioner, 267.

BAIL, continued.special, opposing, *continued.*grounds of, *continued.*

peers, and members of the House of Commons, 247, 267.

attorneys, and their clerks, 247, 267, 8; 273.

sheriff's officers, &c. 247, 267.

when same persons are bail in several actions, 267, 270.

persons indemnified by defendant's attorney, 268.

not knowing defendant, 270.

living within verge of the court, *id.*

not being housekeepers, or freeholders, 246, 268, 269, 273.

in respect of property, 269.

bankrupts, 247, 269, 373.

insolvent debtors, *id.*

persons before rejected as bail, 275, 6.

having no property in *England*, 270, 71.

want of attorney's certificate no ground of, 77, 301.

costs of, in K. B. 271.

C. P. *id.* 272.

Exchequer, 272.

further time to justify, or add and justify;

when allowed;

on stat. 43 Geo. III. c. 46, § 2, p. 228.

if bail do not attend, 272.

for defect in bail-piece, 264, 272.

notice of bail, 265, 272.

justification, 265, 6; 272.

service of notice of, 266, 272.

affidavit of, *id.*

affidavit of caption, or justification, 267, 272, 3.

when bail are prevented from justifying, by subsequent circumstances, 273.

deemed a waiver of irregularity in process, 160.

when not allowed;

for amending errors in notice of bail, without *affidavit* of merits, *id.*on account of personal insufficiency, at time of putting in, *id.**habeas corpus*, 266, 273, 409, 10.

in error, 273, 1157.

judge will not interfere with another judge's order for, 273, 4.

mistake in drawing up rule for, on wrong day, immaterial, 274.

examination of, *id.*commitment of, for prevarication, *id.*punishment of, for perjury, *id.* 277.assuming feigned names, *id.*personating others, *id.*rejection of one bail, rejection of both, *id.*

rejected;

cannot be bail in another action, *id.* 276.

BAIL, continued.**special, continued.****rejected, continued.**

cannot be bail in another court, 276.

exception to this rule, *id.*

may render defendant in K. B. 275, 282.

C. P. on entering into fresh recognizance, 275, 281, 2.

allowance of ;

rule or order for, 276, 7.

on bailing prisoner in vacation, 279.

setting aside, when improperly obtained, 235, 6 ; 276, 7.

grounds of, 276, 7.

effect of, on render, 282.

bail-piece ;

amending, 264, 5 ; 272.

filing, in K. B. 252, 3 ; 255, 277.

entry of recognizance, in K. B. 277, 8.

C. P. 278.

Exchequer, 236.

amendment of, 278.

for prisoners ;

notice of justification may be given by new attorney, 94, 259.

pending action, 278.

after judgment, 248, 278, 9.

form of entry of recognizance, 279. (*b.*)

in vacation, 279.

how put in and justified, *id.*

must be put in afresh, after rendering defendant, *id.*

for one of several defendants, 537.

privileged from arrest, *eundo*, &c. 196.

may take principal at any time, 201, 218, 285.

plead to the merits, after staying proceedings on bail bond, in
C. P. 304, 5.

cannot move court before justification, 258.

plead in abatement, &c., after staying proceedings on bail
bond, 304.

be witness, 258, 9.

liability of, in general, 279, 80.

extent of liability, in K. B. 250, 51 ; 258, 280, 1026.

C. P. 251, 280, 81.

Exchequer, 281.

on *habeas corpus*, 410.

liability of, to plaintiff's attorney, after settlement with plaintiff,
838.

defendant's attorney, for general expenses of suit,
246. (*d.*)

payment of costs, 280, 21 ; 288, 302, 3.

not subject to *ca. sa.* in C. P. 1026, 1043, 1132.

when and how discharged ;

by performance of condition of recognizance, 281.

payment of debt or damages, and costs, *id.*

BAIL, continued.

special, when and how discharged, *continued.*

by performance of condition of recognizance, *continued.*

render of principal, 281.

deemed equivalent to perfecting bail, 282.

by whom made ;

attorneys, or their clerks, 247.

bail put in by sheriff, or his bail, 281.

excepted to, and not justifying, in K. B. *id.*

rejected, in K. B. 275, 281, 2.

C. P. on entering into new re-
cognizance, *id.*

by whom not ;

bail surreptitiously put in, in C. P. 282.

at what time, 282, &c. ; 311, 1099, 1130.

before judgment ;

previously to return of writ, 248, 282.

after exception, 282.

ruling sheriff to bring in body, *id.*

regular time of justification expired,
id.

for benefit of sheriff, 281, 2 ; 305.

sheriff's bail, 281, 2 ; 305.

after judgment ;

when plaintiff proceeds by *scire facias*, 283.

when by action of *debt* on recognizance ;

in K. B. *id.* 284.

C. P. 284.

Exchequer, *id.* 1098.

stay of proceedings, pending error, 582, 3.

enlarging time for, 284, 5 ; 288, 293.

when not allowed, in K. B. 282.

C. P. *id.* 283.

after exception, when bail cannot justify,
in C. P. 281.

pending rule to set aside allowance, for
perjury of bail, 282.

without consent of crown, 287, 8.

on extents, 1049.

how made, when defendant is at large, in K. B.
285, 6.

C. P. 286.

in custody, on *civil* process, 286.

criminal account, 287.

when crown is concerned, *id.* 288.

notice of, 288.

affidavit of service of, necessary to complete render,
in K. B. *id.*

unnecessary, in C. P. *id.*

when not given in time, *id.*

entry in marshal's book unnecessary, 289.

of *exoneretur* on bail-piece, in K. B. 288, 9.

BAIL, continued.special, *continued.*when and how discharged, *continued.*

entry in filacer's book, in C. P. 289.

in what cases it may be pleaded, 283, 1128.

plaintiff not entitled to *procedendo* after, 411.

by cause operating in excuse of performance, 281, 289.

act of God, 289.

death of principal, id. 290, 1129, 30.

insanity of principal, 216, 290.

act of law, 289.

principal being made a peer, or member, id. 290.

bankruptcy and certificate of principal, in K. B. or C. P. id.
Exchequer, 290.

cannot be pleaded by bail, 292.

mode of relief on, 292.

directing issue, id.

payment of costs, 288, 292.

discharge of principal, under insolvent act, 289, 90.

when under sentence of transportation, &c. 292.

impressed into king's service, id.

sent abroad, under alien act, &c. id. 293.

general rule, as to relieving bail, when so discharged, 293.

practical modes of relief ;

by entering *exoneretur* on bail-piece, id.bringing up defendant, and rendering him, on *habeas corpus*, id.

enlarging time for making render, id.

result of decisions, id.

by act or default of plaintiff, 289.

not declaring in due time, 294, 424.

great and unnecessary delay, in proceeding to trial, 294.

declaring in different county, by *original*, in K. B. id. 423.

variance of declaration from process, 294.

affidavit to hold to bail, id.

between affidavit and judgment, in C. P. id.

recovery under bailable amount, id.

giving time on *cognovit*, &c., 295.

removing cause from inferior court, 404.

reference to arbitration, 1097.

when not discharged ;

by declaring in a different county, in K. B. by *bill*, or in C. P.
154, 294.

variance between writ and declaration, in C. P. 294, 450.

insanity of principal, 216, 290.

bankruptcy and certificate of principal, 291.

plaintiff's electing to proceed in equity, 294, 5.

accepting composition, 295, 6.

receiving bills from defendant, 296.

giving time, on *cognovit*, 295.to plaintiff in *replevin*, 296.

proceedings for not putting in, or perfecting ;

on bail bond, 297, &c.

BAIL, continued.

special, continued.

proceedings for not putting in, or perfecting, continued.
 against sheriff, 306, &c.

proceedings against;

by action of debt, 530, 1099, 1100.

scire facias, id. and see tit. *Scire facias*.

staying, pending error, 531, &c.

when liable to costs, 280, 81; 288, 302, 8, 4.

relieved, for irregularity of proceedings against principal, 1128, 9.

execution against not allowed, pending error in Parliament, 1147.
 in *scire facias*, 1026, 1132, 8.

discharges principal, and *vice versa*, 1133.

error by, 1135.

certiorari for, how directed, 1170. (i.)

on *certiorari*, 407, 8.

when and how put in, excepted to, and justified, 408, &c.

habeas corpus;

in court below, 407.

notice of, id.

court above, id. 408.

when and how put in, excepted to, and justified, 408, &c.

misnomer in notice of justification, cannot be corrected,
 266, 409.

not allowed further time to justify, except in case of
 unavoidable accident, 273, 409, 10.

recognizance of, 409.

render of, 410.

how far liable, id.

not discharged, under circumstances, by defendant's privilege for arrest, id.

in error;

in what cases required;

at common law, 1149.

by statute;

after judgment by default, &c. 1149, &c.

verdict, 1152, 8.

in dower, and *ejectment*, id. 1251, 2.

against executors and administrators, 1153.

in inferior courts of record, 1149, 50, id. (d.)

now required in all cases, after judgment for plaintiff, in
 any personal action, or verdict, or by default, &c.
 1153, 4.

not necessary, after judgment for defendant, 1154.

on writ of error *coram nobis*, or *vobis*, id.

who may be, 1155.

who not;

hired bail, who are insolvent, id. 1157.

when, where, and how put in, 1154, 5.

in Exchequer, 1156. (b.)

entry of, id. (d.)

not allowed further time to justify, 273, 1157.

recognizance of, 1097, 1101, 2; 1149, 50, and see tit. *Recognizance*.

BAIL, continued.

in error, *continued.*

recognizance of, *continued.*

on error *coram nobis*, 1156. (c.)

may be entered into by bail in error, without principal, in
C. P. 1155.

in what sum, id. 1156.

generally, 1155.

in *debt* on bond, in K. B. 1155, id. (p.)
C. P. 1155, 6.

Exchequer, 1156.

in *ejectment*: See tits. *Ejectment* and *Recognizance*.

by stat. 16 & 17 Car. II. c. 8, § 3, p. 1251.

recognizance of;

by whom entered into, 1252.

in what sum, 1251, 2, 3.

in K. B. 1252.

C. P. id.

Exchequer, id. 1253.

notice and examination of, 1252.

when not chargeable, in action for mesne profits.
1253.

on stat. 1 Geo. IV. c. 87, § 3, how discharged,
id.

cannot render, nor are discharged by taking principal in execution.
1156.

when discharged or not, by bankruptcy, id.

notice of, 1156, 7.

how entitled, 1161.

exception to, and rule for better bail, 1157.

how entitled, 1156, 1161.

adding and justifying, 1157.

when rule given in term time, id.

vacation, in K. B. id.

C. P. id.

Exchequer, id. 1158.

mode of, 1158.

consequence of not putting in, and perfecting, 1157, 8.

proceedings against;

by action of *debt*, 1101.

scire facias, id. 1102, and see tit. *Scire facias*.

liable in C. P. though record be transcribed, 1161.

not liable for interest, on affirmance, 1184.

BAIL BOND,

in what sum, 222, 224.

form of, 224.

upon *capias utlagatum*, 135, 6.

attachment, 222, 481.

misnomer in process, 448.

when good, though condition vary from writ, and when not, 225, 6.

undertaking to sign, not within statute of frauds, 227.

first valid, when two are taken, 301.

BAIL BOND, *continued.*

- void, when executed before condition is filled up, 224.
 - consequence of, 306.
- waiver of irregularity, in omitting christian names in process, 148, 448.
- delivering up to be cancelled, 301, 447.
 - motion for, 488.
- assignment of;
 - in what cases taken, and in what not, 298, 9.
 - in general, 297, &c. 309, 10.
 - after render to sheriff, 226.
 - proceeding against sheriff, 297.
 - to king, 298.
 - at what time it may be taken, id. 299.
 - cannot be taken, after cause is out of court, 299.
 - in counties palatine, 298. (*d.*)
 - by whom made, 298.
 - stamp on, id.
 - render after, and before justification, allowed, 282.
 - bar to proceeding in original action, 300.
 - discharges sheriff, if the bond be valid, 306.
 - aliter*, if it be void, id.
- when put in suit, in C. P. 297, 8, 9.
- actions on, 317, 18.
 - cannot be brought, pending rule to bring in body, in C. P. 297.
 - against principal and bail separately, not in general allowed, 300.
 - must be brought in some court, id. 411.
 - by sheriff, in K. B. 300.
 - C. P. and Exchequer, id.
 - in palace court, *procedendo* in, 411.
 - not within stat. 8 & 9 W. III. c. 11, § 8, p. 585.
 - declaration in;
 - must state with certainty, return of writ in original action, 224.
 - variances between and evidence, 225, 6; 434, 5. (*f.*)
 - may be amended, in C. P. 697.
 - pleadings in, 224, 650, 748.
 - defence in, on *nil debet*, 650.
 - bail in error not required in, after judgment by default, 1149.
- setting aside proceedings on, for irregularity, 300, 301.
 - in K. B. id.
 - C. P. 301.
 - Exchequer, 301.
 - laches, 229.
 - when defendant arrested by wrong name, &c. 301.
- want of attorney's certificate, no ground for cancelling, 77, 301.
- staying proceedings, on terms, 300, &c., 488, (*n.*) 302, 303. (*l.*)
 - motion for, 303, 488.
- affidavit for, in K. B. 302.
 - not required, in C. P. or Exchequer, id.
 - how entitled, 304, 493.
- rule or summons for, how entitled, in K. B. 304, 493.
 - C. P. id.

BAIL BOND, continued.

staying proceedings, on *terms, continued.*

rule may be obtained on same day as bail justified, 300.

taxing costs on, 304.

what may be pleaded after, *id.*

entering into, not a waiver of previous irregularity, 514.

BAIL BOOK,

of commissioners, for taking recognizances of bail, 258.

rejected bail, 275, 6.

BAIL COURT,

origin and history of, 262.

proceedings in, 262, &c.

BAILIFFS, 58, 9.

in fee, 216, 17.

common, 217.

special, *id.* 306.

not to act as attorneys, 84.

of liberties, 58, 216, 17; 231, 2.

punishable for misbehaviour, 58, 9.

return of process, when mandate directed to, 309, 1018, 1025, 1028.

proceedings against, for false return, 309.

to compel bringing in the body, *id.*

BAILMENT, 3.**BAIL-PIECE,**

common, 240, 243, 369.

special, 250, &c.

when transmitted, 252.

filed, upon acceptance of bail, 253.

for want of exception, 256.

after justification, 277.

misnomer in, 252.

amendment of, 264.

on attachment of privilege in C. P. 321.

habeas corpus, in K. B. 408.

C. P. *id.* 409.

exoneretur on, 177, 287, 8.

BALLOTING ACT, 785, &c., 854, 5.**BANK,**

books of, 802.

inspecting, 593.

BANK ACTS, 187, 8.

negating tender on. See tit. *Affidavits.*

not necessary in *trover*, 187.

restrictions on cash payments by, determined, 188.

BANKERS,

in copartnership in *Ireland*, how to sue, or be sued, 9.

declaring on notes of, 617.

interest in actions by or against, 1182.

drafts on, when a legal tender, and when not, 187. (*m.*)

when entitled to sue out extent in aid, 1060.

BANK NOTES,

actions on, restrained, 187.

staying proceedings in, *id.* 520.

BANK NOTES, *continued.*

not to be received, for less than sum specified therein, 187. (*f.*)

when a legal tender, and when not, 187.

negating tender in, formerly required, 187, 8.

now unnecessary, 188.

cannot be taken in execution, 1008.

BANKRUPT,

proceedings against, when in Parliament, 116, &c.

in prison, 202, 809. (*g.*)

commission of;

may be sued out by attorney of K. B., though not a solicitor in
Chancery, 78.

cannot be taken out by plaintiff, against defendant in execution,
1029.

no ground for discharging him, *id.* (*g.*)

not supported by verdict for general damages, on act of bankruptcy
before judgment, 206.

petitioning creditor for;

debt of, when not barred by statute of limitations, 27. (*i.*)

action against, for things done in obedience to warrant of com-
missioners, 35, 6.

liable to solicitor, 330, 31.

messenger, 331.

costs of, 330, 31.

bond by, not within stat. 8 & 9 W. III. c. 11, § 8, p. 585.

debts proveable under;

in general, 204.

debts contracted before issuing, *id.*

payable on future day, *id.* 205.

contingent debts;

not proveable before stat. 6 Geo. IV. c. 16, p. 205.

when proveable by stat. 6 Geo. IV. c. 16, p. 205.

on bottomry or *respondentia* bonds, *id.* (*h.*)

policies of assurance, *id.* *ib.*

when not proveable, *id.* 206.

by sureties, before and on stat. 49 Geo. III. c. 121. pp.
206, 7.

determinations on that statute, 207, 8.

on stat. 6 Geo. IV. c. 16, § 52, pp. 208, 9.

for payment of annuities granted by bankrupt, 209.

by annuity creditors, 206, 209.

interest on bills or notes, 209, 10.

costs, when proveable, 210.

by stat. 6 Geo. IV. c. 16, § 58, *id.*

when not proveable, *id.*

proving or claiming debt under, an election to abide by, 202, 3.

cannot be pleaded in bar, 204.

creditor having elected to come in under, if it be afterwards super-
seded, restored to his former rights, 208.

decisions on similar clause, in stat. 49 Geo. III. c. 121, § 14, *id.* 204.

disputing validity of, 212, 292.

bill of costs, for business done under, 330, 31.

BANKRUPT, continued.

commission of, *continued*.

evidence, on undertaking to bring back venue to *Middlesex*, 612, 13.

commissioners of;

notice of action against, 33.

persons appointed by, entitled to benefit of stat. 24 Geo. II. c. 44,
pp. 35, 6.

attending, privileged from arrest, 197.

how discharged, 198.

could not formerly have enlarged time, for bankrupt's discovery,
indefinitely, 200.

may now adjourn bankrupt's last examination, *sine die*, 202.

bringing bankrupt before, when in custody, 202, 809. (*g.*)

bankrupt remanded, on commitment by, 287.

expenses of witnesses, summoned before, 807.

actions against;

limitation of, 21.

notice of, 33.

bringing money into court in, 621.

pleading tender of amends in, 646. (*a.*)

general issue in, 653. (*b.*)

evidence in, 33.

costs in, 988.

assignees of;

to pay costs of petitioning creditor, 330, 31.

bill of costs on, to be taxed, 331.

liable to solicitor for his bill, though not taxed, *id.*

actions by or against, 6, 7, 13, 14, 432.

joinder in, 13, 14.

arrest in, 176.

changing venue in, 612, 613.

set off in, 665, 6, 7.

notice in, of intention to dispute petitioning creditor's debt, &c.
668, &c.

form of, 669.

when given, *id.* 670.

on whom, and how served, 670.

proof of, *id.*

evidence on, *id.* 671.

costs on, 669.

depositions when conclusive in actions by, for debt of bankrupt,
669.

staying proceedings in, 1018.

need not be so described, in common process, 147.

affidavit of debt by, 182.

when required to give security for costs, 536, 7.

personally liable, on reference to arbitration, 836.

in what cases they may proceed to judgment and execution, in bank-
rupt's name, 934, 1115, 16.

death or removal of, does not abate suit, 934.

scire facias for, when necessary, 1115, 16.

BANKRUPT, continued.**assignees of, continued.**

liability of future effects of, on stat. 6 Geo. IV. c. 16, § 105, pp. 1111, 12.

ejectment by, 1190.

demise in, without their permission, 1206.

certificate of;

in what cases a bar, and in what not:

generally, 204, &c.

when cause of action arises abroad, 211, 648.

in *Scotland*, 211.

Ireland, *id.*

to sureties, 206, &c.

annuity creditors, 206, 209.

execution, on bankrupt's goods, 212.

action on bail bond, 305.

attorney's bill for obtaining, must be signed, and delivered, 331.

may be returned to *ca. sa.* 1028.

obtained by principal, cannot be pleaded by bail, 292, 305, 1129. (*k.*)

before affirmance, no discharge of bail in error, 1156.

discharges *cognovit*, 210, 562.

does not discharge prisoner, on *capias utlagatum*, 136.

upon what terms he may be discharged, *id.*

when evidence, in support of general plea of bankruptcy, 647, 8.

how affected by former bankruptcy, 1109, 10.

deed of composition, *id.*

no ground for staying proceedings, in action for escape of certified bankrupt, 529.

uncertificated, cannot be bail, 269.

when entitled to benefit of insolvent act, 394, 5.

required to give security for costs, 536.

actions against;

privilege in, of defendant from arrest:

in coming to surrender, &c.

by stat. 5 Geo. II. c. 30, § 1, p. 200.

determinations on that statute, *id.* 201.

by stat. 6 Geo. IV. c. 16, § 117, p. 201.

how discharged, *id.*

penalty for detaining him, *id.*

on adjournment of last examination, by commissioners, 202.

after time for surrendering, &c. expired, and before certificate, *id.*

by stat. 6 Geo. IV. c. 16, § 59, on creditor's electing to prove or claim under commission, *id.* 203.

decisions on similar clause, in stat. 49 Geo. III. c. 121, § 14, pp. 203, 4.

after obtaining certificate, 204.

of what debts discharged, *id.* 205.

how discharged, 212.

on mesne process, *id.*

after judgment, *id.*

liability in, of defendant to arrest, after escape, 201.

BANKRUPT, continued.actions against, *continued.*liability in, of defendant to arrest, for contingent debts, 205, 6.
on subsequent promise, 211.pleas in. See tit. *Bankruptcy.*

costs in, 203, 210, 11.

execution in 212, 570, 1008, 9, 10; 1017, 18; 1109, &c.

sheriff not liable to action, for arresting, 215.

future effects of, how far liable;

on stat. 5 Geo. II. c. 30, § 9, p. 1109.

6 Geo. IV. c. 16, § 127, p. 1111.

bail of, when and how discharged, 290, 91, 92; 305, 1129. (*k.*)to sheriff, not considered as sureties, within stat. 49 Geo. III. c.
121, § 8, pp. 208, 291.having paid debt, entitled to relief, on stat. 6 Geo. IV.
c. 16, § 52, p. 291.

time enlarged, for their rendering principal, 284, 5; 287, 293.

sureties of, when and how relieved, on bankruptcy of principal, 206, &c.
209, 291.

not liable to attachment, for not performing award, 835.

judgment creditor of, put on same footing with other creditors, 570, 936,
1009, 10.*scire facias* by, as executor or administrator, 1118.**BANKRUPT ACT,**

actions for things done in pursuance of;

limitation of, 21.

notice of, 33.

costs in, 988.

BANKRUPTCY,of plaintiff, may be given in evidence on general issue, in *assumpsit*, 647.defendant, cannot be given in evidence, *id.*

principal, sureties when and how relieved on, 207, 8.

discharging bail on, 290, 91, 2.

one of several grantors of annuity, 393.

acts of, by traders having privilege of parliament, 116, &c.

lying in prison, 229.

between verdict and judgment, debts proveable on, 206.

plea of, in plaintiff, 647, 1115, 16.

in *trover*, 651, *id.* (*k.*)

after the last continuance, 847.

defendant, 647, 8.

may be pleaded, after regular judgment set aside, in C.
P. 586.must be pleaded, in *assumpsit*, 647.what general plea is sufficient, *id.* 648.

special plea is necessary, 648.

need not be signed, in K. B. 671.

aliter, in C. P. 672.

must be delivered, in K. B. 671, 2.

after the last continuance, 847, 849.

must be pleaded specially, *id.* (*d.*)

in one of several defendants, 682.

entering *nolle prosequi* on, *id.*

BANKRUPTCY, continued.

- special replication to general plea of, bad on special demurrer, 648.
- of plaintiff, no revocation of submission to arbitration, 824.
- of party, before award, no ground for setting it aside, id.
- certificate evidence in support of general plea of, 647, 8.
- submission to arbitration when not revoked by, 824.
- evidence on notice of intention to dispute, 670, 71.
 - of former, to avoid certificate, 1110.
 - necessary to support it, id.
- judgments how affected by, 936.
- king's debtor not discharged by, 1049.
- no abatement of writ of error, 1164.
- taxation of costs in, 330, 31.

BANKRUPT LAWS,

- do not extend to debts contracted abroad, 211.

BAR,

- pleas in. See tit. *Pleas and Pleading*.
- substantially bad, not cured by verdict, 920.
- trials at. See tit. *Trials*.

BARGAIN AND SALE,

- enrolled, how stated in pleading, 442. (b.)

BARON AND FEME,

- actions by or against, 9, 13.
 - limitation of, 15, 23.
 - declaration in, 447.
 - appearance in, of *feme* under age, 99.
 - distringas* in, executed on goods of *feme*, 112.
 - arrest in, on *mesne* process, 194.
 - process of executing, id. 1026.
 - filing common bail, or entering common appearance, in action against, 240.
 - declaring by the bye in, in C. P. 425.
 - set off in, 666.
 - plea of release by *baron*, *puis darien continuance*, set aside, 848.
 - abatement of, by death of *feme*, 763, 934, 1115.
 - costs in, 1114.
- service of process on, 169.
 - declaration in *ejectment*, 1210.
- seisin of *baron jure uxoris*, how pleaded, 442. (b.)
- warranty by, in fine, amended, 700.
- whether liable to attachment, for not performing award, 835.
- residence of, on court of requests act for *London*, 956.
- execution on property of *feme*, cohabiting with defendant as his wife, 1006, 7, 1011.
 - for husband's debt, on wife's separate property, 1010.
 - debt of *feme*, as administratrix, 1011.
- scire facias*, by or against, 1114, 15; 1118, 1244, 1249.
- error by, 1135, 1137, 1169, and see tit. *Feme Covert*.
- ejectment* by, 1190.
 - against *feme* sole, who marries, 1244, 1249.

BARONS OF EXCHEQUER, 39.

- salaries of id. (g.)

BARRISTERS, 41, 2.

- requisites, previously to being called to the bar, *id.*
- calling to the bar, *id.*
- taking the oaths of allégiance and supremacy, &c. 42.
- admission of attorney's clerks, after being pupils to, 69.
- privilege of, from arrest, 193.
- exempted from serving on juries, 784.

BASTARDY BOND,

- action on, by whom brought, 7.
- recovery on, against bankrupt for subsequent breaches, 205.
- staying proceedings, in action on, 541.

BATH, City of;

- court of requests for, 958.

BEAST GATES,

- ejectment* lies for, in *Suffolk*, 1191.

BENEFICED CLERK. See tit. *Clerymen*.**BERWICK UPON TWEED.**

- direction of process into, 152.
- venue, in local action, must be laid in, 429.
- changing, 608.
- award of *venire facias*, 724, 5.
- trial, 750. (*n.*)

BILL,

- in King's Bench.

- against attorneys;

- jurisdiction of court, and mode of proceeding by, 27, 37,
80, 81, 91, 145.

- may be filed in vacation, 27, 321.

- when and how filed, and proceedings thereon, 321, &c.
- prisoners in custody of sheriff, &c. 341, &c.

- in custody of marshal;

- what, and when and how filed, 353.

- by same plaintiff, *id.*

- third person, *id.* 357, 8.

- in vacation, 357.

- persons upon bail; 37, 352, 3.

- when actually filed, and when not, 353.

- how far considered as commencement of action, *id.*

- in Common Pleas,

- against attorneys;

- jurisdiction of court by, 38.

- may be filled in vacation, 27, 323.

- when and how filed, and proceedings thereon. See tit.
Attorneys.

- issue by, how made up of a subsequent term, 719.

- filed, to warrant judgment, after error assigned, 1172.

- warden of Fleet, could not formerly have been filed in vaca-
tion, 324.

- on stat. 59 Geo. III. c. 64, *id.*

- formerly filed against prisoners in the Fleet, 92.

- against members of the House of Commons;

- jurisdiction by, and mode of proceeding, on stat. 12 & 13 W.
III. c. 3, pp. 27, 37, 91, 92, 116, 17; 145.

BILL, continued.

against members of the House of Commons, *continued.*

when and how filed, and proceedings thereon, 120, 21.

declaration in *ejectment* by, 1205.

amendments of, or by, 427, 440, 41; 713.

want of, aided by verdict, 923, 1171.

error, after judgment by default, &c. 1171.

how assigned, 1170.

certiorari for; id.

proceedings on, id. 1171.

BILL OF COSTS. See *tit. Attorneys, and Costs.*

BILL OF MIDDLESEX,

what, and why so called, 145, 146, 7.

might formerly have been sued out before cause of action, 145, 353.

cannot now be sued out for debt not due, 145, 6.

lies not against peer, &c. 118, 145.

proper process, when defendant resides in *Middlesex*, 147.

how far considered as commencement of suit, 27, 145, 6; 353.

continuance of, by *latitat*, 27, 147.

out of what office it issues, 149.

signed, but not sealed, id.

common or special, id. 150.

has no direction, or *teste*, 151.

how stated in pleading, 152.

should not be served out of *Middlesex*, 168.

arrest on in *London*, irregular, 218.

need not be sued out against casual ejector; in *ejectment*, 1224.

BILL OF PARTICULARS. See *tit. Particulars.*

BILLS OF EXCEPTIONS,

what, and how they arise, 862, &c.

grounds of, 862, 3.

in what cases allowable, and in what not, id.

must be tendered at the trial, 863.

case always goes to the jury on, 862.

abandoned, on moving for a new trial, 863, 913.

forms of, 864.

effect of, when the whole evidence is set out, id.

objecting to evidence on, id. (c.)

sealing, 864, 5.

on writ of false judgment, id. (i.)

waived, by bringing writ of error before it is signed, 863.

proceedings on;

writ of error, 863, 4.

to confess or deny seal, 865.

on error from K. B. in *Ireland*, id.

judgment on, id.

costs of, id.

on reversal, 1181.

BILLS OF EXCHANGE, AND PROMISSORY NOTES, &c.

actions on;

of *debt*, 3.

by indorsees of, 6.

BILLS OF EXCHANGE, ETC., *continued.*actions on, *continued.*

when payable after sight, or demand, 17.

limitation of, 23, 4.

what will take case out of statute of limitations, 23, 4.

what will not take case out of statute of limitations, 19, 25.

arrest in, 165, 171, 178, 984.

of *feme covert*, 195.

when barred by bankruptcy, and when not, 202, 207, 8.

affidavit of debt in, 183, 4; 195.

liability of bail on, 294.

parties to, when allowed to be bail, and when not, 270.

declaring in, on foreign bill, 429.

banker's notes, 617.

costs in, on attachment against sheriff, 315.

staying proceedings in, 530, 541.

assessing damages in, without writ of inquiry, 571, &c.

notice must be given of appointment for, in C. P. 572.

venue cannot be changed in, 604.

interest recoverable in, and from what time, 872, 3.

considered as damages, *id.*

when allowed, on error in Exchequer Chamber, 1182, 3.

damages in, 872, 3.

warrant of attorney on, when given for a gaming debt, 548.

evidence of, on execution of inquiry, 581.

delivering copies of, 591.

cannot be set off, if indorsed after bankruptcy, 667.

proof required for setting off, *id.*

notice of indorsement of, 440.

demand and refusal by acceptor, must be laid in action against indorser.
919, 20.notice to produce, need not be given in *trover*, 803.

interest on, proveable under commission, 209, 10; 873.

damages in *trover* for, 873.

bail not discharged by plaintiff's receiving, 296.

in error not required in *debt* on, after judgment by default, 1151.

BILLS OF MIDDLESEX,

signer of, 43, 4.

BIRMINGHAM, 30.

court of requests for, 957, 8.

paving act, treble costs on, 988.

BLACK ACT, 122.

repealed by stat. 7 & 8 Geo. IV. c. 27, *id.*proceedings, declaration, evidence, and cases determined on, *id.* (c.)

BLANK WRITS,

not to be sealed, 54, 5.

BOARD of Green Cloth, 219.

BOG,

ejectment lies for, in *Ireland*, 1191.

BONA NOTABILIA, 604.

BONDS,

when presumed to be satisfied, 18, 19.

BONDS, continued.

on stat. 4 Geo. III. c. 83, analogous to recognizance of bail in error, 117.
entered into by wrong names, how declared on, 447.

actions on ;

no statute of limitations in, 18.

affidavit of debt in, 184, 5.

arrest in, 173, 4.

staying proceeds in, 541, 2.

consolidating, 614.

assessing damages in, 879, 80.

for performance of covenants ;

liability of surety on, after bankruptcy of principal, 209.

what are within stat. 8 & 9 W. III. c. 11, § 8, and what not, 584,
5; 1108.

proceedings on. See tit. *Debt on Bond, for performance of covenants.*

of arbitration, need not be stamped as agreements, 821, 2.

outstanding, plea of, 644.

set off by assignees of, 666, 7.

to king, 1044.

proceedings on, 1045, 6.

from what time lands are bound by, 1051.

BOOKS,

of a public nature, 593, 4.

judicial, 801, 2.

not judicial, id.

entries in, proof of, id.

inspection of. See tit. *Inspection.*

of attorneys' names, 71, 2.

rules delivered out in *ejectment*, 1221.

ejectments, at judges' chambers, 1224, 1230.

warrants of attorney, and *cognovits*, 455, 6.

for entering declarations, in Exchequer, 454.

writs of *ca. sa.* in sheriff's office, 1098, 1125, 6.

BOROUGH,

capital burgess of, when not privileged from arrest, 197.

BOROUGH COURT,

return of proceedings in, 407, (b.)

BOTTOMRY BOND,

debt proveable on, under commission of bankrupt, 205. (h.)

action on ;

assessing damages in, without writ of inquiry, 571.

bail in error in, 1150.

BREACHES,

negative, or affirmative, 440.

how assigned, id. 686.

on stat. 8 & 9 W. III. c. 11, § 8, pp. 583, 4, 5 ; 686.

BRIBERY,

actions for ;

staying proceedings in, 518.

consolidating, 614.

altering venue in, 602.

BRIEF, 799, 847.

expense of preparing on execution of inquiry, 580.

BRINGING Money into Court. See tit. *Money*.

BRISTOL, City of;

court of requests for, 957.

BRIXTON,

court of requests for *Eastern* half, and *Western* division of hundred of, 957.

BROKERS, See tit. *Policy Brokers*.

when compellable to produce books, 592.

BUILDING ACT,

actions, for things done in pursuance of;

limitation of, 21.

notice of, 32.

BYE LAWS,

assumpsit, or *debt* on, 2, 3.

avowry or cognizance on, 645.

C.

CAMBRIDGE,

claim of conusance by university of, 631, &c.

CANAL ACT,

distress for money due on, not within stat. 11 Geo. II. c. 19, § 22, p. 977.

CANTERBURY,

service of *capias* in, directed to sheriff of *Kent*, 168.

CAPIAS AD RESPONDENDUM,

when it lies, 128, 193.

against whom it does not lie, 116, 128, 190, &c.

in Kings's Bench;

special, 128.

Common Pleas;

quare clausum fregit. See tit. *Process*.

by continuance, id.

Exchequer;

of privilege, 38, 9; 92, 321.

alias, 128.

pluries, id.

testatum, id.

non omittas, id.

teste and return of, 129, 152.

amendment of, 130, 155, 161.

bailable, 171, 2.

not bailable, 166, 7.

common or serviceable, 166, (*g*.)

against a peer, set aside, 118, 192.

returns to, 308, &c.

on *pone*, or *recordari*, &c., 417.

CAPIAS AD SATISFACIENDUM,

generally, 993, &c. 1025.

CAPIAS AD SATISFACIENDUM, *continued.*

generally, *continued.*

not expressly given by statute, 1025.

when it lies, and when not, 1025, 6, 7; 1103.

for defendant's costs, on *nonpros*, &c. 1026.

against whom it lies, and whom not, 1025, 6, 7; 1132, 3.

lies not against spiritual persons, for non-residence, 1026.

bail, in C. P. 1026, 1043, 1133.

to whom directed, 1027.

form of, *id.*

for the residue, 1019, 1027.

signing and sealing, 999, 1027.

teste and return of, *id.* 1027, 8.

by original, *id.*

indorsement on, of defendant's place of abode and addition, in K. B. 999.

amendment of, 1028, 1120.

returns to, 1028, 1097, 8.

testatum, 1028.

non omittas, *id.*

process of outlawry, 131, 1028.

clause of, in extent, 1064.

relief on, of crown debtor, by stat. 57 Geo. III. c. 117, § 6, *id.* 1065, 6.

consequence of defendant being taken on, 1028.

not satisfying plaintiff, 1029.

plaintiff bound to accept debt and costs, when tendered, and discharge defendant, 1028.

sheriff not authorised to receive money of defendant, 1029.

how far considered as satisfaction, *id.* 1030.

generally, *id.*

as against co-defendants, 1030.

third persons, *id.*

after defendant's discharge, by privilege of parliament, *id.* 1031.

death, 1031.

escape, or rescue, *id.* 1032.

discharge on Lord's act, 385.

to charge bail, 1097, 8.

fresh writ of, when necessary, 1098.

direction, *id.*

teste and return of, in K. B. *id.*

C. P. 1099.

must lie *four* days in sheriff's office, 1098, 9; 1125.

Sunday not reckoned as one of them, *id.*

must be entered in *public* book, in sheriff's office, 1098, 1125, 6.

filing, 1099.

cannot be sued out, or returned, pending error, 1129, *id.* (l.)

want of, when and how pleadable, 689, 1128, 9.

against peers of the realm, 121, 1025, 6.

feme covert, on judgment against her, 1026, 1114, 15.

for charging defendant in execution, in county gaol, 363.

damages and costs in *ejectment*, after verdict, 1243, 4.

CAPIAS AD SATISFACIENDUM, *continued.*

prisoners on. See tit. *Prisoners.*

CAPIAS *pro fine*, 558, 943. (c.)

si laicus, 1086, 7.

CAPIAS UTLAGATUM,

general, 135, 6.

special, 137.

bankrupt in custody on, not discharged by proof of debt,
&c. 136.

poundage on, 1040.

CAPIAS IN WITHERNAM, 1038.

CAPIATUR,

want or wrong addition of, aided, 943.

CARETS, of Rolls, 732.

CARRIERS,

liability of, 620. (m.)

actions against, 5.

declarations in, 445, 620. (m.)

pleas in, 635, 6.

CASE,

actions upon, 4, &c.; 10, (a.) 58, 430, 31.

against sheriffs, &c. See tit. *Sheriffs.*

limitation of, 15.

process in, 128.

declaration in, 433, 440, 41, 2.

variances between, and evidence, 434, 5. (f.)

Pleas in. See tit. *Pleas and Pleading.*

damages in. See tit. *Damages.*

judgment in, 931.

costs in. See tit. *Costs.*

execution in, 993.

special. See tit. *Special Case.*

CASES, in House of Lords, 1177.

by whom signed, id.

contents of, id.

number of, id.

when delivered, id.

CASH PAYMENTS,

restrictions on, determined, 520. (b.)

CASSETUR *billa, vel breve*;

entry of, in K. B. 677, 683, 930.

C. P. id.

arrest after, 175.

declaring after, 424.

defendant not entitled to costs on, 683.

CATHOLICS. See tit. *Roman Catholics.*

CATTLE GATES,

ejectment lies for, in *Yorkshire*, 1191.

CERTAINTY,

in pleading, 451, 661, id. (e.) 850.

awards, 828.

CERTIFICATE,

- of attorneys. See tit. *Attorneys*.
- of special pleaders, draftsmen in equity, and conveyancers, 77.
 - only qualifies members of inns of court, id.
- death, &c. for reversing outlawry, 144.
- bankrupt. See tit. *Bankrupt*.
- or copy of causes, from gaoler, &c. 368.
- no bill or declaration, when dispensed with, id. (*g.*)
- cause shown, on rule for judgment on *nul tiel record*, in C. P. 746.
- probable cause of seizure, in actions, &c. relating to customs or excise, 892, 968, 9.

alleging diminution, &c. in House of Lords, 1171.
for costs ;

- on 43 Eliz. c. 6, pp. 659, 952, 3.
- in what actions granted, 952, 3.
- 7 Jac. I. c. 5, p. 989.
- 22 & 23 Car. II. c. 9, pp. 963, &c.; 1000, 1001.
- 8 & 9 W. III. c. 11, § 1, p. 986.
- § 4, pp. 965, 968.
- 4 & 5 Ann. c. 16, § 5, p. 660.
- 24 Geo. II. c. 18, § 1, p. 792.
- Welch* judicature act, 969, 70.

for costs of special jury, 792.

CERTIFYING RECORD. See tit. *Error*.

CERTIORARI,

- what, and when it lies, in general, 397, 8; 1134.
- for removal of all causes, from inferior courts, 398.
- in *ejectment*, id.
- out of what court it issues, 397, 8; 745, 6.
 - Chancery, 397.
 - K. B. or C. P. id.
 - Exchequer, id. 398.
- and *mittimus*, 398, 745, 6; 943.
 - what, 745, 6.
 - when record must be certified, or only tenor, id.
- in civil actions, before judgment, 38, 398.
 - to remove causes from isle of *Ely*, 398.
 - cinque ports, &c. id.
 - on foreign attachment, id. 399.
- to *Wales*, or county palatine, 399.
 - by stat. 1 Geo. IV. c. 87, id.
 - 5 Geo. IV. c. 106, id. 400.
- lies not, to remove record from *Durham*, for rendering bail, 286, 401, 2.
- replevin*, from county court in *Wales*, into K. B. 400.
- when debt is under 40s., p. 399.
- in civil actions, after judgment, 400.
 - for having execution ;
 - to inferior courts, 401.
 - courts in *Wales*, and counties palatine, id. 402.
 - courts of requests, 402, 3.

CERTIORARI, *continued*.

in criminal cases, 400, 1142.

affidavit for rule *nisi* for, how entitled, 400, 493.

for removing recognizance to keep the peace, 1093.

to certify whether defendant is an attorney, 635.

practice of inferior court, 715.

direction and form of, 403.

teste and return of, *id*.

quashing, and superseding, *id*.

effect of, 404.

receipt and allowance of, *id*. 405.

in what stage of the cause, 405.

in causes under *five* pounds, *id*. 406.

twenty pounds, 401, 406.

return of proceedings in borough court, 407. (*b*.)

Mayor's court of *London*, *id*.

Great Sessions, *id*.

that defendant was taken, &c., on plaint levied in sheriff's court of
London, 407. (*d*.)

when and how made, 407.

to what officer, 1159, 60.

effect of filing, 411, 12.

bail on, 407, 8.

when and how put in, excepted to, and justified, 408, &c.

procedendo ;

what, and when it lies, 410, &c.

cannot be granted, after return filed, 411, 12.

cause remanded, 412.

declaration on, *id*.

de novo, *id*.

form of *scire facias*, after removal by, 400, 401, 1106.

execution on removal by, out of what court, 401, 995.

in error, 1143.

præcipe for, 1170.

by plaintiff, to verify his errors, 1167, (*d*.) 1170, &c.

by defendant, to disprove them, 108, 714, 1172, 8.

by court, for their own information, 1174.

CESSET EXECUTIO, 876, 1104.

CESSET PROCESSUS. See tit. *Stet Processus*.

CESTUI QUE TRUST,

money due to or from, may be set off, 666.

execution against lands, &c., of, 1035, 6.

CHALLENGE of Jurrors. See tit. *Jury*.

overruling, ground for bill of exceptions, 862.

disallowing, no ground for new trial, but for *venire de novo*, 853, 4;
906.

CHAMPERTY,

what, 825.

CHANCERY. See tit. *Equity*.

six clerks of, and cursitors, &c., excepted out of stat. 22 Geo. II. c. 46,
p. 62.

affidavits in, of execution of articles of clerkship, 64. (*f*.)

CHANCERY, continued.

- solicitor in, may practise on equity side of Exchequer, 72, 3.
 - on equity side of Exchequer, cannot as such practise in, 73.
 - privilege of, in arresting attorney of K. B. 83.
 - bound to proceed in cause, 86, 7.
 - declining to act, has no lien for costs, upon a fund in court, 87.
 - costs of, when concerned for pauper, 99.
- attorney of K. B. though not a solicitor in, may sue out commission of bankrupt, 73.
- costs in, when proveable under commission of bankrupt, 210.
 - taxation of, 330.
- subpoena* in, 156.
 - service of, *id.*
- process out of, not within stat. 23 Hen. VI. c. 9, p. 222. (*d.*)
- bail on attachment in, 222.
- sixty clerks in, may be bail, 247.
- effect of injunctions in, 461, 1105, and see tit. *Injunctions*.
- hearing counsel, on cause sent out of, in C. P. 507.
- bill in, no foundation for staying proceedings, 528.
- exemplifications in, 800.
- office copies of depositions in, 801.
- proceedings in, *id.*
- court of, trial of issues directed by, 753.
 - not within stat. 9 & 10 W. III. c. 15, § 1, p. 821.
 - application for new trial, on feigned issue, directed by, 913.
 - evidence of verdict thereon, 943.
- sequestration in. See tit. *Sequestration*.

CHAPEL,

- ejectment* lies for, 1192.

CHAPEL-WARDENS,

- service of declaration in, *ejectment* on, 1212.

CHARTER-PARTY,

- affidavit of debt on, 186.
- venue cannot be changed in action on, 604, 611.

CHATTELS REAL,

- may be extended or sold, on *elegit*, 1035.
 - extent, 1052.
- from what time bound, on extent, *id.*

CHIEF BARON,

- of Exchequer, salary of, 39. (*g.*)

CHIEF JUSTICES,

- salaries of, *id.*

CHIEF USHER AND CRIER, OF K. B. 52.

PROCLAMATOR, IN C. P. *id.* 53.

CHIROGRAPH,

- of fine, when evidence, and when not, 800, 801.

CHOSE IN ACTION,

- actions by assignees of, 6, 7.

CHRISTIAN NAMES, 447, 8, 9; 702.

- initials, or omission of, in process, &c., 148, 301, 447, 8.

CHURCH,

- ejectment* lies for, 1192.

CHURCHWARDENS,

service of declaration in *ejectment* on, 1212.

CHURCHWARDENS AND OVERSEERS,

entitled to protection of stat. 24 Geo. II. c. 44, § 6, p. 35.

actions by, on stat. 59 Geo. III. c. 12, § 17, pp. 7, 8.

CINQUE PORTS, 152, 680, 1138.

CIRCUITS, 106.

commissions of judges on, 41.

opening, *id.*

officers on, 59.

CIRCUITY OF ACTIONS, 10.

CLAIM,

of conusance. See tit. *Conusance*.

property, in Exchequer, 1076, 7.

CLAUSUM FREGIT. See tits. *Original Writ*, and *Process*.

CLERGYMEN,

arrest of, 219.

exempted from serving on juries, 784.

proceedings against, 1023, 4.

on insolvent act, 1 Geo. IV. c. 119, p. 1024.

CLERK OF DECLARATIONS,

his duty, &c. 322. (*e.*)

CLERK OF JUDGMENTS,

books of, 801, 806, 7.

CLERK OF PEACE,

cannot act as attorney, 84.

CLERK OF PLEAS, in Exchequer, 58.

CLERK OF ATTORNEYS. See tit. *Attorneys*.

CLOSE,

ejectment will not lie for, without other description, 1191.

COGNIZANCE. See tit. *Replevin*.

COGNOVIT ACTIONEM,

what, 559, 60.

objects of, 559.

when and how given, *id.* 560.

before declaration, 559.

process sued out in Exchequer, *id.* 560.

after declaration, and before plea, *id.*

after plea, *id.*

relictâ verificatione, 559.

withdrawing plea on, 560.

upon terms, *id.*

form of, 559, 60.

stamping, 560.

when given by attorney, 562.

prisoner, in custody of sheriff's officer, on mesne process,
550, 560.

marshal, *id.*

tenant in *ejectment*, to prejudice of landlord, 1236.

of the whole, or part of cause of action, 560.

or copy, and affidavit, &c. to be filed with clerk of dockets, in K. B. 561.

consequence of omission, in case of bankruptcy, or insolvency, *id.* 562.

COGNOVIT ACTIONEM, *continued.*

defeasance on, to be written on same paper or parchment, before filing,
561, 2.

proceedings on, 560, 61, 62.

charging defendant in execution after, 560, 61.

entry of satisfaction on, 555, 6; 1041. (*d.*)

waiver of irregularity, 243, 562, 567.

when it operates as a discharge of bail, and when not, 295, 301, 305,
609, 1097.

sheriff, 315.

discharged, by defendant's bankruptcy and certificate, 210, 562.

costs on, when not allowed, 560, 61.

after argument of special case, and new trial ordered, 900, 916.

no bar to writ of error, unless so expressed, 1185.

COLOUR, in pleading, 653, 4.

express, *id.*

implied, *id.*

want of, aided by statute of jeofails, 924.

COMMISSION,

of judges, upon their circuits, 41.

opening, *id.*

of bankrupt; See *tit. Bankrupt.*

bill of costs, for business done under, 332.

rebellion, in Exchequer, 157.

for taking affidavits, 496, 7.

grantable by courts in *Ireland*, 166. (*c.*)

in court of great sessions, 497. (*n.*)

stamp duty on, 179. (*o.*)

recognizances of bail, 249, 50.

stamp duty on, 249. (*f.*)

to be granted only to certificated attorneys or solicitors,
491.

examining witnesses abroad, 770, 71; 810, &c.

trial of cause at the assizes, in Exchequer, 777.

finding simple contract debts to crown, 1046, 7; 1063, 4.

evidence of debt, on execution of, 1047.

del credere, 665.

COMMISSIONERS,

of turnpike roads, actions by or against, 8, 9.

upon circuits, 41.

opening their commissions, *id.*

of bankrupt. See *tit. Bankrupt.*

actions against, *Same title.*

proceedings in. *Same title.*

bankrupt remanded, on commitment by, 288.

of land tax;

distress for fine imposed by, 528. (*f.*)

lottery, 594.

stamp office, 80, 487, 590.

sewers;

treble damages in action for taking distress, &c. by authority of,
888, 894.

COMMISSIONERS, continued.

- for auditing public accounts, &c. ;
- bringing witnesses before, when in custody, 809.
- taking affidavits, 179, 80; 241, 2; 491, 2; 496, 7.
- recognizances of bail, 249, &c.
- bail book of, 258.
- scire facias* on, 1122.
- affidavit sworn before, how entitled, 492.
- acknowledgment of party to fine or recovery, 494.
- examining witnesses, on interrogatories, 810, 11.
- under inclosure acts, &c. 819, 20; 844.

COMMITMENT, 285, 364, &c.

- on *habeas corpus*; 350, 51, 2.
- evidence of, 351.
- when matter of record, and when not, 351, 2.
- entry of, 364.
- by commissioners, bankrupt remanded on, 287.
- for contempt in face of court, 479, 80.
- in execution for penalties, on *Goldsmith's Company's act*, 996.

COMMITTITUR,

- on render, in K. B. 289.
- charging defendant in execution, 364, 5.
- entry of, in marshal's book, 364.

COMMITTITUR PIECE, 364.

- filing and entering, id.
- not necessary, on commitment under *habeas corpus*, id.

COMMON,

- right of, how stated, 444.
- justification under right of, 645, 6.
- ejectment* for, 1193.

COMMONERS,

- avowry or cognizance by, 645.
- pleas in bar by, id.

COMMON PLEAS,

- jurisdiction of, in personal actions, 37, 8.
- officers of, 44, &c.
- means of commencing actions in, 91, 2.
- error from, 1137.
- to, lies not from inferior courts, id. 1138.

COMMON PLEAS AT LANCASTER,

- teste* of original writ in, 107.
- assignment of bail bond in 298. (*d.*)
- removal of causes into, 406, 7; 1188.
- recognizance on, 406, 7.
- direction of writ of error to, 1142.
- bail required on writ of false judgment in, 1188.
- statutes of jeofails extended to, 298.

COMMON RECOVERY. See tit. Recovery.**COMMON ROLLS, in C. P. 728, 9.**

Exchequer, 729.

COMPANIES,

- actions by or against public, 8.

COMPERUIT *ad diem*;

plea of, 310, 317, 18.

striking recognizance of bail off the file on, 317, 18.

need not be signed, in K. B. 671.

C. P. 672.

must be delivered, in K. B. 671, 2.

issue on, by whom made up, 717.

COMPOSITION,

deed of, when sufficient or not to avoid bankrupt's certificate, 1108, 9.

COMPOUNDING PENAL ACTIONS, 546.

in what cases allowed, *id.*

in what not, 557.

application for, must be made in *bank*, and not at *nisi prius*, 556.

consent of crown, when necessary, 557.

affidavit for, 556, *id.* (i.)

motion and rule for, when and how made, in K. B. 486, 556, 7; 556. (i.)

C. P. 486, 557.

proceedings thereon, 557, 8.

costs on, 557.

composition money;

king's part of, to whom paid, 557.

how recovered, on informations, *id.*

attachment for non-payment of, *id.*

order for, conclusive, 558.

COMPROMISE,

effect of, on attorney's lien, 338, 9.

COMPULSIVE CLAUSES, in Lords' act, 382, &c.**COMPURGATORS,**

number of, on wager of law, 649.

CONCILIUM. See tit. *Demurrers*, and *Error*.**CONCLUSION** to Declaration. See tit. *Declaration*.**CONCORD,**

of fine, amended, 700.

supplied, when lost, 701.

CONDITIONAL PROMISE,

when sufficient, or not, to take case out of statute of limitations 26, 7.

CONDITIONS, precedent, 436, &c.

plea of non-performance of, 643.

subsequent, 436, 7.

CONFESSION,

of lease and entry only, in *ejectment*, 490, 1227.

judgments by. See tit. *Judgments*.

and avoidance. See tit. *Pleas* and *Pleading*.

without avoidance, 920.

proceedings on, *id.* 921.

CONFIRMATION,

of promise by infant, must be in writing, 650. (p.)

CONSENT,

rules by, 484, 5.

CONSENT RULE,

in *ejectment*, 484, 490, 1203, 4; 1225, &c. 1230.

CONSIDERATION,

express, or implied, 485.
 executed, or executory, id.
 when good, id. 436.

CONSOLIDATION,

of actions, in general, 614.
 on policies of insurance. See tit. *Policy of Insurance*.
 motion and rule for, in K. B. 487, 614.
 judge's order for, in C. P. 615.
 informations in nature of *quo warranto* not allowed, 614.
 ejectments, 1232.

CONSOLIDATION RULE. See tit. *Policy of Insurance*.**CONSPIRACY,**

person convicted of, may make affidavit to hold to bail, 179.
 indictment for, no ground for staying proceedings, 907.

CONSTABLES AND HEADBOROUGHES,

demand of copy of warrant from, 33, 4, 5.
 authorized to execute warrants, out of their precincts, 34. (c.)
 actions against, 33, 4, 5.
 limitation of, 19, 20.
 venue in, 430, 31.
 pleas in, 653.
 costs in, 892, 970, 988.

attorneys not liable to be chosen, 82.

CONSUL,

Qu. if affidavit of debt may be made before, in foreign country, 181, 2.
 not privileged from arrest, 191.

CONSULTATION, writ of,

in *prohibition*, for not verifying suggestion in six months, 948.

CONTEMPT,

in non-payment of money or costs, discharged by insolvent act, 392, 3.
 face of court, proceeding on, 479, 80.
 addressing jury, fining defendant for, 860.
 attachment for;
 not in general bailable, 222, 481.
 proceedings on, 481, 2.

prisoner in custody for, not in general entitled to rules of prison, 373.

CONTEMPTUOUS WORDS. See tit. *Attachment*.**CONTINGENT DAMAGES.** See tit. *Damages*.**DEBTS,**

when proveable under commission of bankrupt, 205, 6.
 not discharged by insolvent debtors' act, 213.

CONTINUANCE,

of bill of *Middlesex*, by *latitat*, 27, 147.
 effect of entering, in support of commission of bankrupt, 27. (i.)
 how stated in pleading, 162.
capias by, in C. P. See tit. *Process*.
 of process, 151, 162, 3; 678, 8.
 before declaration, 678, 9.
 after declaration, and before issue, 679.
 issue, and before verdict, id. 932.
 verdict, or demurrer, 678.

CONTINUANCE, *continued.*

of process, *continued.*

after judgment by default, 678.

in error, 1175.

entry of, 162, 1104.

may be made at any time, 678, 1163.

certiorari for, how directed, 1170. (i.)

want of, when aided or cured, 679.

may be added, after judgment in penal action, *id.*

of notice of inquiry. See tit. *Inquiry.*

trial. See tit. *Trial.*

pleading after last. See tit. *Pleas and Pleading.*

CONTINUANCE DAY, 277.**CONTRACTS,**

by parol, 433, 4.

in writing, 433, 4.

by deed, under seal, 434.

agreement, without seal, 434.

express or implied, 23, 435.

present or future, 434.

actions upon, 1, &c.

by and against whom brought, 6, 7.

limitation of, 15.

how stated in declaration, 435.

special, admitted by bringing money into court, 625, 6.

CONTRIBUTION,

action for, 208, 896.

CONTUMACE CAPIENDO,

writ of, 373, (c.)

CONVEYANCERS,

stamp duty on certificates of, 77.

certificated, may maintain action for fees, *id.*

not allowed to be bail, 247.

take affidavits, 491.

CONVICTION,

removal of, by *certiorari*, 400.

plea of former, 644.

damages and costs, in actions against justices, after quashing, 882, 8,
970.

new trial after, 907, 911, 12.

CONVOCATION, Members of, 193.**CONUSANCE,**

what, 631.

in what cases it may be claimed, *id.* 632.

by whom, *id.* 633, 4.

cannot be claimed in Exchequer of Pleas, 81, 2, 632.

when and how claimed, 463, 632, &c.

proceedings after, 413.

COPARCENERS,

ejectment by, 1190.

demise in, how laid, 1205, 6.

confession in, of lease and entry only, 490, 1227.

COPY of Causes, 368.

process. See tit. *Process*.declaration. See tits. *Declaration*, and *Ejectment*.

records, &c.

under seal, 800.

not under seal, id.

deeds, &c. on *oyer*, 586.

for the purpose of declaring thereon, 487, 591.

if there be only one part, 590.

when one part is lost, id.

grantor of annuity entitled to, 591.

written instruments, 590, 91, 2.

in what cases formerly demandable, 591.

at present, id.

in actions on bills of exchange, and promissory
notes, id.

policies of assurance, id.

what a sufficient compliance
with the order, id.

in other cases, id.

when action is founded on written instrument, id.

defendant is in nature of a trustee, &c. 592, 3.

in what cases not demandable, 591, 2.

books, &c. 593, &c.

examinations before justices, &c. 593.

record of acquittal, id.

copy of, not evidence, 800.

COPYHOLD Lands, not bound by judgment, 935.

within register acts, 941.

extendible on *elegit*, 1034, 5.COPYHOLD Tenant, rule for his inspecting court rolls, 485, 6; 468, (a.)
594, 5.

title, how stated in pleading, 442. (b.)

COPYHOLDER,

in right of his wife, not allowed to be bail, 246.

custom or prescription by, for common, &c. 443. (e.)

CORONER,

direction to, of mesne process, 151.

jury process, 780.

exempted from serving on juries, 784.

CORPORATION,

must be sued by original, 27, 37, 91, 102, 104, 112, 145.

process against, 121.

must appear by attorney, 92, 109.

what they may do, without their common seal, 92. (p.)

note of appearance for, 121. (l.)

not entitled to essoin, 109.

members of not subject to arrest, 193.

beginning of declaration against, 121. (l.)

seisin of, how stated in pleading, 442. (b.)

claim of, by custom or prescription, 443. (e.)

note by, on Lords' act, 381, 2.

CORPORATION, *continued*.

pleas in *quo warranto*, against members of, 656, 7.

CORPORATION BOOKS, 802.

inspecting, 595.

COSINAGE, damages on writ of, 878.

COSTS,

what:

parcel of damages, 945.

as between *party* and *party*;

de incremento, origin of, *id*.

in abatement;

on issue in fact, 27, 642, 962.

law, 642, 982.

cassetur billa, vel breve, 688.

in *scire facias*, 1132.

interlocutory, 945.

payable by attorneys, for improper conduct, 85, 6; 707.

on proceeding by original, in K. B., 103.

writs of *distringas*, 111, 119.

reversing outlawry, 143.

discharging married women, 195.

soldiers, 199, 200.

insolvent debtors, 214, 15.

stat. 43 Geo. III. c. 46, § 2, pp. 227, 8, 9.

staying or setting aside proceedings on bail bond, 282, 302, 3,
&c. 541, 2.

rendering principal by bail above, 280, 81; 288, 305.

attachment against sheriff, in action against acceptor of bill
of exchange, 315.

setting aside attachment against sheriff, after render, 312.

motions, 503, &c. 521, 2.

not allowed on showing cause in first instance, 503.

when rule is made absolute, 503, 521, 2.

discharged, 494, 503, 4.

in Exchequer, 491, 503, 1082.

setting aside proceedings, for irregularity, 516.

need not be paid, before commencement of fresh action,
538, 9; 1099, 1100.

staying proceedings, 1099, 1100.

on payment of debt and costs, 540, 41.

when not allowed, 540.

in *debt* on recognizance, 542.

in *ejectment*, for non-payment of rent, 1234, 5.

by mortgagee, 1235, 6.

striking out superfluous counts, &c., 616, 17.

bringing money into court, 621, &c. 626, 7, 8.

discontinuance, 679, 80, 81; 915, 981, 989.

on amendments, 598, 9; 707, &c. 710.

of writs of error, 1161, 2.

after error, 715, 1171, 2.

reference to arbitration, 824, 5; 830, &c. 959, 983.

discharging rule to set aside award, 845.

COSTS, *continued.*interlocutory, *continued.*on *remanet*, 758, 833.

withdrawing juror, 627, 861, 2.

repleader, 921.

venire de novo, 923.writ of entry, 946. (*a.*)applying for costs, on stat. 48 Geo. III. c. 46. § 3. pp. 984, 5.
to enlarge time for sheriff's making his return, 1018.quashing writs of *scire facias*, in K. B. 947, 8; 1123.C. P. *id.*

error, 1162, 8.

suing out original writ, after error, 1171, 2.

of writ, &c. deposit to answer, 227, 8, 9.

opposing bail, in K. B. 271.

C. P. *id.* 272.

declaration, when allowed on staying proceedings, 456.

sham pleas, 565, 6.

counsel, on inquiry, 580.

petitioning creditor for commission, 330, 31.

proving his debt, &c. after notice, on stat. 6 Geo. IV. c. 16 § 90.
p. 669.

solicitor to commission, 331.

application for judgment as in case of nonsuit, in C. P. 769, 70.

special jury, 792, 8; 832.

witnesses, 680, 760, 806, 7; 811, (*d.*) 814, 15.

examining on interrogatories, 813.

arbitrators, 833.

trials at bar, when plaintiff is poor, 749.

bill of exceptions, 865.

application for new trial, in C. P. 916.

new trials, 599, 914, &c.

when costs are directed to abide event of suit, 832, 915, 16.

rule is silent as to costs, in K. B. 916.

C. P. *id.* 917.

Exchequer, 917.

after special case, 900, 916.

how to proceed for non-payment of, 917.

for not declaring, after reversal of outlawry, in C. P. 423.

proceeding to trial:

generally, 484, 758, &c.

in King's Bench, 759, 60.

Common Pleas, *id.*

Exchequer, 760.

criminal cases, 758, 9.

quo warranto, *id.*by *proviso*, 761, 2.

executing inquiry, 484, 5; 580.

motion for, 580.

final; 945.

for plaintiff:

at common law, *id.*

COSTS, *continued.*final, *continued.*for plaintiff, *continued.*

by statute of *Gloucester*: 945, 6.

when *double* or *treble* damages are given, or a certain *penalty*, by subsequent statute, *id.*

single damages are given, by subsequent statute, 946.

restrained, by 48 Eliz. c. pp. 952, 3, 4.

court of requests acts: See tit. *Court of Requests Acts.*

exceptions out of, 958, 9, 60.

when and how taken advantage of, 960, 61, 2.

on reference to arbitration, 831, 959.

restrained, by 21 Jac. I. c. 16, in actions for *words*, 962.

22 & 23 Car. II. c. 9, in *trespass*, 963, &c.

23 Geo. III. c. 37, § 24, in actions against officers of customs, or excise, 892, 968, 9.

43 Geo. III. c. 46, § 3, when plaintiff does not recover sum sworn to, &c. 174, 489, 981, 2; 984.

c. 46. § 4, in *debt* on judgment, 969.

c. 141, in actions against *justices*, 892, 3; 970.

5 Geo. IV. c. 106, § 21, 2, in *Wales*, 969, 70.

6 Geo. IV. c. 108, § 92, against officers of customs or excise, 969. (*a.*)

7 & 8 Geo. IV. c. 29, 30, relative to larceny, &c. 970.

extended by 4 & 5 W. & M. c. 23, pp. 967, 8.

8 & 9 W. III. 3. 11, p. 968.

in inferior courts, 825, 962, 966, 7.

on removal by *habeas corpus*, 413, 14.

for defendant;

at common law, 945, 976.

by statute of *Marleberge*, 976.

on nonsuit, or verdict, 671, 977, 8; 980, 81.

when proveable under commission, 210.

judgment as in case of a nonsuit;

by stat. 14 Geo. II. c. 17: pp. 762, 769, 70.

when not allowed, 769, 979.

for not proceeding to trial, allowed in C. P. and Exchequer, on discharging rule for, 759, 60; 769.

aliter, in K. B. 759, 769.

of application for, 769, 70.

discontinuance, 679, 80, 81; 981, 989.

nolle prosequi, 681, 981.

non pros, 418, 460, 851, 979, 981.

in *ejectment*, 1231.

error, 1160, 1167, 8; 1181.

demurrer, 654, 5; 659, 60; 949, 972, 982.

Welch judicature act, 969, 70.

when plaintiff does not recover sum sworn to, &c. 174, 489, 982, &c. judgment for plaintiff is reversed on error, 1180.

COSTS, *continued.*final, *continued.*for defendant, *continued.*

of double pleading, 658, &c.

on several counts, when plaintiff succeeds on one of them, 917, 971,
972, 974, 5.

pleas of justification, 971, &c. 973, 4, 5.

issues, on inclosure act, 975.

when there are several defendants, 981, 985, 6.

in actions real, 946.

writ of right, 769.

of ward, 976.

mixed:

dower *unde nihil habet*, 945.ejectment. See tit. *Ejectment*.*quare impedit*, 946.waste, *id.*

in personal actions;

upon contracts:

account, 977, 8.

assumpsit, 945, 954, 963, 971, 2; 981.

against several defendants, 981.

on feigned issues, 986, 7.

covenant, 945, 963, 977, 8.

debt;

for plaintiff, 945, 963.

on bond, 984.

judgment, 487, 970.

for rent, 958.

penalties, 945, 985, 987.

on game laws, 987.

for not setting out tithes, 946, 947.

on compounding, 557.

for defendant, 969, 70; 976.

on court of conscience acts, 881, 954, &c.
956, &c.not within stat. 22 & 23 *Car.* II. c. 9, p. 963.*scire facias*;on stat. of *Gloucester*, 946, 7; 1132.stat. 8 & 9 W. II. c. 11, § 3, pp. 948, 1108,
1132.

§ 6, pp. 947, 1132.

§ 8, pp. 881, 947,
1132.cases not within stat. 8 & 9 W. III. c. 11,
§ 3 pp. 948, 1132.

quashing writs of, 947, 8; 1114.

to repeal letters patent, 948.

in error, 1167.

for wrongs:

case, 945, 953, 969, 70; 977, 8; 986.

for crim. con. 4, (*d.*) 659, 60; 963.

COSTS, *continued.*final, in personal actions, *continued.*for wrongs, case, *continued.*

for defamation, 962, 969, 70.

in trover, 945, 963, 971, 978, 986.

detinue, 977, 8.

respecting distresses, 946, 976, 7; 988.

replevin;

for plaintiff, 945.

defendant; 976, 7.

on a distress for poors' rates, 987.

of double pleading, 654, 5; 660.

against several defendants, 986.

trespass; 945, 963, &c. 971, 986, 7.

and assault, 963, 965, 986.

battery, 945, 952, 3, 4; 963, 4, 5; 969.

false imprisonment, 953, 963, 986.

forcible entry, 987.

for plaintiff; 831, 945, 963, &c.

how restrained, 963, &c.

against inferior tradesmen, &c. 967, 8.

when wilful and malicious, 968.

on several counts, 972, &c.

for defendant;

on 5 R. II. 977, 8.

Welch judicature act, 969, 70.

of double pleading, 658, &c.

on new assignment, 966, 973.

against several defendants; 981, 985, &c. 991.

on joint plea of not guilty, when one
is acquitted, 986.not allowed, unless plaintiff is entitled to judgment on the whole
record, 975, 6.

on arrest of judgment, 985.

in error; 976, 1180, 81.

for plaintiff in original action: 1181.

on affirming judgment in House of Lords, 1184, 5.

double, 1181.

for defendant, 1181.

not allowed on reversal, 1181.

bail in action not liable to, 280.

false judgment, 1188.

by paupers, 98.

assignee of insolvent debtor, 979.

by attorney, for bill of costs, within stat. 43 Geo. III. c. 46,
§ 3, p. 988.

against bail, 280, 81; 288, 302.

bankrupts, 210.

seaman and soldiers, 199, 200.

officers of customs, and excise, 892, 968, 988.

army, navy, or marines, 988.

justices, and constables, &c. 892, 3; 970, 988.

COSTS, continued.final, *continued.*in personal actions, *continued.*

against persons acting under bankrupt act, 33, 988.

acts relative to larceny, &c.
970.

insolvent debtors, 892, 3.

by or against infants, 100, 536, 1232.

baron and feme, 1114.

executors and administrators. See tit. *Executors and Administrators.*

in prohibition, 946, 948, 9.

on *mandamus*, 946, 949, 50, 51.

quo warranto, 758, 9; 946, 949, 951, 2.

extents, 1074, 1081, 2.

when taxable, 329, 1082, 3.

double or treble, what, 987.

when recoverable, in prohibition, 948, 9.

by plaintiff, 987, 8.

on stat. 15 Geo. III. c. xlvii. pp. 977, 988.

defendant, 954, 5; 956, 988.

in *replevin*, 977, 988.

ejectment, 988.

how calculated, 987, 8.

recovered, 988.

judgment for, how entered, 989.

suggestions for. See tit. *Suggestions.*

certificates for. See tit. *Certificate.*

rule to be present at taxing, in K. B., 484, 990.

C. P., *id.*

after special verdict, 898.

taxation of. See tit. *Attorneys.*

on judgment by default:

final, 568.

interlocutory, in K. B., 581.

C. P., 568, 581.

discontinuance, 680.

to what time it relates, *id.*

demurrer, 741.

Welch judicature act, 969, 70.

verdict, &c.: 898, 980, &c. 987, &c.

affidavit of increased costs, 989.

rule for new trial, 917.

and signing final judgment, contemporaneous acts, 930.

reviewing: 990.

affidavit for, *id.*

in Exchequer, 990.

recoverable by plaintiff, though his attorney be not certificated, 77.

on *cognovit*, when not allowed, 991.

setting off against costs, &c.: 839, 831, 991.

when not allowed, 991.

judgment for, reversed, 1179.

COSTS, continued.**final, continued.**

- demand of, when barred by bankrupt's certificate, 210, 11.
- means of recovering,
 - under commission of bankrupt, *id.*
 - by execution or action, 990.
 - attachment: 478, 990.
 - rule for, absolute in first instance, 480, 990, 91.
 - may be moved for the last day of term, 497, 991.
- on *non pros*, &c. in Exchequer, 991.
- arrest not allowed for, 178.
- proceeding in action for non-payment of, 838, 626. (*h.*)
- requiring security for, 583, &c.
- payment of, in former action, 538.
- in equity, 375, 1233.
- on indictment, award of, 833.
- as between *attorney* and *client*. See *tit. Attorneys*.

COVENANT,

- to pay money by instalments, when not discharged by bankruptcy, 205.
- action of, 3, 10, 11, 104, 429, 824.
- not within statute of limitations, 15, 16.
- process in, 109.
- arrest in, 171, 2.
- declaration in, 433.
- variances between, and evidence, 434, 5. (*f.*)
- staying proceedings, on payment of what is due, 541.
- assessing damages, without writ of inquiry, 570, &c.
- when not allowed, 571, 2.
- particulars of demand in, 597.
- changing venue in, 604.
- bringing money into court in, 619, 621.
- no general issue in, 667.
- pleas in. See *tit. Pleas and Pleading*.
- of tender, 648.
- when to be delivered, 671.
- notice of set off cannot be given in, with *non est factum*, 667, 8.
- issues in, by whom made up, 717, 18.
- damages in;
 - on contract to pay money. See *tit. Damages*.
 - do, or forbear, some other act. *Same title*.
 - when some defendants are acquitted, 895.
- judgment in, 931.
- costs in, 945, 963, 977, 8.
- execution in, 993.
- writ of, for levying fine, amended in form, *teste* or return, 699, 700.
- for not levying fine, within stat. 5 Geo. IV. c. 106, § 21, 2. p. 969. (*k.*)
- scire facias* in, for damages arising after judgment, 1102, 1107.
- interest not recoverable in, for nonpayment of rent, 873.
- on affirmance, in Exchequer chamber, 1182, 8.

COVENANTS,

- dependent, or independent, 487, 8.

COVENANTS, *continued.*

- to be performed at same time, 437.
- debt on bond for performance of;
 - assessing damages in, 570, 71; 1108.
 - bail in error in, 1150, 51.

COVERTURE,

- plea of, in abatement, 635.
 - bar, 643.
 - debt on bond, 650, 658.
- may be given in evidence, on general issue, *in assumpsit*, 646.
- when pleadable after the last continuance, 847, 8; 850.
 - assignable for error, 1137, 1169.
- affidavit of, for allowance of writ of error *coram nobis*, 1144.
- costs on plea of, 1114.

COVIN. See tit. *Fraud.*COUNSEL. See tit. *Advocates.*

- signature of pleas, &c. by, 640, 671, 2, 3; 693, 696, 743.
- rules granted on signature of, 484, 5.
- on motions;
 - how heard, 506, 7, 8.
 - moving for argument, 508.
- absence of, when paper is called over, in K. B. id. 738.
 - on arguing special case, in Exchequer, 508.
- on inquiry, attending by, 580.
 - fee to, when allowed or disallowed, id.
- trial;
 - brief for, 799.
 - number of, 799.
 - withdrawing record, 851.
 - in what order heard, 858, 9.
 - when entitled to reply, id.
 - plaintiff must go into his whole case, 859, 60.
 - examination of witnesses by, 860.
 - when separate counsel are employed, by different defendants, id.
 - effect of objections taken by *junior*, &c. id.
 - acquiescence in judge's opinion, id.
 - in *ejection*, 507, 1238.
 - in criminal case; 860, 61.
 - opening new facts, and not calling witnesses to prove them, 861. (c.)
- on writ of error, in K. B. 1176.
 - House of Lords, 1177, 8.

COUNTER AFFIDAVIT,

- when received on arrest, 189.

COUNTERMAND, of Notice of trial. See tit. *Trial.*

inquiry. See tit. *Inquiry.*

COUNTS; See tit. *Declaration.*

- in real actions, amendment of, 699.
- pleas in abatement of. See tit. *Pleas and Pleading.*
- use of several, and when proper to insert them. 616. (d.)
- or matter superfluous, striking out, 488, 616, 17.
- bad or inconsistent, how cured after general verdict, 894.

COUNTS, *continued*.

- costs of several, when plaintiff succeeds on one, 971, &c.
- difference between K. B. and C. P. abolished, 974, 5.

COUNTY COURT;

- attorneys in, must be admitted, 61.
- certificates of, 78.
- liable to be struck off the roll, for practising in, when prisoners, 85.
- actions in, 516.
- declaration in, 417. (*k*.)
- avowries, &c. on judgments in, 645.
- evidence of proceedings in, 944.
- for *Middlesex*, 957, 960, 61, 2.
- execution in, 1043.

COUNTY PALATINE; See tit. *Common Pleas at Lancaster*, and *Durham*.

- attorneys of, excepted out of stat. 22 Geo. II. c. 45. p. 62.
- stamp duty on articles of clerkship to, 65.
- filing *affidavits* of execution thereof, 64. (*f*.)
- not entitled to practice, in courts at *Westminster*, 62.
- original writ cannot be issued into, 105, 129.
- attachment on *justices* in, not within stat. 7 & 8 Geo. IV. c. 71, p. 115.
- process into, 105, 115, 129, 154.
- direction of, 151.
- service of, 167, 8.
- arrest on ;
 - for what sum, 171, 998.
 - by what authority, 216.
 - bail-bond on, *id*.
 - assignment of, 298. (*d*.)
- bail in, how taken before commissioner, on *testatum capias*, 251, 2.
- entry of recognizance, on process into, 278.
- attachment or *distringas* in, for not returning writ, &c. 312.
- ejectment* in, on stat. 1 Geo. IV. c. 87, § 1, pp. 1209, 1221, 2.
- commissions for taking affidavits in, 491, 2.
- stamp-duty on affidavits in, abolished, 496.
- sheriffs of, amenable to the court for contempts, 312.
- summonses and orders in, by judges on circuits, 509, 10.
- changing venue, 105, 607.
- bringing it back, 611, 12.
- pleading to the jurisdiction, 630.
- mittimus* to, 607, 723, 777, 780, 81.
- trial at bar, 749.
- jurors in ;
 - qualifications of. See tit. *Jury*.
 - mode of returning, and impanelling. *Same title*.
- judgments, how entered, 932, 3.
- relation of, 938. (*f*.)
- costs, 952, 963.
- execution in, 401, 2.
- error from, 1138.
- quashing writ of, 1147.
- bail in, 1149, 50.

COUNTY PALATINE, *continued.*error from, *continued.*

alleging diminution in, 1167.

statutes of jeofails extended to, 298.

COUNTY TREASURER,

mode of reimbursing, on stat. 7 & 8 Geo. IV. c. 31, p. 124, id. (b.)

COURTS,

superior, or inferior;

justification, under process of, 646.

COURT BARON,

avowry or cognizance on judgment of, 645.

rolls of, 802.

inspecting, 594, 802.

evidence of proceedings in, 944.

COURT for relief of INSOLVENT DEBTORS, 888.

COURT MARTIAL,

witnesses on;

privilege of, from arrest, 198.

habeas corpus for attendance of, 809.

attachment against, for non-attendance, 807, 8.

COURT of PLEAS, in *Durham*, 967.Exchequer. See *tit. Exchequer.*

COURT of REQUESTS,

removal of decree or judgment from, to have execution, 402, 3.

mode of executing judgment of, by aid of justice, on stat. 48 Geo. III.

c. xcvi. § 31, p. 995. (g.)

writ of false judgment lies not from, to superior court, 1187.

COURT of REQUEST ACTS,

for sums under *forty* shillings;in *London*, 854, &c. 958, &c.

distinctions on, 955, 6.

actions excepted out of, 958.

Middlesex, 957, 960, 61, 2.*Southwark*, &c. 957, 8, 9; 1187.*Westminster*, &c. 957, 8; 960.*Tower Hamlets*, id.*Bristol*, and *Gloucester*, 956, 7.*Lincoln*, &c. 947.*Birmingham*, &c. id. 958.*Liverpool*, &c. 957.*Yarmouth*, id.*Kingston-upon-Hull*, id.for sums not exceeding *five* pounds;in *London*, 957.*Southwark*, and *Eastern* half hundred of *Brixton*, id.*Western* division of same hundred, id.*Blackheath*, *Bromley*, and *Beckenham*, &c. id.*Sandwich*, and *Ramsgate*, &c. id.*Isle of Thanet*, id.*Wight*, id. 958, 60.*Gravesend*, &c. id.*Rochester*, &c. id.

COURT OF REQUESTS ACTS, continued.

for sums not exceeding five pounds, *continued.*

in *Birmingham*, id. 95, 8.

Manchester, 957.

Manors of *Sheffield* and *Ecclesall*, id.

Kingston-upon-Hull, id.

for sums of larger amount ;

in *Bath*, &c. id. 958.

Bristol, &c. 957.

attorneys not in general subject to, 80.

plaintiffs, not within stat. 39 & 40 Geo. III. c. civ. § 10, pp. 80, 960.

causes excepted out of, 958, 9.

in *Southwark*, &c. 959.

persons excepted out of, 80, 960.

mode of taking advantage of, 516, 960, 61, 2.

pleas of, 644.

costs on. See tit. *Costs*.

COURT ROLLS, 802. See tit. *Inspecting Books*, &c.

motion to inspect, and take copies of, 485, 6 ; 486. (a.)

rule for inspecting, in C. P. 486, (a.) 594.

mandamus, to inspect, 594, 5.

CRIMINAL CASES,

certiorari in, when it lies, and when not, 400.

reading affidavits, and hearing counsel in, 507, 8 ; 860, 61.

not within statutes of amendments, 712.

costs for not proceeding to trial in, 758.

trial by *proviso* not allowed in, 761.

striking special jury in, 789.

new trial in, 911, 12.

CRIMINAL CONVERSATION, 68.

action for, 4.

declaration in, 442.

changing venue in, 604.

trial at bar in, 748.

damages in, 988, 4.

costs in, 4, (d.) 659, 60 ; 963.

CROFT,

ejectment will not lie for, without further description, 1191.

CROWN. See tit. *King*.**CROWN DEBTORS,**

not discharged by insolvent act, 895, 1066.

relief of, on stat. 7 Geo. IV. c. 57, § 75, pp. 1066, 7.

CROWN ROLLS, 728.**CURSITORS; 104.**

excepted out of stat. 28 Geo. II. c. 46, p. 62.

CUSTOM,

what, 443.

to issue summons and attachment at same time, bad, 92, 110.

declare against defendant in inferior court, before appearance, bad, 419.

CUSTOM HOUSE,

books of; 802.

inspecting, 593.

CUSTOMS;

avowry or cognizance for, 645.

CUSTOMS and BYE LAWS,

when and how discussed, on removal by *habeas corpus*, &c., 411.

CUSTOMS and EXCISE;

actions relating to, by whom brought, 519, 20.

against officers of;

limitation of, 20.

notice of, 30, 31.

where laid, 431.

bringing money into court in, 621.

pleading tender of amends, 646. (*a.*)

damages in, 892.

costs in, *id.* 968, 9; 988.

officers of, exempted from serving on juries, 784.

indictment, or prosecution, against officers of, 892.

fine on, *id.*

CUSTOMS and PRESCRIPTIONS, 443. (*e.*)**CUSTOS BREVIUM; See tit. *Officers.***

office and business of, in K. B. 43, 4; 1170, 1172.

C. P. 53, 1159, 1170, 1171, 2.

fees anciently payable to, in C. P. 53. (*e.*)

commissioners of treasury authorized to purchase office of, in C. P. 54.

to indorse on writ, the day and hour of filing it, 308.

D.**DAMAGE FEASANT,**

avowry or cognizance for; 645.

pleas in bar to, *id.*

DAMAGES,

what, 870.

costs, parcel of, 945.

how laid, in actions upon contract, 440.

trespass, 441, 888, 890, 91, 2.

case: 445.

general, *id.*

special, *id.* 446.

arrest for, after bankruptcy, 205, 6.

general, arrest not allowed for, 172.

cannot be brought into court, 620.

set-off, 664.

in actions real, 870.

mixed, *id.*

ejectment. See tit. *Ejectment.*

assize, and writs of entry, &c., *id.*

dower, *id.*

waste, *id.*

quare impedit, &c., *id.*

in personal actions:

how ascertained;

in general, 570, 870.

DAMAGES, continued.in personal actions, *continued.*how ascertained, *continued.*

on confession of the action, 559, &c. 870.

by reference to master or prothonotaries, in actions on
notes or bills, &c. 570, 71; 870.

when not allowed, 571, 2.

rule or order for, and proceedings thereon, 572, 3.

assessing by jury;

after interlocutory judgment, 570.

on writ of inquiry, 573, 581, 2.

judgment for, with plaintiff's assent, without inqui-
sition, 583.

on stat. 8 & 9 W. III. c. 11, § 6, pp. 1117, 1131, 2.

§ 8, pp. 583, &c. 879.

on demurrer to evidence, 575, 866.

verdict for plaintiff, 869.

nonsuit, or verdict for defendant, in *replevin*, id.

in other actions, id. 870.

award of jury process for, 721, 2, 3.

on several issues, in same cause, 717.

judgment by default as to part, or by some defendants,
and issue as to other part, or by other defendants,
894, 5.

when some defendants are acquitted, 895.

in actions upon contract, id.

of tort, id.

on demurrer to part, and issue on other part, 681, 2; 895.

some counts, and plea to others, on bills of
exchange, 895, 6.

when defendants sever, or join in pleading, 896.

on replication of subsequent demand and refusal, to plea of
tender, 622.

after bringing money into court, 627.

measure of:

in general, how treated of, 871.

regard must be had, in estimating, to nature and object of
action, id.

on contracts:

in *assumpsit* and covenant;

to pay money, id.

plaintiff may recover less than sum demand-
ed, 871.interest, when recoverable. See tit. *Interest*.

to do or forbear some other act, 875.

on personal contracts;

for breach of promise of marriage, id.

contracts relating to real property;

for sale of real estate, when title proves
defective, id.

not repairing premises, id. 876.

DAMAGES, continued.

in personal actions, on contracts, *continued.*

in *assumpsit* and covenant, *continued.*

contracts relating to personal property;
for not delivering goods, 876.

accepting goods, *id.*

on warranty of horse, *id.*

generally;

for liquidated damages, *id.* 878.

difference between penalty and liquidated
damages, &c. 876, 7, 8; 878.

remedy, when performance is secured by
penalty, 878.

when plaintiff proceeds for penalty, *id.*
general da-
mages, *id.*

in account, *id.* 879.

annuity, 879.

debt;

generally, *id.*

nominal damages, *id.*

on bond for performance of covenants, *id.*

to replace stock, *id.* 880.

of indemnity, 880.

judgment, 573, 880.

foreign, 880.

statute;

penal, by common informer, *id.*

remedial, by party grieved, *id.*

for escape of prisoner in execution, *id.*

scire facias, 881.

error, *id.*

for wrongs, independently of contract, *id.*

case, for consequential damages, *id.*

torts to persons,

generally, *id.*

individually, *id.*

for malicious prosecution, 882.

slandorous words, 581, 882.

evidence of truth of, 882, 3.

relatively;

crim con. 4, (*d.*) 883, 4.

debauching daughter, 884.

enticing away servant, *id.*

to real property, *id.*

disturbances and nuisances, 885.

diverting watercourse, *id.*

to personal property;

trover, for goods, *id.*

bill of exchange, *id.*

jewel, *id.*

title deeds, &c. *id.* 886.

DAMAGES, continued.

in personal actions, for wrongs, *continued.*

torts to personal property, *continued.*

trover, by assignees of bankrupt, against sheriff, 886.

against sheriff, &c. for escape, &c. ;
on mesne process, id.
final process, id.

detinue, id. 887.

replevin ;

for plaintiff, 887.

defendant, 574, 869, 887, 8 ; 931, 993.

trespass *vi et armis*, 888.

generally, id.

to persons ;

assault and battery, id.

mayhem, id.

false imprisonment, 889.

to real property ;

mesne profits, and costs in *ejectment*, id. 890.

to lands, 890.

houses, &c. id. 891.

to personal property, 891, 2.

against officers of customs, or excise, 892.

justices of peace, after conviction quashed, id. 893.

nominal ;

in debt, 879.

other actions, id. 886, 890.

contingent ;

on demurrer to evidence, 575, 866.

to part, and issue on other part, 681, 2 ; 717, 722,
869, 70.

single, 893.

double, or treble, 887, 8 ; 893, 4 ; 945.

excessive, or too small, 582, 909, 10 ; 909, (*f.*) 997.

entire, 894.

on bad or inconsistent counts, how rectified, id.

several, id.

mistake in, how cured, 896.

in penal action, on bad count, 894.

on judgment by default as to part, or by some defendants, and issue
as to other part, or by other defendants, id. 895.

when some defendants are acquitted, 895.

in actions upon contract, id.

of tort, id.

on demurrer to part, and issue on other part, id. 896.

when defendants sever, or join in pleading, 896.

writ of inquiry of. See tit. *Inquiry.*

omission of finding, when supplied by inquiry, 574, &c. 896.

setting off, on award, 838.

higher than laid in declaration, error, 896. (*k.*)

DAMAGES, continued.

in personal actions, *continued.*

remititur of part, 896.

in penal action, after error, 942.

increased, in action for mayhem, 870, 888, 896.

verdict security for, on new trial, 909.

miscalculation of, will not avoid judgment, 942.

in *scire facias*, 870, 881, 1132.

judgment for, reversed, 1179.

error, 881, 1180, 81.

on traversing return to *mandamus*, 949, 50.

DARREIN PRESENTMENT,

damages on writ of, 878.

DAY of *retorna brevium*, 107.**DAY BOOK,**

at judgment office, not evidence of judgment, 556, 943.

DAY RULES, 374.

form of, *id.* (c.)

when and how obtained, 374.

petition for, *id.* (c.)

effect of, 235, 374.

DEATH,

of plaintiff;

outlawry after, in C. P. 135, 142, 3.

in general, no cause for prisoner's discharge, 366, 371, 2; 1118.

when otherwise, 339, 40; 366.

no objection to discharge, on Lords' act, 376.

rule after, to compute principal and interest on bill, 571.

plea of, in abatement, 634.

after interlocutory and before final judgment, abates action for libel, 1117.

of defendant;

determines outlawry, 135, 144.

reversing outlawry on, 144.

pleading in Exchequer, *id.*

not a good return to *capias*, 308. (*h.*)

one defendant, effect of, after outlawry of another, 1117.

prisoner in execution, remedy after, 1031.

principal, before return of *ca. sa.* in what cases pleadable, 1129, 30.

staying proceedings on, 1130.

parties;

warrant of attorney in general countermanded by, 551.

effect of, on bringing money into court, 628.

feme covert, pending action, 763, 934, 1115.

to submission, determines power of arbitrators, 822, 3; 838, 933.

in what cases an abatement of suit, 932, &c. 1116, &c.

when judgment may be entered after, 551, 932, 3; 939.

execution after, of *fieri facias*, 1000.

elegit, 1034.

habere facias possessionem, 1118.

DEATH, continued.of parties, *continued.*

- scire facias* after, 1096, 7 ; 1106, 1116, &c.
in *ejectment*, 1249.
- when assignable for error, 1136, 1169.
- how assigned, 1169.
- when it abates writ of error, 1163.
- sheriff, during his office, 313, 14.
- bishop of *Durham*, 314.
- arbitrators, effect of, 823.
- chief-justice, affidavit necessary after, on moving for new trial, 914.
effect of, on writ of error, 1164.
- testator, need not be averred in *scire facias*, on judgment by executor, 1121.

DEBT,

action of, 3, 10, 11.

on simple contracts, 3, 1019.

specialties, 3.

records, *id.*

lies not, for arrears of annuity, charged on land, 4.

founded in *maleficio*, 3.

limitation of, 15.

original writ in, 102.

process in, 109, 128.

arrest in, 128, 171, 173.

outlawry in, 131.

declaration in, 438.

venue in, 429, 30.

variances between, and evidence, 434, 5. (*f.*)

particulars of demand in, 596, 7.

pleas in. See *tit. Pleas and Pleading.*

damages in, 879.

on bond ;

limitation in actions of, 18.

declaring in, when entered into by a wrong name, 447.

staying proceedings in, 541, &c.

changing venue in, 603, 4, 5.

pleadings in, 667, 688, 9.

for payment of money ;

interest in action on, 873, 4.

performance of covenants ;

particulars of breaches in, 597.

proceedings in, under stat. 8 & 9 W. III c. 11, § 8, p.
583, &c.suggestion of breaches, after judgment by default, &c.
id.

inquiry, writ of ; 573, 588, &c.

execution of, 585.

evidence on, *id.*

assigning breaches in declaration, or replication, 686, 7.

assessing damages, on trial or inquiry, 573, &c. 879.

judgment in, 585.

DEBT, continued.

on bond, *continued.*

for performance of covenants, *continued.*

scire facias in, 1108.

error, bail in, 1150, &c. 1155. *id.* (*p.*)

damages in, 879.

for not replacing stock, *id.* 880.

on indemnity bond, 880.

on bail bond. See tit. *Bail Bond.*

judgment,

for less than *five* pounds, 955.

residue, after part levied on *fi. fa.* 1019.

actions of, 367.

limitation in, 19.

arrest in. See tit. *Arrest.*

staying proceedings in, pending error, 531, 1145.

suing out execution in, pending error, 532, 1146.

interest recoverable in, 582, 874.

damages in, 880.

no waiver of lien created by judgment, 935. (*d.*)

suggesting *devastavit*, 1113.

bail in error in, 1152.

reversal of judgment in, 1179.

costs in, 487, 969.

on recognizance,

of bail, 283, 4; 1099, &c. 1132.

defendant cannot be arrested in, 173, 1099.

when it may be commenced, 1099.

staying proceedings in, pending error, 532, 3.

after render, 541, 2.

bail in error not required in, 1151, 2.

in nature of statute staple, 1085, 6.

on penal statutes:

when brought in superior courts, 517, 18.

at assizes, *id.*

damages in, 880.

on remedial statutes, 172, 3. See tit. *Tithes.*

damages in, 880.

under 40s. staying proceedings in action for, 516.

and costs, staying proceedings on payment of, 540, &c.

for rent, &c. staying proceedings in, 540, 41.

bringing money into court in, 619, 20.

error in, 1150.

foreign money, jury must find its value, 573.

escape, verdict in, 880.

not setting out tithes, 894, and see tit. *Tithes.*

poundage, 1039, 40.

on promissory note, &c. ;

bail in error not required in, 1151, 2.

judgment in, 568, 9; 931.

reversed as to one count, and affirmed as to another, 1179.

writ of inquiry in. See tit. *Inquiry.*

DEBT, continued.

damages in. See tit. *Damages*.

costs in. See tit. *Costs*.

DEBTORS,

in execution for small debts, when and how relieved, 386.

DEBTS,

provable under commission of bankrupt. See tit. *Bankrupt*.

plea of retainer, to satisfy, 644.

to king. See tit. *King*.

of record, 1044, 1050.

not of record, id. 1051.

found on writ of extent, or *diem clausit extremum*, 1044.

proceedings for recovery of, 1044, &c.

from what time lands are bound by, 1050, 51, 2; 1059.

assignment of, 1067.

to king's debtor;

what may be found, on extent in *chief*, 1056, 1058.
in *aid*, 1058.

when bound by *teste* of extent, 1056.

proceedings for recovery of, 1058, 1059, &c. 1068, 9.

DECEIT, action for, 5, 442.

breach in, 440.

DECLARATION,

what, 419, 425. (*m.*)

in ordinary cases, 419.

when to declare, id. 420.

against several defendants, 148, 9; 420, 446, 7.

in chief, 419, &c.

for what cause of action, 352, 450, 51.

in King's Bench;

time to declare, by bill, 419, 20, 21.

original, 421, &c.

further time, 423, 4.

motion for plaintiff to declare peremptorily, 424.

rule to declare, not necessary, 458.

in Common Pleas;

time to declare, 421, &c.

further time, 423, 4.

rule for, 423, 4.

non pros after, 424, 484.

rule to declare, 421, 2; 458.

peremptorily, 487, 8.

in *replevin*, 483.

consequences of not declaring in time, 421, 2.

non pros. See tit. *Non Pros*.

by the bye, 419.

in King's Bench, by bill, 424, 5.

original, 425.

Common Pleas, id.

indorsement on, id. 473.

by attorneys, on attachment of privilege, 321.

beginning of, id. (*a.*)

DECLARATION, *continued*.

- against attorneys, 321, &c.
 - beginning of, 323. (*k*.)
 - peers, and members of the House of Commons, 121.
 - breach in, *id*.
 - sheriffs, &c. 236, 445.
 - prisoners, in custody of sheriff, &c.; 341, 2, &c.
 - when and how delivered, 342, &c.
 - marshal, 353, 4.
 - warden, 354, 5, &c. 358, 9, 60.
- after outlawry, 140, (*f*) 422, 3.
 - in joint action, 423.
 - in Common Pleas, *id*.
 - reversal of outlawry, *id*.
- after removal by *certiorari*, or *habeas corpus*, 412, 13.
 - pone*, or *recordari*, &c., 417, 18.
- parts of;
 - title, 425, 6, 7; 720.
 - venue. See *tit. Venue*.
 - commencement;
 - in King's Bench, by bill, 432.
 - original, 433.
 - Common Pleas, *id*.
 - Exchequer, 432. (*l*.)
 - designation of parties, 433.
- in actions upon contracts, 433, &c.
 - contract, 435.
 - consideration, *id*. 436.
 - inducement, 436, 7.
 - averments;
 - what and when necessary, *id*.
 - how made, 438.
 - of performance of conditions precedent, *id*. 439.
 - excuse for non-performance, *id*.
 - facts necessary to ascertain plaintiff's demand, 439.
 - of request, 439.
 - notice, *id*. 440.
 - existence of lives, 437. (*a*.)
 - breach, 440.
 - damages, *id*.
- in actions for wrongs:
 - injury complained of;
 - immediate, *id*.
 - consequential, *id*. 441, 2.
 - inducement, in actions for malfeasance, 441, 2.
 - affecting persons, 442.
 - real property, 442, &c.
 - personal property, 442, 445.
 - in actions for nonfeasance, 445.
 - misfeasance, *id*.
 - against carriers, *id*. 620. (*m*.)
- damages, in trespass, 441.

DECLARATION, *continued*.in actions for wrongs, *continued*.

damages, in case, 445.

conclusion, 432, (*l.*) 446.

pledges, 446.

general requisites or qualities of, *id.*correspondence with process, *id.* 450, 51.

as to parties, 446, 7.

christian and surnames, 447, 8, 9; 636.

character in which they sue, or are sued, 450.

cause of action, *id.* 451.venue, 154, 292; and see tit. *Venue*.

precision and brevity, 451.

against one of several defendants, on bailable process, irregular, 420,
446, 7.

defects in;

how taken advantage of, 451.

cured, *id.*amendment of. See tit. *Amendment*.copy of, by whom made, *id.*

how written, 452.

paying for, *id.* 456, 7; 990.delivering, or filing, *absolutely*, 419, 451, 2, 3.

in what cases, 452, 3.

at what time, 419, 452, 3; 499, 500.

to or with whom, in K. B. 451, 2, 3.

C. P., *id.*

Exchequer, 454, 5.

filing, or delivering, *de bene esse*;

in what cases, 419, 20; 453, &c.

at what time, 419, 20; 453, &c. 499, 500.

in King's Bench, 453.

Common Pleas, *id.* 454.

Exchequer, 454, 5.

joint action, 420.

in C. P. 456, *id.* (*d.*)

on process returnable the last return, 453.

indorsement on declaration, when so filed or delivered, 425, 457, 8.

notice of. See tit. *Notice*.to plead to, 473, 4; and see tit. *Notice*.

filed, good only from time of notice, 456.

costs of, when allowed on staying proceedings, 456.

in *ejectment*, 1203, 4, &c. 1230, 31; and see tit. *Ejectment*.

copies of, how written, 1206.

amendment of, 1207.

on vacant possession, 1201, 2, 3.

in county court, 417. (*k.*)

causes removed from inferior court, 417.

title of, *id.*

demand of, 418.

irregularity in delivering, filing, or notice of. See tit. *Irregularity*.

DECLARATION, continued.

- striking out superfluous counts or matter in, 616, 17, 18.
- how connected in evidence, with writ, 163.
- evidence of commencement of action, 335.
- variances between, and evidence, 534, 5. (f.)
- error in copy of, no ground for arresting judgment, 918.
- in *scire facias*. See tit. *Scire facias*.

DECREE,

- of court of equity, for payment of money, disobedience to, an act of bankruptcy, 117.
- court of great sessions, enforcing obedience to, 401, (b.) 995. (g.)

DEDIMUS POTESTATUM, 105, (f.) 328.**DEEDS, &c.**

- must be delivered up by attorney, on satisfaction of his lien, 87.
- delivering up, on payment of mortgage money, 1235, 6.
- an *oyer*. See tit. *Oyer*.
- how set out, 443. (d.)
- inserting at head of plea, 589.
- praying enrolment of, in replication, id.
- inspection and copy of, 589, 90, 91, 2.
- grantor of annuity, entitled to copy of, 591.
- compelling production of, for various purposes, 487, 590, &c. 802, 3.
- to lead uses, amendment by, 699, &c.
- enrolment of, 729.
- enrolled, evidence of, 801, 2.
- evidence of;
 - when in possession of party, 802.
 - adversary, id.
 - third person, id. 806.
- noticia to produce, 802, &c.; and see tit. *Notice*.
- evidence on, of execution, 804.
- cannot be taken in execution, 1003.

DEFAMATION. See tit. Words.**DEFAULT. See tit. Judgments by Default.**

- at *Nisi Prius*, 778.
- repleader not allowed after, 921.

DEFEAZANCE,

- on warrant of attorney, 545, 6.
- when necessary, 546.
- contents of, id.
- want of, does not vitiate warrant of attorney, id.
- how stated, in memorial of annuity, id.
- does not require a separate stamp, 547.
- or *cognovit*, to be written on same paper or parchment, before filing, 545, 6; 555, 6; 561.

DEFECT OF FENCES,

- plea in bar for, in *replevin*, 645.
- of, in *trespass*, 646.

DEFENCE,

- when and how made, 637.

DEMAND,

- when necessary, for completing cause of action, 28.

DEMAND, continued.

when necessary, for proceeding on warrant of attorney, 546.

of perusal and copy of warrant, 33, &c.

evidence of service of, 35.

declaration, 421, 2; 458, 9; 483, 4; 499, 500.

on removal by *pone*, or *recordari*, &c. 417, 18.

not necessary in K. B. by *original*, 458.

plea;

what, 475.

in what cases necessary, and in what not, 354, 5; 347, 359, 60;
469, 475, 6, 7; 483, 4.

on whom made, in country causes, in C. P. 476.

when and how made, *id.* 477.

may be made at time of delivering declaration, in K. B. 359, 476.

aliter, in C. P. 476.

when a waiver of bail, or justification, 255, 476.

when not, 476.

at what time judgment may be signed thereon, in K. B. 477.
C. P. *id.*

in *scire facias*, 1127.

replication, &c. 483, 4; 676, 693.

surrejoinder, &c. 693.

possession, on stat. 1 Geo. IV. c. 87, § 1, p. 1209.

money on award, 836, 7.

by whom and how made, *id.*

costs, 73, 758, *id.* (o.) 990.

rent, in what cases necessary, and how made;

at common law, 1200.

by stat. 4 Geo. II. c. 28, *id.*

DEMI MARK,

on tender of, tenant must begin, on trial of writ of right, 748, 859.

DEMISE.

entry under, how pleaded, 442. (b.)

in *ejectment*. See tit. *Ejectment*.

on vacant possession, 121, 2; 1205.

how laid, 1205, 6.

adding, 1206, 7.

avowry or cognizance under, 645.

DEMURRER BOOKS. See next title.**DEMURRERS,**

what, 694.

history of, *id.* 695.

to the whole or part of declaration, 694.

pleas, replications, &c.; 464, 694.

puis darrein continuance, where to be argued, 851.

extents, 1072, 1079.

pleas or replications to, 1079.

waiving, *id.* 1080.

general, 694.

what may be taken advantage of under, 695, 927.

cannot be waived, in K. B. 673, 696.

withdrawn, in C. P. after trial has been lost, 671.

DEMURRERS, *continued.*

general, *continued.*

allowed to be withdrawn, and general issue pleaded, in C. P. id. 672.

making up issue on, 717, 18.

special, 694.

to plea in abatement, unnecessary, 638, 695.

allowed to be withdrawn, 638.

of *misnomer*, 447.

for duplicity, 694.

striking out, and giving general demurrer, 671, 2; 696.

rule to abide by, 696.

arguments on, 504, 5.

in *scire facias*. See tit. *Scire Facias*.

error, 1173, &c. and see tit. *Error*.

must be signed by counsel, or serjeant, 696.

delivering, or filing, in K. B. id.

C. P. id.

punishment for signing fictitious name to, 89.

when considered as issuable pleas, 472, 3; 563.

notice of inquiry on, in C. P., 578.

Exchequer, id.

amendments after, 709, 10.

demurrer books, 717, 18; 739.

how concluded, 725.

by whom made up, 717, 18.

when returned, 725.

after paper-book, 726.

entering of record, 734, &c.

by whom, and when delivered to judges, in K. B., 504, 738.

C. P. 504, 5; 739.

Exchequer, 739, 40.

names of counsel, or serjeants, to be inserted in, 738, 9.

exceptions to be marked in margin, 505, 738.

number roll, and day of argument, to be set down on, in C. P. 738, 9.

paying for copies of, 739.

proceeding to argument on, 727, 736.

when there are several issues, in law and in fact, 736, &c.

court may postpone trial of issues in fact, 736, 7.

assessing contingent damages, 869, 70; 895.

in King's Bench:

concilium, 484, 5.

motion and rule for, 736.

service of rule, when necessary, and when not, id.

signing, considered as a step in the cause, id.

proceedings on. See tit. *Motions*.

entering cause for argument, 737, 8.

notice of, need not be given, id.

motion for judgment, 486, 738.

when counsel are absent, 508, 738.

DEMURRERS, continued.proceeding to argument on, *continued.*

in Common Pleas :

motion and rule for *concilium*, 738.drawing up, and service of rule, *id.*

setting down cause for argument, 504, 5 ; 738.

days appointed for arguing, *id.* 739.

in Exchequer, 499, 739, 40.

judgment on. See *tit. Judgments.*

motion in arrest of, not allowed after, 918.

damages on, 895.

costs on, 654, 5 ; 659, 60 ; 739, 949, 972, 982.

DEMURRERS to EVIDENCE,

what, 865.

how they arise, 862.

after bringing money into court, 625.

do not apply to the pleadings, 865.

not allowed in the king's case, *id.*when the opposite party must, or may join in demurrer, *id.* 866.upon evidence in writing, *id.*- parole evidence, *id.*

of a circumstantial nature, 866.

construction of, *id.*under control of court or judge, *id.* 867.

subject to appeal, 866.

how taken and returned, *id.*

assessing damages on, 575, 867.

refusal of, good ground for bill of exceptions, 862, 866.

on extents, 1080.

DEPARTURE, in pleading. See tit. Pleas and Pleading.**DEPOSIT,**of money in sheriff's hands, under stat. 43 Geo. III. c. 46, § 2, pp. 221,
227, 8, 9 ; 308.

paying it into court, 227, 8.

to plaintiff, 228.

repaying it to defendant, 227, 8 ; 488.

repaying it to bail, &c. 288.

sheriff not entitled to poundage on, 228, 9 ; 1040.

money in court, in lieu of special bail, 244, 5.

DEPOSITIONS,

when conclusive, in actions by assignees, for debt of bankrupt, 669.

in Chancery, 801.

evidence of, *id.*

of witnesses, on interrogatories, 810, &c.

evidence of, 811, 12.

on charge of felony, 593.

DEPUTY,

for issuing process, and taking affidavits, 179.

DESCENT;cast, bar to *ejectment*, 1194.**DETINUE,**

action of, 5, 11, 12, 104, 337.

DETINUE, continued.

action of, *continued.*

limitation of, 15.

original writ in, 102, 104.

process in, 109, 128.

outlawry in, 131.

affidavit to hold to bail in, 171, 2.

declaration in, 433.

pleas in, 645, 652; and see tit. *Pleas and Pleading.*

protestando in, 687, 8.

inquiry of damages in, 574.

evidence in, 5.

damages in, 886, 7.

judgment in, 931.

costs in, 977, 8.

execution in, 993.

DEVASTAVIT, 1018, 1025, 1113, 14.**DEVISEE,**

privileged from arrest, 193, 4.

pleas by, 644, 5.

judgment against, on stat. 3 W. & M. c. 14, p. 938.

ejectment by, 1190.

DIEM CLAUSIT EXTREMUM;

writ of, when it lies, and when not, 1057, 8; 1091.

form of, 1057.

how tested, *id.*

affidavit of danger not necessary for obtaining, 1058.

proceedings for recovery of debts found on, 1044, 1091.

DIES DATUS, 421, 678.**DIES NON JURIDICUS, 142, 3; 260.**

writ returnable on, altogether void, 161.

DILAPIDATIONS;

money cannot be brought into court, in action for, 620.

DILATORY PLEAS. See tit. *Pleas and Pleading.***DIMINUTION. See tit. *Error.*****DIRECTION of PROCESS. See tit. *Process.*****DISCHARGE,**

of insolvent debtors. See tit. *Insolvent Debtors.*

pleas in, before breach, 643.

after breach;

in actions upon contracts, *id.* 644, 646, 7.

for wrongs, 646.

matters in, when pleaded or given in evidence, *id.* 647, 651, 2.

DISCLAIMER,

allowed to be entered by defendant, in *quo warranto*, without costs, 949.

DISCONTINUANCE,

of estate tail, &c. a bar to *ejectment*, 1194.

process. See tit. *Continuance.*

plaint in county, no objection to removal by *recordari*, &c. 416.

pleading, 284, 368, 660, 678, 696.

rule for, when allowed, and when not, 484, 679, 80.

in Common Pleas, 679, 80.

DISCONTINUANCE, continued.

of pleading, *continued.*

rule for, when allowed, and when not, *continued.*

service of, without appointment to tax costs, no discontinuance, 680.

without, or upon payment of costs, 679.

from whom obtained, *id.* 680.

not allowed to avowant, in *replevin*, 679.

proceedings on, 680.

when obtained by unfair practice, discharged, 679.

taxing costs on, to what time it relates, *id.*

attachment lies not, for non-payment of costs, 680.

arrest after, 174, 5.

evidence of, in action for malicious arrest, 680, 81.

aided, by statute of jeofails, 924, 942.

cured, by appearance of party, 924.

judgment on, 930.

to what time it relates, 680.

costs on, 679, 80, 81; 915, 16; 981, 2; 989.

of writ of error, 1164, 5.

DISCOVERY, 592.**DISQUALIFICATIONS,**

of aliens, &c. to serve on juries, 783.

DISSEISINS: double or treble damages on, 870. (*h.*)

DISSENTING MINISTERS,

when exempted from serving on juries, 784.

DISTRESS, 1003, 1014, 15; 1054.

for poor's rate, on goods of ambassador's servant, 191.

rent, may be made through a window, 1012, 13.

of goods, under fraudulent execution, 1005.

outlawry, 1015.

bankruptcy, *id.*

goods under, cannot be taken in execution, 1003.

how far available on bankruptcy, or insolvency, 1015.

when postponed to extent, 1054.

under act of parliament, in nature of execution, 528. (*f.*)

avowry or cognizance on, in *replevin*, 645.

justification on, in *trespass*, *id.*

at common law, *id.*

by act of parliament, 645.

plea of former, for same cause, 646.

costs in action for, 946, 976, 7; 988.

DISTRINGAS,

by original. See *tit. Process.*

costs on, 111, 119.

in Exchequer, on *venire*, 155, 6.

taking partnership effects under, 112.

to compel appearance, on removal by *pone*, or *recordari*, &c. 417.

for bringing in jury. See *tit. Jury Process.*

against bishop of *Durham*, for not returning writ, 312. (*i.*)

constable of *Dover* castle, for not bringing in body, 312, 13. (*m.*)

bailiff of liberty, 309, 313. (*h.*)

- DISTRINGAS**, *continued*.
 against late sheriff, 312, 313.
 to compel him to sell goods, taken on *feri facias*, 1021.
 issues, on *alias*, id. 1022.
tenere curiam, 1187.
- DISTURBANCE**, action for, 4.
 declaration in, 444.
 variance between, and evidence, 434, 5. (f.)
- DOCKET**,
 of numbers for rolls, in K. B., 728, &c.
 common, in C. P., 731.
- DOCKET ROLL**, Id.
 antiquity of, in C. P. id. (A.)
- DOCKETING ISSUES**, 731.
 Judgments. See tit. *Judgments*.
 Rolls, in K. B., 162, 731.
 C. P. id.
- DOCKETS**,
 clerk of, in K. B., 43.
 C. P., 45, 51, 898.
- DOCTORS**,
 of civil law, when exempted from serving on juries, 784.
- DOGS**,
 justification in action for killing, 645.
- DOMESDAY BOOK**, 802.
- DOORS**;
 breaking open, under *feri facias*, 1012.
- DOUBLE or TREBLE COSTS**. See tit. *Costs*.
 DAMAGES. See tit. *Damages*.
- DOUBLE PLEAS**. See tit. *Pleas and Pleading*.
 costs of, 658, &c.
- DOUBLE RENT**,
 avowry or cognizance for, on stat. 11 Geo. II. c. 19, p. 645.
- DOWER**,
 pleas in, 655.
 damages in, 878.
 costs in, 945.
 bail in error in, 1152, 3.
- DUCHY CHAMBER of LANCASTER**,
 filing *affidavit* in, of execution of articles of clerkship, 64. (f.)
- DUPLICITY**, in pleading, 661, 694, 1174.
- DURESS**,
 plea of, 643.
 not formerly signed, in C. P., 672.
 when pleaded, or given in evidence, 650.
- DURHAM**,
 certiorari lies not to remove record from, for rendering in discharge of
 bail, 286.
 distringas against bishop of, for not returning writ, 312. (i)
 effect of bishop's death, 314.
 landlord not entitled to year's rent, on *pone per vadios* in, 1014.

DURHAM, continued.

- mode of declaring in *Middlesex*, on recognizance taken before commissioner in, 1128. (b.)
- quashing writ of error, &c. on judgment of C. P. in, 1147.

E.**EAST INDIA COMPANY,**

- books of, 802.
- inspecting, 593.

EAST INDIES,

- mandamus* for examining witnesses in, 813, 14; 813. (g.)

ECCLESIASTICAL COURTS,

- have no jurisdiction over trusts, 378. (c.)
- proceedings in, 801.

EJECTMENT,

- action of,
 - what and when it lies, 1189.
 - origin of; and what may be recovered in, id. 1190.
 - by whom brought, 1190.
 - against whom, id.
 - for what things it will lie, id.
 - corporeal hereditaments:
 - messuages, &c. id. 1191.
 - lands, &c. 1191.
 - how described, id.
 - manor, id. 1192.
 - rectory, 1192.
 - church, or chapel, &c. id.
 - incorporeal hereditaments:
 - tithes, id.
 - common appendant, or appurtenant, 1193.
 - several fishery, &c. id.
- for what not;
 - corporeal hereditaments:
 - tenement, or close, &c. without further description, 1191.
 - water-course, or rivulet, id.
 - incorporeal hereditaments:
 - rent, 1193.
 - advowson, id.
 - common in gross, or *pur cause de vicinage*, id.
 - pannage, 1193.
 - liberty of digging for metals, id.
- title* necessary to support it;
 - legal estate, 1193, 4.
 - right of entry, 1194, 5.
 - must be immediate, 1194.
 - not assignable, id. 1195.
 - taken away by discontinuance of estate tail, &c., 1194.
 - descent cast, id.
 - statute of limitations, id. 1195, 6.

EJECTMENT, continued.**action of, continued.**

lies not by insolvent debtor, after assignment of term to provisional assignee, 889.

against vendor of term, after *feri facias* set aside for irregularity, 1032.

limitation of, 1195.

by stat. 21 *Jac.* I. c. 16, § 1, id.

adverse possession, a positive title, id.

how negatived, id. 1196.

when parties are under disability, 1196.

after *elegit*, 1036, 7.

remedy by *entry*, without suit, 1196.

actual entry, when formerly necessary, but now dispensed with, id. 1197.

to seal lease, for trying title, id.

on *proviso* of re-entry, for non-payment of rent, 1197.

at common law, id.

by stat. 4 Geo. II. c. 28, § 2, id.

provisions and objects of this statute, id. 1198.

actual entry, when still necessary,

to avoid fine, 1197, 8; 1204.

on vacant possession, 1198, 1201, 1204.

in inferior court, 1198, 1201.

by joint tenant, or tenant in common, 1198.

by whom made, id. 1199.

how made, 1199.

actual entry, when not necessary, 1203.

demand of rent, 1200.

in what cases necessary, and how made,

at common law, id.

by stat. 4 Geo. II. c. 28, id.

ancient mode of proceeding in, 1200, 1201.

on vacant possession, 1201.

actual entry not necessary, id.

when not maintainable, id.

lease, 1201.

power of attorney to execute, id.

attorney must not be lessee, id.

entry and ouster of lessee, id.

declaration, id. 1202.

demise in, 1202.

delivery of, 1201, 2.

notice to appear and plead to, 1202.

motion and affidavit for judgment, in K. B. id.

unnecessary in C. P. id.

rule for judgment, in K. B. 1202.

taking from office, id.

third person not admitted to defend. id.

in inferior court, 1198, 1204.

in what cases still necessary, id.

present mode of proceeding in, 1202, 8.

EJECTMENT, continued.action of, *continued.**present* mode of proceeding in, *continued.*

in general:

origin and nature of, 1203.

actual entry, &c. not necessary, id.

declaration and notice to appear, id.

consequences of non-appearance, id.

consent rule, id. 1204.

against *casual* ejector, in ordinary cases, 1204.*declaration*, 1204, &c.

considered as first process, 1204.

title of, id.

venue in, 1205.

by original writ or bill, id.

commencement of, 433, 1205.

demises in, 1205.

when to be laid, in general, id.

after entry to avoid fine, &c., id.

by tenants in common, id. 1206.

joint tenants, or coparceners, id.

party, without authority, 1206.

assignees of bankrupt, without their permission, id.

adding, id. 1207.

enlarging term of, 1207.

entry and ouster, 1206.

copies of, how written, id.

amendment of, id. 1207.

notice for tenant to appear, and be made defendant, &c.
1204, 1207.

by whom given, 1207.

to whom, and how directed, id. 1208.

when there are several tenants, 1208.

when to appear, id.

where, id.

in K. B. id. 1209.

C. P. 1209.

Exchequer, id.

amending, 1208.

service of declaration and notice;

in general, 1209, 10.

on whom, 1210.

how, id.

when, id.

on *Sunday*, id.

where, id.

on wife, id.

when husband is abroad, id.

when there are several tenants, id. 1211.

on relation, or servant, &c. 1211, 12, 13, 14.

when tenant, or his wife, cannot be met with, 1211.

EJECTMENT, continued.

action of, *present mode of proceeding in, continued.*

against *service of declaration, and notice, continued.*
subsequent acknowledgment, 1211.

perfect or imperfect, *id.*

when tenant resides abroad, *id.*

in case of tenant's illness, *id.* 1212.

lunacy, 1212.

death, *id.*

on churchwardens and overseers, *id.*

chapel-wardens, *id.*

clerk of public body, *id.*

attorney, 1212.

servant, &c. having charge of premises, 1212, 13.

person appointed by court of Chancery, to manage
infant's estate, 1213.

when tenant, or his wife, refuses to accept declaration,
id.

absconds, or keeps out of the way, to avoid
being served, 1214.

no house or building on premises, or they are shut
up, *id.* 1215.

notice of, to landlord, 1228.

affidavit of service of declaration, and notice, 1215, &c.

by whom made, 1215.

title of, *id.*

jurat of, id.

contents of;

in general, *id.*

when served on tenant, *id.*

explanation of notice, *id.* 1216.

when served on wife, 1216.

several tenants, *id.* 1217.

relation, or servant, &c. 1212, 13,
14; 1217.

when tenant, or his wife, cannot be met with, 1217.

subsequent acknowledgment, *id.*

when tenant, or his wife, refuses to accept declaration,
id. 1217.

absconds, or keeps out of the way, to
avoid being served, *id.*

supplemental, 1216, 1218.

motion for judgment, 489, 1218.

what, 1218.

when made, *id.*

in town causes, *id.*

in K. B. *id.*

C. P. *id.*

Exchequer, 1220.

in country causes, 1218, 19.

when service of declaration is out of the common way,
1219.

EJECTMENT, continued.

action of, *present mode of proceeding in, continued.*

against *motion* for judgment, *continued.*

rule that service on relation, or servant, &c.
may be deemed good service, 489, 1213,
1219, 20.

history of, 1219.

upon whom, and how granted, id.
service of, 1213, 14, 15; 1219.

rule for judgment, 489, 1219, 20, 21.

granting or refusing, 1219.

when absolute in first instance, id. 1220.

form of, 1220.

in K. B. id.

C. P. id.

when there are several tenants, id.

time for appearance on;

in K. B. 1218, 1220, 21.

C. P. 1220, 21.

in town causes, 1220.

country causes, id. 1221.

in Exchequer, id.

book of rules delivered out, 1221.

when taken away, id.

consequence of not taking away, id.

judgment by default, 1224.

when and how signed, id.

common bail must first be filed for casual ejector, by
bill, in K. B. id.

unnecessary to enter appearance for him by *original*,
in K. B. or C. P. 1224.

give rule to plead, id.

sue out bill of *Middlesex*, &c. id.

setting aside for irregularity, 489, 90; 1224.

judgment by default, against casual ejector:

setting aside, when regular, upon affidavit of merits, and pay-
ment of costs, 490, 1244, 5.

by *landlord* against *tenant*,

on stat. 4 Geo. II. c. 28, § 2, pp. 1197, 8.

provisions and objects of this statute, id.

when landlord cannot proceed thereon, 1200, 1201.

service of declaration, 1197, 1200.

affidavit of, 1217, 18.

rule for judgment, 1219.

on stat. 1 Geo. IV. c. 87, pp. 1209, 1221, 2, 3.

to what cases it extends, and to what not, 1222, 3.

mode of proceeding thereon, 1223.

demand of possession, 1209, 1221, 1223.

notice to appear, and find bail, &c.; 1204, 1209.

by whom signed, 1209.

additional to ordinary notice, id.

form of, id.

EJECTMENT, *continued.*

action of, *present mode of proceeding in, continued.*

by landlord against tenant, *continued.*

affidavit of service of declaration, and notices, 1221.

production and proof of execution of lease, or agreement, &c., id. 1223.

motion, and rule *nisi*, to give undertaking, and enter into recognizance, id.

affidavit of service of rule *nisi*, 1222, 3.

rule absolute thereon, id.

undertaking to give judgment of preceding term, id.

when to be given, 1223.

usually inserted in consent rule, id.

recognizance to pay costs and damages, 1222, 3.

before whom, and how taken, 1222.

proceedings thereon, id.

in *Wales*, and counties palatine, 1209, 1221, 2.

not to prejudice other remedies, 1222.

appearance ;

by tenant, 1224, 1225, &c.

consent rule, in K. B. 490, 1224, 1225, 6, 7.

C. P. id.

Exchequer, id.

agreement for, 1226, 7 ; 1230.

form of, 1225.

history of, id. 1226.

must specify premises, 1226.

operation and effect of, id.

how filled up, id.

title of, id.

for the whole, or part of premises, 1227.

when there are several tenants, id.

by landlord, 1224, 1227, &c.

before, and on stat. 11 Geo. II. c. 19, pp. 1227, 8.

who may or may not defend thereon, 1228, 9.

motion for, and rule to defend, with or without tenant, 490, 1229.

when made, 1229.

entering into consent rule, &c. 1230.

proceedings on, by tenant or landlord.

filing common bail, or entering appearance, 1227, 1230.

rule to confess lease and entry only, 490, 1227.

proceedings on, by lessor of plaintiff,

searching for consent rule or agreement, 1230.

by lessor of plaintiff, on appearance ;

drawing up rule, 1230.

removal of, from inferior court, 398.

courts of great sessions in *Wales*, 399.

declaration, against tenant, &c. 1204, &c. 1230, 31.

plea, to jurisdiction, 630, 31.

of not guilty, 1227, 1230, 31.

rule to reply, 1231.

EJECTMENT, *continued*.

present mode of proceeding, in action of, *continued*.

nonpros, for not replying, 1231.

costs on, *id*.

summonses and *motions*, after appearance, and before trial, *id*.

calling for account of lessor's residence, *id*.

particular of premises, for which notice is brought, or
defended, *id*.

breaches of covenant, 600, 1231, 2.

consolidating ejectments, 1232.

staying proceedings in ;

when two actions are pending for same premises, in dif-
ferent courts, *id*.

many ejectments are brought against several tenants,
for different premises, on same demise, *id*.
for refusing accounts of lessor of plaintiff's residence,
1231.

until security be given for costs, *id*. 1232.

when lessor of plaintiff is an infant, resident abroad,
or dead, 1232.

in second *ejectment*, until costs are paid of former one,
on same title, *id*. 1233.

pending error, 1234.

on payment of rent, &c. on stat. 4 Geo. II. c. 28, § 4,
id. 1235.

mortgage money, &c. on stat. 7 Geo. II. c.
20, § 1, pp. 1235, 6.

on stat. 1 Geo. IV. c. 87, § 3. pp. 1244, 5 ; 1258.

setting aside release, by nominal plaintiff, or his lessor, 848, 1231,
1236.

retraxit, and *cognovit* by tenant, 1231, 1236.

issue in, 1236.

delivery of, *id*.

of what term and how made up, 1236.

when there are several tenants, who plead separately, *id*.

trial in ;

notice of, *id*.

costs for not proceeding to, *id*.

by *proviso*, *id*.

judgment as in case of nonsuit, *id*.

putting off, *id*.

record of *nisi prius*, *id*.

jury process, *id*.

subpoena, *id*.

at bar, 1237.

in what cases grantable, and in what not, *id*.

when moved for, *id*.

on what terms granted, *id*.

at *nisi prius*, *id*.

award in, good, though it do not find in terms any cause of action, 832.

nonsuit, for not confessing lease, &c. 1237, 8.

EJECTMENT, continued.

present mode of proceeding, in action of, *continued.*

when there are several defendants, some of whom confess, and some not, 1238.

on stat. 1 Geo. IV. c. 87, § 2, *id.*

when defendant appears at trial, and confesses lease, &c. *id.*

evidence;

in general, *id.*

in action by assignee of insolvent debtor, 388.

on stat. 1 Geo. IV. c. 87, § 2, p. 1239.

elegit, 1037.

hearing counsel, 507, 1238.

when lessor's counsel begins, and has the reply, and when not, 1238.

nonsuit, on merits, *id.*

verdict, *id.*

general or special, *id.*

special, how drawn, *id.* 1239.

entry of, according to judge's notes, 1239.

damages in;

in general, merely nominal, *id.*

by stat. 1 Geo. IV. c. 87, § 3, *id.*

in action for secreting *ejectment*, 987, 1228. (*a.*)

postea in, 1237, 8, 9.

rule for judgment, after verdict, in K. B. 1239, 40.

practice in C. P. 1240.

new trial in, *id.*

judgment in, *id.*

for plaintiff, what, *id.*

against whom, and on what grounds, *id.*

when signed, *id.*

in case of vacant possession, *id.*

against casual ejector, for non-appearance, *id.*

remittitur damna, *id.*

on nonsuit, for not confessing lease, &c. in C. P. *id.*

K. B. *id.*

verdict for plaintiff, *id.* 1241.

for defendant, what, 1241.

on what grounds, *id.*

when and how signed, *id.*

costs in;

of plaintiff, *id.*

defendant, 1198, 1241.

on *nonpros*, for not replying, 1231.

for not proceeding to trial, 1236.

double, on stat. 1 Geo. IV. c. 87, § 6, p. 988.

when one of several defendants is acquitted, 1241.

payment of, or liability for, when there are several defendants, *id.*

means of recovering, *id.*

of lessor of plaintiff, *id.*

EJECTMENT, continued.

present mode of proceeding, in action of, *continued.*

costs in, means of recovering, *continued.*

after judgment against casual ejector, for non-appearance,
1241, 2.

when tenant does not confess lease, &c. 1242.

on verdict and judgment against tenant, *id.*

of defendant, in K. B. *id.*

C. P. *id.* 1243.

Exchequer, 1243.

after death of lessor of plaintiff, *id.*

prochein ami of infant, *id.*

baron, *id.*

when lessor of plaintiff is a peer, *id.*

execution in ;

for plaintiff, in general, what, 1243.

after judgment against casual ejector, *id.*

verdict and judgment against tenant or landlord,
id. 1244.

cannot be had for defendant's costs, *id.*

by *habere facias possessionem*. See tit. *Habere facias possessionem*.
staying, after verdict by landlord against tenant, on stat. 1 Geo. IV.

c. 87, § 2, 1244, 5.

application for leave to take out, against casual ejector, for land-
lord's not confessing lease, &c. 1245.

unnecessary, after verdict against landlord, *id.*

mode of delivering possession on. See tit. *Habere facias posses-
sionem*.

remedy for taking more than lessor is entitled to, 1246, 7.

disturbance in giving possession, &c. See tit. *Habere
facias possessionem*.

restoring possession of premises improperly delivered, 490, 1246, 7.
poundage on, 1248.

scire facias in ;

after year and day, *id.* 1249.

in general, *id.*

against tertenant, after judgment by default against
casual ejector, 1249.

feme sole, who marries, 1011, 1244, 1249.

after death of original parties, 1249.

lessor of plaintiff, *id.*

one of several plaintiffs, *id.*

real defendant, *id.*

must be again tertenants, *id.*

error in ;

by whom, and when it lies, *id.* 1250.

when not, *id.*

death of nominal plaintiff, not assignable, *id.*

into what court, *id.*

when issued, and returnable. *id.* 1251.

how far a *supersedeas* of execution, *id.*

when writ of possession sued out, without taxing costs, *id.*

EJECTMENT, *continued.*action of, *continued.*error in, *continued.*

bail in;

by stat. 16 & 17 Car. II. c. 8, § 3, *id.*

writ to inquire of mesne profits, 1153, 1251, 2.

rule for restraining waste, pending error, 1252.

recognizance of, by whom entered into, *id.*in what sums, in K. B. *id.*C. P. *id.* 1253.

Exchequer, 1253.

on stat. 1 Geo. IV. c. 87; how discharged, *id.*

notice and examination of, 1252, 3.

when not chargeable for mesne profits, 1253.

subsequent proceedings, *id.***ELECTION**, of **ACTION**, 9, 10.

to proceed under commission of bankrupt, 202, 3.

ELEGIT,

what, 993, 1033, &c.

history of, 1033. (*e.*)

when it lies, 1033.

against whom, *id.* 1034, 1089.

after a year, 1104.

in different counties, 1034.

upon several judgments, 936.

for the residue, 1019.

may be executed after defendant's death, 1034.

necessary, for redeeming mortgaged estate, 1036.

proceedings under;

against goods, 1033, 4; 1086.

lands, 1033, 4, 5; 1087.

in trust, 1035, 6.

terms for years, 1036.

on several judgments, 936, 1035.

notice of executing, unnecessary, 1036.

inquisition and return, *id.*delivery of moiety, *id.* 1037.entry on, *id.**ejectment*, 1037, 1190.

evidence in, 1037.

further process on, 1036, 7.

after eviction, 1037, 1087, 8.

interest allowed on, in equity, 1037.

mode of regaining possession, when judgment is satisfied, 1037, 8.

creditor by, when entitled to priority against the crown, 1052.

poundage on executing, 1039.

extent under, when pleadable, 1130.

ELISORS, 151, 314, 780.**ELONGATA**,

return of, 1038.

ELY, Isle of;*certiorari* to, 398.

ELY, Isle of, *continued*.

certiorari to, *continued*.

indorsement on, 398. (*m.*)

process into, how directed, 152, 998. (*e*)

EMBLEMENTS,

justification under right of entry, to take, 646.

ENGINES,

action against hundred, for destroying, 122.

ENLARGED RULES, 502.

ENROLMENT,

of lease, when not evidence, 801.

ENTERING CAUSE for TRIAL, 816, &c.

ENTERING CLERKS, 780.

ENTERING ISSUE. See tit. *Issue*.

Cause. See tit. *Trial*.

ENTRIES,

of record;

attachment of privilege, to save the statute in K. B. 819.

change of *prochein ami*, or guardian, 100.

warrants of attorney, in K. B. 95, 784.

C. P. id.

writs, &c. to avoid statute of limitations, 162, 729.

for other purposes, 288.

appearance, id. 239, 729.

recognizances of bail, in K. B. 277, 8; 729.

C. P. id.

Exchequer, 236, 1156. (*d.*)

discontinuance, 680.

on rolls, in general;

by whom and how made, 730.

imparlance roll, 462, 8; 720, 729.

plea roll, 728, (*g.*) 729.

issue roll. See tit. *Issue Roll*.

judgment roll, in K. B. 569, 729.

on judgment roll, in C. P. 568, 9; 932.

county palatine, 932.

proceedings in *scire facias*, in K. B. 729, 80; 1126.

C. P. id.

error, 1175, 1185, 6.

false judgment, 730.

not of record:

of names, and places of abode, of attorneys, 71, 2.

day of appearance, in filacer's book, in C. P. 817.

render in marshal's book unnecessary, in K. B. 289.

in public books, proof of, 801, 2.

ENTRY,

under lease, &c. how pleaded, 442. (*b.*)

elegit, 1036, 7.

right of, justification under, 646.

necessary to maintain *ejectment*, 1194.

remedy by, without bringing *ejectment*, 1196.

actual, when formerly necessary, but now dispensed with, id. 1197, 8.

ENTRY, continued.actual, *continued.*

when still necessary, 1198, 9; 1201, 1204.

when not, 1203.

how made, 1199.

and ouster, in *ejectment*, 1201, 1206.

writ of, in adverse suit,

pleading deed in, on *oyer*, without *profert*, 587.

not amendable in disseisor's name, 699.

costs allowed on interlocutory proceedings in, 946. (*a.*)

for suffering recovery,

returns of, abridged, 706.

amendment of, in *teste* or return, 699.**EQUITY; See tit. Chancery.**

attorney may be admitted solicitor in, 72.

solicitor in, may be admitted attorney, 72, 8.

solicitor in other courts of, 73.

lien of, 337, *id.* (*i.*)

stamp duties on certificates of draftsmen in, 77.

disobeying decree or order in, for payment of money, an act of bankruptcy, 117.

bail not discharged, by plaintiff's electing to proceed in, 294, 5.

effect of injunction in, 461, and see tit. *Injunction.*

bill in, no foundation for staying proceedings, 528.

pleas in courts of,

various kinds of, and their essential difference, 630. (*a.*)correspondence of, with pleas at law, 644. (*g.*)to the jurisdiction, 630. (*h.*)in abatement, 642, (*d.*) 644. (*g.*)

to the person of plaintiff:

outlawry, 634. (*p.*)excommunication, *id.*attainder, *id.*alien enemy, *id.*infancy, 634. (*p.*)coverture, *id.* 635. (*g.*)bankruptcy, or insolvency, 647. (*p.*)person of defendant: 635. (*c.*)to bill, 644. (*g.*)in bar, *id.*release, 647. (*d.*)former judgment, or decree, *id.* (*f.*)statute of limitations, *id.* (*k.*)obtaining production of written documents in, 802. (*i.*)

effect of filing bill in, after submission to arbitration, 824.

grounds of setting aside award in, 841.

motion in arrest of judgment not allowed, on issue directed by court of, 918.

statute of, 1077.

costs in, 375.

prisoner in custody for, entitled to benefit of Lords' act, *id.*

setting off against costs at law, 991.

EQUITY, continued.costs in, *continued*.nonpayment of, on ground for staying proceedings in *ejectment*, 1233.**EQUITY of REDEMPTION, 1235.**

not affected by execution, 1036.

plaintiff's remedy for obtaining, 1003, 1036.

may be taken on extent, *id.* 1050.**EQUITY SIDE of EXCHEQUER;**proceedings on, See *tit. Chancery* and *Exchequer, on equity side*.**ERASURE,**in *jurat* of *affidavit*, not allowed, 495.over *jurat*, does not vitiate, *id.* (*h.*)evidence, on *non est factum*, 650.

in fine, 700.

ERROR, writ of,

what, 1134.

by whom brought, *id.* 1135.

plaintiff, to reverse his own judgment, 1134, 1165.

on judgment against *feme covert*, 1135.principal and bail, *id.*several defendants, *id.* 1136.

summons and severance, 1136, 1169.

when it lies;

generally, 38, 1134, 1136, 7.

for error in fact, 1136, 7.

law, 1137, &c.

for denying *oyer*, when demandable, 588.

granting or denying repleader, improperly, 921.

on bill of exceptions, 864, 5.

cannot be brought, before it is signed, 863.

after *non pros* of former writ of error, 1137, 8.

when it does not lie;

generally;

when defect is aided by verdict, 919, &c. 1136.

amendable, 696, &c. 927, 8; 1136.

cured by statutes of jeofails, 923, &c. 1136.

for defects in mesne process, 129.

damages awarded, with plaintiff's assent, without inquisition, 583.

granting *oyer* improperly, 588.

after special case, 898.

agreement to the contrary, 1134.

judgment in *scire facias*, 1131.of *respondeat ouster*, on plea to the jurisdiction, 1141.death of nominal plaintiff in *ejectment*, 1169.for any thing which contradicts the record, *id.*error in fact and in law together, *id.*

upon what judgment, 1140, 41.

in *same* court;*coram nobis*:

when it lies, 1136, 7.

for error in fact, *id.*

process, 1137

after an abatement, &c. *id.*

ERROR, writ of, *continued.*

in *same* court, *continued.*

coram nobis, when it lies, *continued.*

to reverse outlawry, 138, 9.

in Common Pleas, *id.*

direction of, 1142.

form of, *id.* 1143.

allowance of, 1144.

how far a *supersedeas* of execution, 1154.

recognizance of bail on, 1156, *id.* (c.)

unnecessary to transcribe on, 1158.

sue out *scire facias*, 1165.

rule to assign errors, 1168.

assignments of error, &c. 138, (p.) 1168, 9, 70.

issue on, how entered, 1175.

record of *nisi prius*, *id.*

execution on, 996, 1185, &c.

costs on reversal, 1185.

coram vobis; 1137.

lies not in K. B. affirmance, *id.*

in *superior* court;

to King's Bench, 1137.

from Common Pleas, *id.*

inferior courts, *id.* 1138.

except in *London*, 1137.

cinque ports, 1138.

stannaries, *id.*

counties palatine, *id.*

Wales, *id.* 1139.

from King's Bench;

to Exchequer Chamber, 1138, &c.

House of Lords, 1138, 9.

from law side of Exchequer;

in *England*, 1140.

Scotland, *id.*

Ireland, *id.*

when brought;

before judgment, 1141.

after judgment, *id.*

by statute of limitations, *id.*

considered as a new action, 94, 1141.

how sued out, 1141.

direction, 1142.

form of, *id.* 1143.

correspondence of, with record, 1143.

teste and return, *id.*

sealing, *id.*

allowance, and service of, 1141, 1143, 4.

formerly not allowed in C. P. without showing real error, 139, 1149.

how far a *supersedeas* of execution;

in general, 530, 81.

when defendant is a prisoner, 538.

ERROR, writ of, continued.

how far a *supersedas* of execution, *continued*.

when parties are misnamed, &c. 1143.

sued out before interlocutory judgment, 1144, 5.

final judgment, in K. B. id.

C. P. 1145.

after final judgment and before execution, id. 1146.

in K. B., id.

C. P., id.

Exchequer, 1146.

House of Lords, id.

execution begun, 1148, 9.

when brought against good faith, 1146.

for delay, 530, 31; 1146, 7.

when bail is required, 1144, 5; 1149, &c. 1154, 5.

on error *coram nobis*, 1154.

after former writ of error, id.

in *ejectment*. See tit. *Ejectment*.

when writ of error is brought by landlord, 1244, 5.

possession is sued out, without taxing costs, 994,
1145, 1244.

on stat. 1 Geo. IV. c. 87, § 3, p. 1253.

arrest not allowed in second action, pending, 174.

proceedings against prisoners, how affected by, 360, 61; 370, 71.

motion for leave to take out execution, pending, 370, 71; 487, 996,
1135, 6; 1147.

taking out execution, pending, 1148.

application to set it aside, id.

staying proceedings, pending, 530, &c. 1147.

suing out execution on second judgment, pending error on first, 532, 1146.

security for costs required, when plaintiff in error resides abroad, 535.

no objection to setting off debt on judgment, 664.

an answer to motion for new trial, 913.

repleader cannot be awarded after, 921.

amendments after, 714.

costs on, 715, 1172.

by principal, may be pleaded by bail, 1129.

bail on. See tit. *Bail*.

certifying or transcribing record, 1158, 9.

rule for, in K. B. and C. P. id.

when obtained, 1158.

how entitled, 1161.

service of, 1158, 9.

practice in Exchequer, 1159.

House of Lords, 1159, id. (c.)

when the record is certified, or only a transcript, 1159, 60.

mode of certifying, or transcribing;

in inferior court, id.

King's Bench, and Common Pleas, 1160.

House of Lords, id.

non pros for not transcribing, id.

in Exchequer Chamber, id. 1161.

ERROR, writ of, continued.

certifying or transcribing record, *continued*.

entry of transcript, in K. B. 729, 30.

entitling proceedings in, before and after transcript, 1161.

amendment of;

at common law, *id.*

by stat. 5 Geo. I. c. 13, *id.* 1162.

allowed, on information in nature of *quo warranto*, 1162. (*c.*)

not allowed on appeals, or process on indictments, &c. 1162.

costs on, *id.*

quashing;

ground of, *id.* 1163.

motion for, in what court, *id.*

on writ of error returnable before judgment, 1162.

when it may be quashed in part, &c. 1163.

costs on, *id.*

abatement of;

by death of parties, 996, 1163, 4.

chief-justice, 1164.

prorogation, or dissolution of parliament, *id.*

bankruptcy, *id.*

marriage, &c. *id.*

discontinuance of, *id.* 1165.

scire facias quare executionem non, in K. B. 1107, 1165, 1188.

what, and when it lies, 1165, 6.

out of what court, and when it issues, *id.*

direction of, *id.*

form of, *id.*

teste and return, *id.*

need not lie four days in sheriff's office, 1166.

rule to appear to, *id.*

whether plaintiff in error may plead thereto, *id.*

consequence of not assigning errors, *id.*

alleging diminution,

in Exchequer Chamber;

what, and when necessary, 714, 15; 1165, 1167, &c.

within what time, 1167, 8.

plaintiff not confined to one rule in each term, 1168.

not allowed, against the record, 1167, 1171.

in inferior courts, 1167.

rule for, when and how given, *id.*

non pros for not alleging diminution, *id.* 1168.

in House of Lords, 1167, (*d.*) 1171.

rule to assign errors;

when and how given, 1168.

on error *coram nobis*, or *vobis*, *id.*

in King's Bench, *id.*

Exchequer Chamber, *id.*

House of Lords, *id.*

assignment of errors;

in fact, 1168, 9, 70.

in law, 1168, 9.

common, 1169.

ERROR, writ of, *continued*.assignment of errors, *continued*.in law, *continued*.

special, 1169.

in fact and in law, not assignable together, id.

by several plaintiffs, id.

set aside, when calculated for delay, 1170.

engrossing, 1169.

need not be signed, id.

delivering or filing, id. 1170.

certiorari for original, &c.

what, and when necessary, 1170.

direction of, id.

teste and return, id.

amendment, id.

course of proceeding thereon, id. 1171.

in King's Bench, id.

House of Lords, 1171.

return to, 1170, 71.

petition for original, 1171, 2.

practice thereon, id.

in what cases the parties may have a second *certiorari*, 1172.

when the court will award it for their own information, 1174.

scire facias ad audiendum errores, in K. B. 1172, 3; 1188.*processum et recordum*, 1121, 1173.

compelling plea, or joinder, in Exchequer Chamber, 1173.

House of Lords, id.

pleas in ;

common, id.

in nullo est erratum, 1178, 4.

special, id.

release of errors, 1174, 5.

delivering or filing, 672, 1175.

demurrers, 672, 717, 1173, 4.

issues ;

making up and entering, 717, 1175.

in King's Bench, 1175.

on error *coram nobis*, id.

in Common Pleas, id.

Exchequer Chamber, 1176.

trial of issues in fact, 1175.

arguing errors in law ;

in King's Bench, 1176.

Exchequer Chamber, id. 1177.

House of Lords, 1177.

printed cases. See tit. *Cases*.

hearing counsel, 1177, 8.

motion and rule for judgment, 486, 1177.

judgment of *non pros*. See tit. *Non pros*.

affirmance, or reversal, &c. 1172, 1175, 1178.

when court are divided in opinion, 1178.

in part, or for the whole, id. 1179.

ERROR, writ of, *continued*.

judgment of affirmance, or reversal, &c., *continued*.

what shall be given, on reversal of first, 1179, 80.

rule *nisi*, on reversal, in K. B. of judgment of inferior court, 1180.

damages in, 881, 1180, 81.

interest, 1182, 3, 4.

costs in, 975, 6; 1180, 81; 1184, 5.

execution after, 1106, 7; 1171, 2; 1185, &c.

on abatement, by death of plaintiff in error, 996.

two *scire facias*, to revive judgment in original action, and in error, 1132.

out of what court, 994, 5, 1186.

setting aside for irregularity, 996, 1145, &c.

remittitur of proceedings, 1186.

entries after, in K. B. *id*.

rule for, after *non pros* in Exchequer of Pleas, 1185. (*k*.)

direction of, 1186.

how returnable, *id*.

restitution, after reversal of judgment, *id*. 1187.

to what the party shall be restored, *id*.

ERRORS,

clerk of, in K. B. 43.

C. P. 45, 52.

ESCAPE,

refusal of marshal or warden, &c. to show prisoner, so considered, 366.

proceedings against warden of fleet in vacation, for, 324.

retaking defendant after, 201, 233, 4.

plaintiff's remedies on, 235.

on mesne process;

attachment against sheriff, for not bringing in body, *id*.

action for, when maintainable, 224, 235, 236; 282, 3; 309, 10; 368.

when not, 235, 6; 309, 481, 307, 1030.

against the old sheriff, 307.

mode of declaring in, 236, 426.

venue in, cannot be changed, 604.

how defeated, 235, 6.

setting aside, or staying proceedings in, 316.

evidence in, 236, *id*. (*f*.) 352, (*c*.) 367, 612.

damages in, 886.

recovery in, a bar to ruling sheriff, 310.

on execution;

from tipstaff, on render, 283.

action for, 231, 1029, 1031, 1132, 3.

declaration in, 649.

setting aside proceedings in, 529, 1132, 3.

damages in, 886.

new execution after, 1031.

when covered, by relation of day rule, 374.

retaking after. See *tit. Recaption*.

must be pleaded, 649.

ESCAPE WARRANT, 342.

in what cases it may be obtained, 233, 4; 1031.

ESCAPE WARRANT, *continued.*

- by whom granted, 234.
- arrest on, when, by whom, and how made, id. 235.
- recaption on, 342.
- time to declare after, 346.

ESCHEAT,

- ejectment* for lord, claiming by, 1190.

ESCROW, 650.

ESSOIN, 107, 109, 460.

- adjournment of, on writ of right, 109. (*o.*)
- not allowed in personal actions, 109.
- at *nisi prius*, 778.

ESSOIN DAY,

- interval between, and day of court's sitting, taken as part of term, 324.

ESSOINS,

- clerk of, in C. P. 45, 51, 781, 2.

ESTOPPEL,

- what:
 - entering into bail-bond, or putting in bail above, in wrong name, 448.
 - imparlance, 464, 639.
 - giving *cognovit*, 242, 562.
 - plea or replication of, 83, 140, 448, 643, 677, 685.
 - must be pleaded with certainty, 685.
 - party must rely upon it, 83, 662, 685.

ESTOVERS,

- justification under right of common of, 645, 6.
- entry, to take, 646.

ESTREATS,

- roll of, in K. B. 728.

EVICTION, 1037, 1087, 8.

EVIDENCE,

- generally;
 - must be the best the case admits of, 799.
 - plaintiff not obliged to furnish, against himself, 591, 802.
 - bound to disclose, before trial, 592.
 - must be confined to strict legal rights, 678.
 - not allowed to be given, on taking view, 799.
 - governed by pleadings, id.
 - circumstantial, 866.
 - variance of, from declaration, 433, 4, 5; 434, 5. (*f.*)
 - demurrer to. See tit. *Demurrer to Evidence*.
 - admitting or rejecting improperly, good ground for bill of exceptions, 862.
 - new trial, 907.
 - on both sides, ground for refusing new trial, 908.
 - judge's report of, on motion for new trial, 914.
- written, 799, 800.
- public, 800.
- of record, id.
 - acts of parliament, id.
 - public, id.

EVIDENCE, *continued.*written, public, of record, *continued.*acts of parliament, *continued.*

private, 800.

how proved, *id.*

judgments ;

in superior courts, 556, 800, 902, 943.

inferior courts, 943.

recognizances, 800, 1083, &c.

letters patent, 800, 1090, 1098, &c.

writs and returns, when filed, 162, 3 ; 800.

affidavits, when read and filed, 800.

copies of, *id.*under seal, *id.*exemplifications, *id.*under great seal, *id.*seal of court, *id.*not under seal, *id.*sworn copies, *id.*office copies, *id.* 801.when admissible, and when not, *id.*

copy of copy, 800.

not of record, *id.* 801, 2.

judicial, 800, 801.

in actions at law :

commencement of action, &c.

generally, 146, (*k.*) 162, 3.

by and against attorneys, 321, 2 ; 335.

copy of signed bill of costs, 335.

writs, not filed, 162, 3.

declaration, 335.

commitment on *habeas corpus*, 351.

rules of court, 490, 624, 834.

judge's order of reference, in action on award, 834.

affidavits, not filed, 801.

depositions of witnesses, 811, 12.

under old commission, 812.

in recent transaction, *id.*

before commissioners of bankrupt, 669.

record of *nisi prius*, 335, 777, 944.*postea*, in what cases evidence, and in what not,
901, 2 ; 944.masters' *allocatur*, 902.

judgment paper, 943.

proceedings in Chancery, 801.

depositions, *id.*judgments in House of Lords, *id.* 944.inferior courts, not of record, *id.*

sentences in ecclesiastical courts, 801.

courts of admiralty, *id.*foreign courts, *id.*

EVIDENCE, continued.written, public, not of record, *continued.*judicial, *continued.*

commission of bankruptcy, &c. to prove petitioning creditor's debt, &c. 668, 69, 70, 71.

certificate of bankrupt, on general plea of bankruptcy, 647, 8.

under former commission, 1110.

former bankruptcy, to avoid certificate, id.

support same, id.

examinations before justices, 598.

depositions, on charge of felony, id.

inquisitions, 801.

awards, &c. id. 884.

books of quarter sessions, 593, 801.

clerk of judgments, &c. 801, 806, 7.

King's Bench and Fleet Prisons, 801.

for what purposes allowed, 852.

day-book at judgment office, when not allowed, 556, 943.

not judicial ;

journals of Lords, or Commons, 881.

London gazette, id.

domesday book, id.

surveys of ecclesiastical benefices, &c. id.

pope's bull, or license, id.

books of herald's office, id.

books of history, 881.

parish registers, 593, 4 ; 802.

rate books, &c. 802.

rolls of courts baron, 594, 5 ; 802.

ancient terriers, or surveys, 802.

corporation books, 595, 802.

books of navy office, 802.

custom-house, 593, 802.

stamp office, 802.

post office, 593, 802.

bank, id.

South Sea house, id.

East India company, &c. 593, 4 ; 802.

proof of entries in public books, 802.

inspection of. See tit. *Inspection.*

private: 800, 802.

deeds under seal, 802.

agreements, &c. not under seal, id.

deeds, &c. in possession of party to suit, id.

producing, and proving execution of, id.

in possession of adverse party, id. 803.

production of, may be obtained in equity, 802. (i.)

notice to produce, 803, and see tit. *Notice to produce deeds, &c.*

how proved, 804, 5.

EVIDENCE, *continued.*written, private, *continued.*deeds, &c. in possession of adverse party, *continued.*

regular time of calling for production of, 804.

calling for, does not make them evidence for the

other party, *id.*proving execution of, when produced, *id.*when evidence for adverse party, and when not, *id.*in possession of third persons, *id.*, 806.*subpoena* to produce, with clause of *duces tecum.*See tit. *Witnesses.*

indorsements on bond, 19.

promissory note, or bill, &c. *id.*

when parties compellable to produce, 487, 591, &c. 802, 3.

unwritten, 799, 805.

parol evidence, when not admissible,

to prove delivery of bill of costs, 335.

notice to produce deeds, &c. 804, 5.

day of trial, at *nisi prius*, 777, 944.

in particular actions:

assumpsit, on attorneys' bills, 78, (*g.*) 354, 5.

debt on bond, of payment or release, 18.

for performance of covenants, 585.

on *non est factum*, 650. (*k.*)judgment, suggesting a *devastavit*, 1113.

detinue, upon a finding, 5.

penal action, removed out of proper county, 724.

case, for malicious arrest, 229, 680, 81.

prosecution, 593, 892, 3.

words, 582, 651, 2.

libels, 652.

slander of title, 652.

case, for seducing daughters, 582. (*m.*)

trespass, on plea of license, 690.

ejectment, in general, 1238.

by assignee of insolvent, 388.

founded on *elegit*, 1037.

on stat. 1 Geo. IV. c. 87, § 2. p. 1237.

actions against attorneys, 321, 2.

hundredors, 122, *id.* (*a, b, c, d.*) 127.

justices of peace, 892, 3.

sheriff's, for escapes, 236, *id.* (*f.*) 352, (*c.*) 367, 612.

not taking bail, 223.

on stat. 8 Ann. c. 14, § 1, pp. 1015, 16.

sheriff's officers, on stat. 32 Geo. II. c. 28, § 12,
p. 233.

commissioners of bankrupt, 33.

assignees of bankrupts, to dispute bankruptcy, &c.
668, 69, 70, 71.

on indictment for perjury, 496.

plea of nonjoinder, in abatement, 636.

EVIDENCE, continued.

on plea of misnomer, that defendant was called as well by one name as another, 689. (n.)

general issue;

what may, or what may not be given, 668, 4.

is to be proved, 799.

plea, or notice, of set off, 667, 8.

notice of intention to dispute bankruptcy, 670, 71.

special issue, 799.

execution of inquiry, 581.

in action against hundredors, &c. 128.

when plaintiff has not recovered his full demand, 582, 8.

after judgment on demurrer, 585, 740.

of cause of action:

what sufficient to take case out of statute of limitations, 22, &c.

in Common Pleas at *Lancaster*, 107.

necessary, notwithstanding admission in defendant's bill of particulars, 600.

not allowed to be given out of particulars, id.

exception to this rule, id.

must be material, to retain venue, 612.

what is, or is not, sufficient for that purpose, id. 613.

when it must arise in a particular county, 724, 868.

promise to re-pay money, on count for money had and received, 3.

or acknowledgement, to take case out of statute of limitations, 18, 19, 22, &c.

payment, or release, when presumed in *debt* on bond, &c. 18.

of interest, by indorsement on bond, 19

demand of copy of warrant, 85.

process, 162, 8.

delivery of bill of costs, 835.

prisoner being in custody of marshal, &c. 867.

execution of warrant of attorney, 553, 4.

bringing money into court, 624, 627.

intent of, when admissible, 627.

does not give plaintiff a right to reply, 629.

day of trial at *nisi prius*, 777, 944.

facts stated in special case, 899.

admission by attorney's clerk, on taxing costs, 990.

receipt of money levied on *feri facias*, 1019.

assignment of lease by deed, under *feri facias*, 1004.

precise time of seizure of goods under execution, and act of bankruptcy, 1009.

debt to king and his debtor, on commission and extent *pro forma*, 1047, 1068, 4.

payment of duties, &c. *onus* lies on claimer, 1076.

allowance of writ of error, 1145. (e.)

defendant being beyond sea, on error to reverse outlawry, 189, 40.

EXAMINATIONS,

before justices, evidence of, 598.

EXAMINERS,

reference to, on insolvent debtors' act, 892.

EXCEPTION DAY, 107.

EXCEPTIONS, Bills of. See tit. *Bills of Exceptions.*
 marking in margin of demurrer books, 505, 738.

EXCHEQUER,

barons of, 39.

salaries of, *id.* (g.)

equity side of:

solicitor on, cannot practise as such in Chancery, 73.

service of *subpoena* on, 156. (m.)

proceedings on forfeiture of bail bond, on attachment for contempt,
 222, 3.

EXCHEQUER,

injunction on,

effect of, for want of answer, 465.

upon the merits, *id.* 466.

breach of, what, 461.

sittings in term, 758. (d.)

trial of issues from, 758.

motion for new trial on issues from, 913, 14.

in arrest of judgment, 918.

issuing extent, 1048, 9.

revenue side of:

proceedings on outlawry, 137, 8; 1047, 8.

for reversing outlawry, 144.

costs on, 143.

by information :

commencement of, 28.

trial of crown causes; 753, 892, 968, 9.

in *Middlesex*, 753, 1080.

days appointed for, 753.

by *proviso*, not allowed on, 761.

recognizance of bail may be vacated, when attorney general does not proceed, *id.*

putting off; 771.

affidavit for, *id.* (e.)

new jury impanelled for, 789.

commission to examine witnesses abroad, 810. (h.)

execution on;

by *levari facias*, 137, 8; 1042, 3.

extent. See tit. *Extent.*

taxing solicitor's bill of costs on, 329, 1082, 3.

scire facias on, for the king. See tit. *Scire facias.*

not necessary, on judgment, after a year, 1091.

EXCHEQUER of PLEAS,

jurisdiction of, 88.

officers of, 58.

postman, and tubman, 42, 3.

business of, how done, 58.

holydays in, 56, 7; 168.

attorneys and side clerks :

qualifications of, 61, &c.

privileges of, 38, 9; 81.

EXCHEQUER OF PLEAS, continued.attorneys and side clerks, *continued*.privileges of, *continued*.

in laying venue, 82.

suing, or being sued, with their wives, 81.

member of university, *id.* 82, 632.

proceedings in actions by :

venire facias of privilege, 81, 92.*capias* of privilege, *id.*

holding to bail on, 81.

beginning of declaration, 321.

proceedings in actions against :

by bill, 81, 92.

beginning of, 324.

delivering bill of, 325, 6.

taxation of costs of, 326, &c.

undertaking to pay bill on, 335. (*i.*)

reviewing, 990.

means of commencing actions in, 92.

proceedings against warden of Fleet, for escape, on stat. 59 Geo. III.
c. 64, pp. 324, 5.

members of the House of Commons ;

by bill :

with whom filed, 120.

process on, *id.*appearance, *id.* 121.process in. See tit. *Process*.order for holding to bail in *trover*, or *detinue*, 171, 2; 186.

affidavit to hold bail ;

by executor, 182.

when conclusive, or not, 189.

bail bond, on attachment,

sheriff cannot take, for non-payment of costs, 222. (*d.*)

proceeding on, if condition broken, 223.

fees to sheriff's officer, on arrest, 233.

bail in ;

common ;

discharging defendant on, 189.

in action against husband and wife, 240, 41.

special :

number of persons, 245.

who may or may not be,

housekeepers, 246, 268, 9.

attorneys' clerks, 247.

foreigners, 270, 71.

time allowed for putting in, 249.

fee allowed to commissioner, for taking, 250.

recognizance of,

by whom entered into, and for what sum, 251, 263, 267.

how entered on record, 236.

entry of, 278. (*d.*)

EXCHEQUER OF PLEAS, *continued.*bail in, *continued.*special, *continued.*

exception to,

when and how made, 257.

notice of, *id.*

justification of;

time allowed for, *id.*

notice of, by whom signed, 260.

on day when court sits in equity, *bad*, *id.*

in vacation, 257, 261.

at chambers, *id.*

at what hour, 263.

affidavit of, 267.

before whom taken, 264.

form of, 267.

costs of opposing, 272.

not justifying on day mentioned in notice, 301.

setting aside order for allowance of, 236.

liability of, 281.

render in discharge of,

sheriff when entitled to benefit of, 282.

time allowed for, in general, 284.

on staying proceedings, pending error, 533.

bail bond;

action on by sheriff, in what court, 300.

staying proceedings on, 209, 302, 3.

when it shall not stand as a security, 303. (*l.*)

time allowed for returning writ, when rule expires in vacation, 307.

attachment against sheriff;

when no bar to assignment of bail bond, 297.

cannot be moved for, after bail justified, 311, 12.

setting aside, when granted on same day, but before bail justified,
312.

prisoners; \

proceedings against:

in custody of sheriff, &c. 342, &c. 346.

warden;

on removal by *habeas corpus*, 354.

charging in custody, with declaration, 355.

affidavit required for, 358.

time allowed for declaring, 356.

proceeding to judgment, 362.

charging in execution, *id.* 363.

treaty or agreement with, must be in writing, 366.

on extent;

changing custody of, 287, 1019, 50.

relief of, 375, (*a.*) 1065, 6.rule on remanding, on Lords' act, 380, *id.* (*h.*)

proceedings against, on compulsory clauses in Lord's act, 385, 6.

discharge of, on stat. 48 Geo. III. c. 123, p. 387.

EXCHEQUER OF PLEAS, *continued.*

removal of causes into, from inferior courts, 397, 8.
usual order on, 397.

declaration in ;

beginning and conclusion of, 432. (*l.*)
against one of several defendants, in joint action, 446. 7.
filing or delivering, 454.

de bene esse, *id.* 455.

after defendant's appearance, 454. (*d.*)

notice of, when and how served, 456, 7.

time for pleading, on declaration *de bene esse*, 454, 5 ; 468.
after defendant's appearance, 467, 8.

rules to plead, 474, 5.

on crown side in, 478.

motions in ;

to remove proceedings, into office of pleas, 397, 8.

for attachments, 481.

how entitled, *id.*

rules, on last day of term, 498.

setting aside proceedings, for irregularity, 515.

notices of, 491.

costs on, *id.*

affidavits in support of :

when made, 495.

jurat of, when made by illiterate persons. *id.*

two or more deponents, *id.*

filing, 497.

office copies of, must be examined and signed, *id.*

sworn after rule made absolute, cannot be read on opening it, 506.

costs of opposing, 503.

days appointed for, 505.

course observed in hearing counsel on, 506, 7, 8.

on extents, 1059, 1072, 3, 4.

rules for attachments ;

absolute or *nisi*, 335, 6 ; 480.

affidavits in support of, how entitled, 480, 81.

to set aside annuity, 490, 527.

service of, generally, 500.

making absolute, 501, 2.

summonses and orders, by barons on circuits, 509, 10.

notices, in whose name given, 500.

setting aside proceedings for irregularity, 513, 515.

staying proceedings, in actions for less than 40s., 516.

against bail, pending error, 538.

security for costs, when required in, and when not, 535.

warrant of attorney :

defeazance on, 545.

filing with master, 555.

judgment by default when signed, 455.

cognovit, when regular, though no process sued out, 559.

reference to master, to compute principal and interest on bond, 548.

bills of exchange,
&c. 571.

EXCHEQUER OF PLEAS, *continued.*

- notice of inquiry ;
 - in town, 577.
 - country, *id.*
 - entry and service of, *id.*
 - terms's notice, *id.*
 - on delivering replication, &c. 578, 9.
- order for particulars of demand, 598.
- affidavit necessary to obtain, *id.*
- changing venue, 609.
 - rule for, 612.
 - discharging, *id.*
- bringing money into court, 619.
 - costs on, 623, 627.
- claim of conusance, 682.
- pleas in abatement ;
 - in *scire facias*, against heirs and tertenants, 640.
 - affidavits in support of, *id.*
- rule to reply, 676.
- issue in, 723.
 - rule to enter, when given, 727.
- delivering copies of demurrer books, 738.
- rule for *concilium*, and argument on demurrer, 739, 40.
- rolls in. See *tit. Rolls.*
- trial ;
 - of issues, in *Middlesex*, 752. (*b.*)
 - sittings appointed for, in *London* and *Middlesex*, 751, 2, 3.
 - commission for, at assizes, 747, 777.
 - clause of *mittimus* in, 777.
- notice of ;
 - entry and service of, 500, 754.
 - on delivering replication, &c. 754.
 - in town, 755.
 - country, *id.* 756.
 - after four terms, 756.
 - countermand of, 757.
- costs for not proceeding to, 760.
- judgment as in case of nonsuit, for not proceeding to, *id.* 765.
 - motion for, when made, 765.
 - after moving for costs, for not proceeding to trial, 760, 765.
- discharging rule for, on what terms, 768.
 - costs on, 769.
- rule for, after peremptory undertaking, absolute in first instance, *id.* (*c.*)
- record in, 777.
- special jury in, rule for, 793. (*b.*)
- view in, when not grantable, 798.
 - rule for, 797. (*d.*)
- witnesses going abroad, commission to examine, 811.
 - costs of, *id.* (*c.*)
- entering causes for trial, in *London* and *Middlesex*, 817.

EXCHEQUER OF PLEAS, *continued*.

entering causes for trial, at the assizes, 818.

award, 827, 829, 30; 842, 3.

objections to, must be stated in rule *nisi*, for setting aside, 845.

hearing counsel, on arguing special case, 508.

nonsuit, how avoided, 867, 8.

costs;

on motions, 503, 1082.

several issues, 973, 975.

of arbitration, 833.

new trial, 915, 917.

suggestion for, on court of requests' act, 959, 60.

in *trespass*, on general issue, and judgment by default to new assignment, 974.

by whom and how taxed, 989, 90.

reviewing taxation of, 990.

mode of recovering on *non pros*, &c. 921.

motion in arrest of judgment, 918, 929.

execution;

by several writs, into different counties, 995, 6.

quashing return to *venditioni exponas*, 1020.

amendment of returns to, id.

settings aside *fi. fa.* after service of allowance of writ of error, refused, 1032.

effect of *ca. sa.* for fixing bail, 1098.

not necessary to enter it in sheriff's book, id. 1099, 1126.

error from, 1140.

on proceedings by extent, id.

writ of, how directed, 1142.

varying from process, in description of plaintiff, 1143.

allowance of, id. 1144.

from what time a *supersedeas* of execution, 1145, 6.

bail on:

time and manner of putting in, excepting to, and justifying, 1156.

recognizance of;

in general, 1155, 6.

in debt for penalty, 1156.

ejectment, 1252, 3.

entry of, 1156. (*d.*)

in *Ireland*, 1167. (*d.*)

no rule to transcribe on, 1159.

proceedings on, id. 1160, 61.

rule for execution, after non-prossing writ of, 1185. (*k.*)

ejectment in. See tit. *Ejectment*.

EXCHEQUER CHAMBER,

writ of error to, 1138, &c.

in *Ireland*, 1167. (*d.*)

lies not, for error in fact, 1137, 1139.

proceedings on. See tit. *Error*.

for non-prossing writ of error, from court of Exchequer, 1159, 60, 61.

rules on. See tit. *Rules*.

EXCHEQUER CHAMBER, *continued*.

return days in, 1176.

interest on affirmance in, 1182, &c.

EXCISE and CUSTOMS. See tit. *Customs and Excise*.**EXCOMMUNICATION**,

persons under, disqualified from serving on juries, 783.

plea of, 634, 638.

after last continuance, 847.

judgment on, 642.

discontinued, except in certain cases, 373. (c.)

EXCOMMUNICATO CAPIENDO, 221, 373.

prisoner on, entitled to benefit of rules, 373.

when entitled to benefit of Lords' act, 375.

when not, 376.

EXCUSE,

of performance, pleas in, 643.

when pleaded, or given in evidence, 646, 7; 651.

matter of, must be pleaded in trespass, 652.

EXECUTION,

what, 993.

distress, under act of parliament, in nature of 528. (f.)

creditor of bankrupt when not entitled to, on judgment by default, &c.
570, 1009, 10.

for plaintiff, 993.

in debt, id.

assumpsit, &c. id.

detinue, id.

replevin, id.

in ejectment, 1243, 4.

staying, on stat. 1 Geo. IV, c. 87, § 3. pp. 1244, 5.

defendant, 993.

different kinds of, id.

at common law, or by statute, id. 994.

when sued out;

in general, 994.

to avoid writ of error, id.

after writ of error, 530, &c. 994, 5; 1104, 5; 1144, &c. 1154.

false judgment, 995, 1188.

injunction, 1105.

agreement to stay execution, 560, 994, 1104.

on second judgment, pending error on first, in K. B. 531, 2; 1146.
C. P. id.

taken out pending action on judgment, irregular, 994.

with or without *scire facias*;

after a year, 994, 1102, &c.

change of parties, 1114, &c.

against defendant, sued by a wrong christian name, 449.

different defendants for same debt, 997.

partners, 1007, 8.

executors and administrators, 993, 1011, 1112, &c.

heir, when charged as tertenant, 1120, 21.

bankrupts, 212, 1109, &c. 1114, 15, 16.

EXECUTION, continued.

- against insolvent debtors, 1110.
 - after irregular discharge, 877.
 - hundredors, 123, &c.
 - on stat. 19 Geo. II. c. 24, § 6. pp. 126, 7.
 - 7 & 8 Geo. IV. c. 81. pp. 123, 4.
 - prisoners, discharged on stat. 48 Geo. III. c. 123, pp. 386, 7.
- by or against survivors, 1119, 20.
- out of what court, 491, 994, 5.
 - on removal by writ of error, 994, 5.
 - certiorari*, 400, 401, 995.
- in court of great sessions. See tit. *Great Sessions*.
- election of, 995.
- against goods and person, at same time, id.
- into different counties, at same time, id. 996.
- in what cases one may be had with or after another, and in what not, id.
 - it cannot be taken out, without leave of court, 839, 996, 7; 1135, 6; 1147, 8.
- application for leave to take it out, pending error, 487, 996, 7; 1135, 6; 1147, 8.
 - to set it aside, 1148.
- special, not warranted by general judgment, 998, 1110, 1112.
- for what sum;
 - in debt on simple contract, 998.
 - for penalty, 997, 1108.
 - on annuity bond, 997, 1107, 8.
 - after award, 997.
- expenses of, levying, 997, 98.
- fraudulent, not entitled to preference, 1005.
- poundage on. See tit. *Poundage*.
- king's precedency of, 1051, &c.
 - as to lands, 1051, 2.
 - goods, 1052, &c.
 - debts, 1056.
- by *fieri facias*. See tit. *Fieri facias*.
- levari facias*. See tit. *Levari facias*.
- sequestrari facias*, 1023, 4.
- capias ad satisfaciendum*. See tit. *Capias ad satisfaciendum*.
- elegit*. See tit. *Elegit*.
- extent*. See tit. *Extent*.
- in *Wales*. See tit. *Great Sessions*.
- may be sued out by a different attorney, in C. P. 94, 994.
- signing writs of, in C. P. 999.
- taking out, pending error, 532, 1146, 7, 8.
- setting aside for irregularity, 489, 513, 994, 1082, 1145, &c.
 - cannot be done by judge at chambers, 511.
- staying proceedings on, by judge in vacation, id.
- supersedeas* of, by writ of error, sued out before final judgment, 1144, 5.
 - after final judgment, 1145, 6.
- on second judgment, pending error on first, 532, 1146.
- new writ of, after discharge of members, by privilege of parliament, 1080, 81.

EXECUTION, continued.

- new writ of, after death of defendant, 1081.
 - escape or rescue, *id.*
- returns to. See tit. *Returns.*
- when necessary to be shown in pleading, 1033.
- prisoners in. See tit. *Prisoners.*
- in action for non-residence, 1026.
- replevin. See tit. *Retorno Habendo.*
- ejectment. See tit. *Ejectment*, and *Habere facias possessionem.*
- scire facias.* See tit. *Scire facias.*
- error.* See tit. *Error.*

EXECUTORS and ADMINISTRATORS,

- how far they represent testator or intestate, 1118.
- actions by or against, 6, 13, 17, 28, 432, 613.
 - joinder in, 13.
 - limitation of, 17, 18, 22, 24, 5, 6, 7, 8.
 - need not be so described, in common process, 147, 450.
- affidavit of debt by, 182.
- arrest in actions against, 150, 193.
- bail to, on reversing outlawry, after plaintiff's death, 142, 3.
- not entitled to privilege of attorneys, 88, 4.
- of attorneys, need not deliver signed bill, 332.
- declaring upon general process, 450.
 - special process, *id.*
 - by the bye, in C. P., 425.
- residing abroad, may be compelled to give security for costs, 584.
- giving warrants of attorney, 548.
- pleas by or against, in abatement, 635.
- pleas by or against, in bar, 644, 648.
 - puis darrein continuance*, 847, 8; 1131.
 - scire facias*, 1131.
- bringing money into court, in actions by, 620, 21.
- set-off in actions by or against, 665, 6.
- judgments against;
 - as in case of nonsuit, 762.
 - after plea may be pleaded *puis darrein continuance*, 847.
 - upon verdict, &c., 1112, 13.
 - in *assumpsit*, &c. 931.
 - debt, *id.*
 - alteration of, 942.
 - of assets in *futuro*, 683, 1112, 13.
 - nunc pro tunc*, 933.
- when entitled to costs;
 - in replevin, 976.
 - where one of several pleas is found for them, *id.* 980.
- when not, 978.
 - where one is acquitted, 986.
- when liable to costs;
 - as plaintiffs:
 - on judgment of *non pros*, 460, 978.
 - discontinuance, 679, 979.
 - for not proceeding to trial, according to notice, 979.

EXECUTORS AND ADMINISTRATORS, continued.

when liable to costs, *continued.*

as plaintiffs, *continued.*

on nonsuit, or verdict, 978, 9.

as for a contempt, 979.

on stat. 43 Geo. III. c. 46, § 8, p. 984.

as lessors of plaintiff, in *ejectment*, 991, 1241.

as defendants :

for pleading falsely, 210, 979, 80.

de bonis testatoris, on judgment of assets *in futuro*, 980.

on interlocutory motions, 979.

writs of error, 1180, 81.

when not liable to costs ;

on taxing testator's bill of costs, 832.

setting aside annuity, 521, 2.

for not proceeding to trial, 759.

on judgment as in case of nonsuit, 762, (c.) 769, 979.

in actions of waste, &c. 947.

prohibition, 948, 9.

scire facias, 1132, 8.

proceedings by or against, on stat. 8 & 9 W. III. c. 11, § 6, p. 934.

in what cases personally liable, on award, 835, 6.

not affected by judgments, unless docketed, 939.

within court of conscience acts, 960.

verdict against, on plea of *ne unques executor*, 809.

executions against ;

in general, 993, 1112, 13.

for their own debts, 1011.

of future assets, 1112, 13.

returns to, 1018, 1025.

after return of *nulla bona*, 1025, 1118, 14.

devastavit, 1018, 1025, 1034, 1118, 14.

signing note, on Lords' act, 381.

scire facias by or against, 1117, &c.

error by or against, 1186.

bail in, not required, 1153.

proceedings in, 1163.

when liable to costs, on affirmance, 1181.

ejectment by, 1190.

EXEMPLIFICATIONS, 52, 800.

EXEMPTIONS,

from serving on juries, 784.

EXIGENTER, 43.

EXIGENTS,

clerk of, in C. P. 44, 50.

EXIGI FACIAS, writ of, 130, 132, 1028.

de novo, 132.

EXONERETUR. See *tit. Bail*, and *Bail-piece*.

EXPENSES,

of knights, on coming to choose grand assize, 748.

witnesses, 680, 760, 806, 7 ; 811, (c.) 814, 15.

arbitration, 833.

EXPENSES, *continued*.

of executions, 998.

EXTENT,

generally;

what, and when it lies, and when not, 1043, 4.

for the king, id.

for debts originally due, or assigned to him, 1044.

of record, id.

not of record, id.

found on writs of extent, or *diem clausit extremum*, id.

against body, lands, and goods, id.

at common law, id.

by *magna charta*, id.

33 Hen. VIII. c. 39, id.

in chief, 1045.

what, id.

on judgments, id.

recognizances, id.

specialties, id. 1046, 1091.

for simple contract debts, 1046, 7.

commission to find, id.

inquisition on, 1047.

immediate, 1046.

proceedings previous to:

affidavit of danger, id. 1047, 8.

fiat, 1046, 1048.

writ of;

out of what court it issues, 1048.

form of, 1048.

teste and return, &c. id. 1049.

several writs of, at same or different times, 1049.

proceedings on writ of;

against the body:

arrest of defendant, 1049.

sheriff's authority to enter liberty, id.

break open doors, id.

defendant not bailable, id.

discharged by bankruptcy, &c. id.

when discharged, id.

habeas corpus for, id.

changing custody of, id. 1050.

bail of defendant, in other actions, not entitled to relief, 1050.

when defendant is entitled to relief, on stat. 7 Geo. IV. c. 57, § 75, pp. 1066, 7.

course of proceeding on stat. 1 Geo. IV. c. 119, § 41. p. 1066. (c.)

for taking inquisition:

impanelling jury, 1050.

summoning witnesses, id.

attendance of third persons, id.

EXTENT, continued.in chief, *continued.*proceedings on writ of, *continued.*

for notice of executing, 1050.

against lands, &c.:

what may, or may not be taken, id.

from what time bound:

by debts of record, id.

as against third persons, id, 1051.

bonds, 1051.

simple contract debts, recorded on commissions, id.

on stat. 13 Eliz. c. 4, id.

king's precedency of execution, id. 1052.

effect of writ of error, after levy, 1055, 6.

against chattels real, 1052.

may be extended or sold, id.

in what case not extendible, id. 1053.

personal, id.

what may, or may not be taken, id.

from what time bound:

in general:

as against purchasers, id.

pawnees, &c. id. 1054.

on distress for rent, 1013, 14; 1054.

bankruptcy, 1054.

execution, 1001, 1014, 1018, 1054, 5.

priority of, id.

against debts;

what may be taken, 1056.

from what time bound, id.

payment of to, or by crown debtor, id.

due to crown debtor, may be taken before his proper effects, 1059.

specialties, 1057.

money, 1056.

seizure of lands, and goods, &c. id. 1057.

collecting or levying debts, id.

inquisition on, form of, 1057.

return to, id.

writ of *diem clausit extremum*, 1044, 1057, 8; 1091, and see tit.*Diem clausit extremum.*

when it lies and when not, 1058.

how tested, 1057, 8.

in second, and subsequent degrees, 1058, 9.

difference between extent in chief and in aid, 1058.

mode of reckoning degrees on latter, id.

writ of;

mode of obtaining, id.

affidavit of danger, id.

fiat, id.

form of, 1059.

EXTENT, *continued.*in chief, *continued.*in second, and subsequent degrees, *continued.*

proceedings under, 1059.

from what time lands are bound on, id.

preferred to extents in aid, of a prior *teste*, id.priority of writs of, *inter se*, id.

in aid, 1045, 1059, 60.

what and when it lies, and when not, 1059, 60.

for and against whom, 1059, 60.

for what debts;

at common law, 1059, 60.

by stat. 57 Geo. III. c. 117, § 4, pp. 1060, 1061, 2.

to what cases this statute does not extend, 1061, 2.

proceedings previous to:

commission to find simple contract debts, 1046, 7.

inquisition on, id.

evidence of debt, on execution of, 1063, 4.

extent *pro forma*, 1063.

form of, id.

inquisition on, id.

affidavit of danger, id. 1064.

on bond debt, 1063.

fiat, id.

writ of:

mode of obtaining, id. 1064.

if crown debt be due by judgment, &c. 1064.

form of, id.

what may be taken under it, id. 1065.

proceedings on:

capias;

not usually enforced, 1064.

relief on, by stat. 57 Geo. III. c. 117, § 6, pp. 375,

(a.) 1065, 6.

general insolvent act, 1066, 7.

what sum may be levied, on same statute, § 1, 2; pp. 1064, 5.

on assignment of debts to crown;

at common law, 1067.

by stat. 7 Jac. I. c. 15, id.

privy seal, id.

rules of court, id.

postponed to extend in chief, 1059.

remedy for parties prosecuting, when extent in chief is satisfied, id.

relief of persons imprisoned on, 1065, 6.

in chief, and in aid, 1068, &c.

proceedings under, in general;

for king, or his debtor:

rule to appear and claim, 1068.

on non-appearance;

venditioni exponas, id. 1071, 2.*scire facias*, to recover debts, 1068.

EXTENT, continued.

in chief, and in aid, for king, or his debtor, *continued.*

on non-appearance, *continued.*

motion to sell lands, on stat. 25 Geo. III. c. 35, id.
1069, 70.

poundage on;

by stat. 3 Geo. I. c. 15, § 4, pp. 1070, 71, 2.

Qu. if sheriff entitled to, before that statute? 1070. (c.)

what, and by whom, when, and how paid, 1057, 1070,
71, 2.

in what cases not allowed, 1071, 2.

penalty on sheriff, for extortion, id.

apportionment of, between different sheriffs, 1072,
id. (g.)

considered as proceedings at law, 1048, (i.) 1140.

for defendant, or a third person;

motion to set aside, 1072, 3, 4.

for matter apparent, 1072, 3.

not apparent, 1073.

when and how made, 1074.

for paying debt into court, &c. 1074, 5.

satisfying extent in aid, out of money levied
on extent in chief, 1059.

petition of right, 1072, 1075.

monstrans de droit, id.

traverse of office, id.

origin and history of, 1075.

mode of proceeding on, id.

entering appearance, and claim, 1076.

in cases of bankruptcy, id.

must be in name of real owner, id.

when allowed or not, after regular time, 1076.

rule to plead, 1077.

pleas to;

by defendant, id. 1078.

third persons, 1078.

demurrer, 1072, 1078.

rule to reply, or join in demurrer, 1078, 9.

replication, or demurrer, id.

rule to rejoin, or join in demurrer, 1079.

waiving plea, replication, or demurrer, id. 1080.

issue, 1080.

pleadings on, not within stat. 4 Ann. c. 16, § 24, p. 927.

trial, 1080.

at bar, or *nisi prius*, 748, 1080.

in what county, id.

when one defendant pleads, and another demurs, 1080.

crown not compellable to proceed to, id.

notice of, id.

nonsuit on, 868, 1076, 1080.

demurrer to evidence, 1080.

verdict, 1081.

EXTENT, continued.

in chief, and in aid, *continued.*

proceedings under, for verdict, *continued.*

general or special, 1081.

motion in arrest of judgment, id.

for new trial, id.

judgment *non obstante veredicto*, id.

judgment; id.

rule for, id.

for crown, id.

proceedings on, id.

subject, id.

proceedings on, id.

amoveas manus, id.

proceedings on, id.

costs;

not in general recoverable, id. 1082.

on motions, 1082.

by stat. 33 Hen. VIII. c. 39, § 54, id.

25 Geo. III. c. 35, id.

43 Geo. III. c. 99, § 41, id.

53 Geo. III. c. 108, id.

taxing, 329, 1082, 3.

writ of error, or appeal from, 1140.

for subject, 1043, 4; 1083.

on statute merchant, 1086, 7.

staple, 1087.

on recognizance in nature of statute staple, 1087.

against heir, on obligation of ancestor, 938, 1089, 1121.

EXTORTION, 232, 1040.

action for;

amendment of declaration, by adding counts, not allowed in, 698, 712.

damages in, 987.

lies not, for taking poundage on *levari facias*, for crown debt, 1040, 41.

EXTRA COSTS, 724. (a.)**EXTRA VIAM,**

costs on new assignment of, 966, 973.

F.**FAIRS,**

justification under right to enter, 646.

FALSE IMPRISONMENT,

action of, 5, 196, 447, 653.

limitation of, 15.

when imprisonment is continued, 20.

pleas in, 653.

damages in, 889.

costs in, 953, 963, 986.

FALSE JUDGMENT, writ of, 38.

what, and when it lies, 1134, 1187.

lies not from court of requests, id.

out of what court it issues, 1187.

FALSE JUDGMENT, writ of, *continued*.

- bill of exceptions may be sued out on, 864, 5. (i.)
- by whom sued out, 1187.
- form of, *id.*
- when it does not lie, *id.*
- by whom made out, and how served and executed, *id.* 1188.
- from what time it is a *supersedeas*, 1187.
- bail on, *id.* 1188.
- assignment of false judgment, 1188.
- scire facias ad audiendum errores*, *id.*
- quare executionem non*, after abatement, &c. *id.*
- joinder, *id.*
- subsequent proceedings, *id.*
- entry of, on roll, 730.
- reversal of judgment, 1188.
- costs, *id.*
- execution, 995, 1188.

FALSE RETURN,

- action for, 309, &c. 100, 5.
- cannot be stayed, on payment of money levied, 544.
- changing venue in, 604.
- damages in, 886.

FAVOUR, Challenges to. See tit. *Jury*.**FEEs**. See tit. *Gaol fees*:

- anciently payable in C. P.
 - to prothonotaries, 47. (a.)
 - to *custos breviarum*, 53. (c.)
 - filacers, for common process, 50. (a.)
 - clerk of treasury, 52. (b.)
 - certificated conveyancer may maintain action for, 77.
 - of attorneys and officers, in C. P., 88. (c.)
 - regulations respecting, of officers of courts at *Westminster*, *id.*
 - sheriff has no right to, at common law, for execution of process, 238.
 - what he or his officer may take, by stat. 23 Hen. VI. c. 9, *id.*
 - for arrest, not to be settled by justices at sessions, *id.*
 - taking recognizance of bail by commissioner, 249, 50.
 - in Exchequer, 250.
 - conveying prisoner, from judge's chambers, to King's Bench, 349.
 - filing recognizances, on stat. 1 Geo. IV. c. 87, p. 1222.
 - payable to king, on writs of *recordari*, *pone*, &c. 105. (f.)
 - suing out process, on recognizance in nature of statute staple, 1187, 8.
 - by prisoners, in K. B., 52, (d.) 372.
 - C. P., 58, (f.) 351, 372.
 - to marshal, at assizes, 818. (b.)
 - action for, 825, &c.
 - not to be taken by officers under marshal, for granting rules of King's Bench prison, 374.
 - non-payment of, no excuse for disobeying *habeas corpus*, &c., 404, 5; 415.
- FEIGNED ISSUES**, 717.
- to try bankruptcy, 212, 292.
 - trial of, by *proviso*, 760. (i.)

FEIGNED ISSUES, *continued.*

putting off trial on, 772.
 new trial on, 913.
 costs on, 986, 7.

FELONY,

justification on suspicion of, 646.
 persons attainted of, disqualified from serving on juries, 783.

FEME COVERT,

acknowledgment of debt by, 23.
 affidavit of debt by, 178, 184.
 arrest of, on mesne process, 194, 5.
 process of execution, 194, 1026.
 in action against feme only, 194, 5.
 on bills of exchange, 195.
 costs, on motion to discharge, *id.*
 husband of, when allowed to be bail for, 248.
 relief of, on insolvent debtors' act, 894.
 service of declaration in *ejectment* on, 1210.
 affidavit of, 1216.
trespass by, in husband's name, 529, 80.
 warrant of attorney by, or to, 548, 551, 2.
 effect of death of, pending action, 763, 934, 1115.
 execution by *ca. sa.* on judgment against, 1026, 1114.
 cannot enter into recognizance of bail in error, 1252.
 amendment of writ of error by, when not allowed, 1162.

FEME SOLE,

marriage of;
 bail on reversing outlawry, after, 143.
 its effect on warrant of attorney, given by, 551, 2.
 attachment, for not performing award, 835.
 execution in *ejectment*, 1244, 1249.
 in what cases an abatement of writ of error, 1164.

FENCES,

justification under right of entry to repair, 646.
 defect of. See tit. *Defect of Fences.*

FEOFFMENT,

how stated in pleading, 442. (*b.*)

FERRIES,

disturbance of, 444. (*b.*)

FIAT,

for admission of *prochein ami*, or guardian, 100.
 original writ, 108, 9.
distingas in Exchequer, 114. (*a.*)
 rule to compute principal and interest, on bill, &c. in vacation, 570.
 entering satisfaction in vacation, in C. P. 1041.
 immediate extent in chief, 1046, 7, 8; 1091.
 in second and subsequent degrees, 1058.
 in aid, 1063, &c.
 not necessary, for issuing *scire facias* for the king, 1091.

by attorney general, for writ of error against the king, 1141.

FIERI FACIAS,

what, 998, 998.

FERI FACIAS, continued.

- before or after other writ of execution, 995, 1022.
- for damages and costs in *ejectment*, after verdict, 1248, 4.
- into different counties, at same time, 995, 6.
- form of, 998.
 - after *scire facias*, id. 1182.
- teste and return, id. 999, 1027.
 - by original, 1027.
 - amendment of, 999.
- signing, and sealing, id.
- indorsement on, 997.
 - of sum directed to be levied, id.
 - defendant's place of abode and addition, in K. B. 999.
- amendment of, id. 1028.
- delivery of, to sheriff, &c. 999, 1000.
- warrant or mandate on, id.
- attaching money paid on, 1000.
- relation of;
 - at common law, id.
 - by statute of frauds, id.
 - as between the parties, id.
 - after death of either party, id.
 - against purchasers, id.
 - the king, 1001.
 - between different plaintiffs, 1001.
- how long executable, 1148.
- what may be taken under it:
 - in general, 1001, 2.
 - corn growing, which goes to executor, 1001.
 - fixtures, removable by tenant, id.
 - terms for years, id. 1004, 1011.
 - interest of out-going tenant, 1004.
 - money in defendant's hands, 1003.
 - goods fraudulently sold, 1004, 5.
 - in actions against partners, 1007, 8.
- what cannot be taken under it:
 - growing crops, belonging to defendant's landlord, 1001, 2.
 - furnaces, or apples upon trees, 1002.
 - fixtures, in defendant's freehold house, id.
 - mills and machinery, id.
 - straw, manure, turnips, hay, grass, &c. id. 1003.
 - money in sheriff's hands, under former execution, 1003.
 - bank notes, &c. id.
 - equitable interest in term for years, id.
 - goods distrained, &c. id.
 - fairly sold, 1006.
 - of third persons, 1008.
 - in possession of defendant, 1006, 7.
- inquisition of property on, 1008.
- after act of bankruptcy, 1009, 10.
 - by stat. 6 Geo. IV. c. 16, § 81, p. 1009.
 - § 108, id. 1010.

FIERI FACIAS, continued.

- against future effects of bankrupt, 1109, &c.
 - insolvent, 1111.
 - wife's property, for husband's debt, 1006, 7; 1010, 11.
 - executors, 1011.
- sheriff's power, in entering house of defendant, or a stranger, id. 1012.
 - breaking open doors, &c. id.
 - duty, in selling goods, 1013, 1020.
 - property in goods, id.
- landlord's lien for rent, 1013, &c.
 - in case of bankruptcy, 1015.
 - how enforced, 1014, &c.
- king's taxes, when payable on, 1013, 1016, 17.
- rule to return, 1017.
 - when granted to defendant, id.
- inspection of, when granted, id.
- enlarging time for returning, id.
 - rule for, to show cause, id. (e.)
- different returns to, 1018.
 - feri feci*, generally, 1019.
 - proceedings on, id.
 - by rule of court, id.
 - action against sheriff, for money levied, id.
 - not within statute of limitations, id.
 - not sufficient to charge plaintiff with receipt of money, id.
 - feri feci*, as to part, 1018, 19.
 - proceedings on, 1019.
 - feri facias*, &c. for the residue, id.
 - must recite former writ, and return, 1020.
- goods taken, and remaining unsold,
 - in what cases a discharge, 1019.
 - proceedings on, 1020.
 - venditioni exponas*, 1018, 1020, 21.
 - amending return of, 999, 1020.
 - distringas* against late sheriff, 1021.
 - set aside, under particular circumstances, id.
- nulla bona*, 1018, 1022.
 - amending, 1020.
 - proceedings on, 1022.
 - another writ into same county, id.
 - need not recite former writ, 1020.
 - teste and return of, 1023.
 - action for false return, 1022.
 - testatum*, and when necessary to have a previous *feri facias*, id. 1023.
 - not allowed to be ante-dated, after execution set aside on error, 1185, 6.
 - non omittas*, 1022.
 - against beneficed clerk, 1018, 1023, &c.
 - in action against executor or administrator, 1025.
 - mandavi ballivo*, &c. 1018, 1025.
- motion to set aside, 1032.

FIERI FACIAS, *continued*.

difference between *erroneous* and *irregular* judgments, and executions, *id.*

on stat. Westm. 2. (13 Edw. I.) c. 18, p. 1033.

regularity of, cannot be impeached at *nisi prius*, 1129.

restitution, on reversing or setting aside judgments, 1038, 1186, 7.

levy under, when pleadable, 1019, 1130.

FIERI FECI,

return of, 1018.

proceedings on, 1019.

FILACERS,

of King's Bench, 43, and see tit. *Officers*.

duties of, *id.* (f.)

act as clerk of *exigents*, and outlawries, 135, 137.

Common Pleas. See tit. *Officers*.

office and duties of, 44, 5; 49, 50.

fees anciently payable to, for common process, 50. (a.)

excepted out of stat. 22 Geo. II. c. 46, p. 62.

name of, need not be added to common *capias*, in C. P., 153.

FILACERS ROLLS, 729.**FILING AFFIDAVITS**. See tit. *Affidavits*.**FINE**, of Lands, &c.

acknowledgment of persons levying before commissioners, how taken, 494.
amendment:

of writ of covenant, 699, 700.

concord, 700, 701.

warranty, 700.

in names of parties, *id.*

description of premises, 699, 700.

by increasing quantity of land, &c. 700.

situation of premises, *id.* 701.

entry of king's silver, 701.

proclamations, *id.*

by deed to lead, or declare the uses, 699, 700.

enrolment of deed, 707.

attested copy of deed, or office copy of enrolment, not allowed, *id.*

when fine is recorded of one term, not allowed, by making it of
another, 701.

cannot be made on last day of term, 499, 706.

affidavit necessary, for connecting it with deed, 701.

that possession had gone along with deed, *id.* 706.

concord and acknowledgment of, supplied, when lost, 701.

not allowed to pass, for defect in *præcipes*, 700.

and proclamations, how pleaded, 442. (b.)

chirograph of, when evidence, and when not, 800, 801.

entry to avoid, 1198, 9.

proceedings on, 1199.

writ of error, to reverse;

direction of, 1142.

scire facias on, 1121.

transcript only removed on, from C. P., 1159.

FINES,

- to king. See tit. *King*.
- when payable, on re-admitting attorneys, 79.
- on original writs, 105.
- deposit to answer, 227, &c.
- roll of, in K. B. 728.
- for non-attendance of jurors, 582. (*d.*) 855, 6.
- levari facias* for, 1042, 1045.

FINES and AMERCIAMENTS,

- debt* for, 8.
- avowry or cognizance for, 645.

FISHERY,

- justification under right of, 645, 6.
- ejectment* for, 1198.

FIXTURES,

- justification under right of entry, to take, 646.
- what liable to be taken in execution, and what not, 1001, 2.

FLEET PRISON,

- warden of. See tit. *Warden*.
- rules for government of, 53, (*f.*) 372.
- fees payable by prisoners in, *id.*
- table of fees for, 88, 372.
- prisoners supersedeable *six* months, to be discharged from, 368.

FORCIBLE ENTRY,

- costs in action for, 987.

FOREIGN ATTACHMENT,

- no bar to arrest, 177.
- not removable, on stat. 19 Geo. III. c. 70, § 4. p. 401.
- return of proceedings on, in Mayor's court of *London*, 407. (*b.*)
- plea of, 644.
- when a good answer to proceedings on award, and when not, 836.

FOREIGN COURT,

- proceedings in, 801.
- evidence of judgment in, 944.

FOREIGNERS, 534.

- limitation of actions by, 16, 17.
- when required to give security for costs, 534.

FOREIGN JUDGMENT,

- assumpsit* or *debt* on, 3.
- assessing damages in, 571.
- interest not allowed in, 571, (*l.*) 573, (*c.*) 880.
- evidence of, 944.

FOREIGN MONEY,

- value of, must be ascertained by jury, in action for, 571, 573.

FOREIGN PLEAS, 640.**FOREJUDGER, 323.**

- judgment of, *id.*

FORFEITURE,

- of lease, &c. *ejectment* on, 1190.

FORFEITURES. See tit. *King*.**FORMEDON,**

- withdrawing demurrer, and replying *de novo*, in, 699, 710.

FORMEDON, continued.

writ of, when necessary, 1194.

time allowed for bringing, *id.*

FORMER ACQUITTAL, or CONVICTION,

plea of, 648, 4.

FORMER DISTRESS,

plea of, 646.

FORMER RECOVERY. See *tit. Judgment recovered.*

plea of, 648, 4; 646, 651.

when pleaded, or given in evidence, 648, 4; 649, 651.

FRANCHISE, 217. (a.)

disturbance of, 444. (b.)

FRAUD,

in going beyond sea, to avoid outlawry, 189.

obtaining warrant of attorney, 547.

executing release, 677, 8; 848.

contract, cannot be gone into, on executing inquiry, 580, 81.

may be given in evidence, on *non est factum*, 650.

in sale of goods, will not defeat execution, 1004, 5.

settlement on wife, 1011.

executing *feri facias*, 1005.

sequestrari facias, *id.*

FRAUDULENT REMOVAL, of Goods;

avowry or cognizance after, in *replevin*, 645.

justification on, in *trespass*, 646.

FREE FISHERY,

justification under right of, 645, 6.

FREEHOLD. See *tit. Liberum Tenementum.***FREEHOLDER,**

avowry or cognizance by, in *replevin*, 645.

FREEHOLDERS' BOOK, 788.**FREEHOLD TENANT,**

when allowed to inspect books, &c. 595.

FREE WARREN,

justification under right of, 645, 6.

costs in *trespass*, for entering, 964.

FREIGHT,

bringing money into court for, 620.

FRESH PURSUIT,

in what cases allowed, and in what not, 283, &c.

recaption on. See *tit. Recaption.*

FRIENDLY SOCIETIES,

actions by or against trustees of, 8.

FUGITIVES, 212, 13, 14, 15; 857, 682, 3.**FURTHER PARTICULARS.** See *tit. Particulars.***FUTURE EFFECTS,**

liability of, on insolvent debtors' act, 395.

proceedings against, 396, *id.* (a.)

G.**GAME LAWS,**

staying proceedings on, 541.

GAME LAWS, *continued.*

bringing penalty into court on, 541.

distress for penalty on, 528. (*f.*)

costs on. See tit. *Costs.*

GAMING,

statute of, when remedial, and when penal, 172. (*k.*)

form of affidavit of debt on, *id.*

plea of, 648.

when pleaded, or given in evidence, 646, 7; 650, 51.

application of penalty on, 985.

GAMING HOUSE,

action for keeping, 518, 19.

staying proceedings in, *id.*

GAOL, 229, &c.

GAOL DELIVERY,

commission of, 41.

GAOLERS,

when entitled to protection of stat. 24 Geo. II. c. 44, § 6, p. 35.

duty of, 231, 2.

punishment of, 231, &c.

exempted from serving on juries, 784.

GAOL FEES,

abolished, with certain exceptions, 372.

GENERAL DAMAGES,

cannot be brought into court, 620.

set off, 663, 4.

GENERAL ISSUE. See tit. *Pleas and Pleading.*

PLEADING, when allowable, 661.

GLEBE LAND, not extendible on *elegit*, 1035.

GLOUCESTER, City of;

court of requests for, 957.

GOLD COIN,

only, a legal tender, 187. (*l.*)

GOOD JURY. See tit. *Jury.*

GOODS,

bargained and sold, or sold only, arrest not allowed for, 173.

sold and delivered, affidavit of debt for, when not sufficient, 183.

interest, when recoverable in action for, and when not, 871, 2.

what may or may not be taken, on *feri facias*, 1001, &c.

extent, 1052, 3.

from what time bound by extent. See tit. *Extent.*

king's priority of execution, on extent, 1054, 5.

GRAND ASSIZE,

trial by, 747, 8.

writ of summons for electing:

nisi prius clause should be inserted in, *id.*

consequence of omitting it, *id.*

return to, not traversable, *id.*

GRANT,

title by, how pleaded, 443.

GRAVESEND,

court of requests for, 957.

GREAT SESSIONS. See tit. *Wales*.

court of;

attorneys of:

articles of clerkship to,

stamp duty on, 65.

proper officer for filing, 64. (*f*.)

admission of, stamp duty on, 61, 2; 65.

not entitled to practise in courts at *Westminster*, 61, 2.officer of, removing, 232. (*c*.)

writs in:

may issue from one county to another, 129.

rules to return, may be granted in vacation, 307.

removal of causes from,

in civil cases:

before judgment,

at common law, 399.

on stat. 1 Geo. IV. c. 87, § 5, id.

5 Geo. IV. c. 106, § 23, id.

after judgment;

on stat. 33 Geo. III. c. 68, § 1, pp. 301, 995.

in criminal cases, 400.

return of proceedings in, 407. (*b*.)enforcing obedience to rules, orders, and decrees, against persons
residing out of jurisdiction of, 401, (*b*.) 995. (*g*.)commission for taking answers, examinations, and affidavits, &c. in,
motions and petitions in, 510. 491, 2.

rules and orders in,

when and where made, id.

for particulars of demand or set off, in vacation, 486, 7, (*u*.) 598. (*l*.)

jurors in;

qualification of, 782.

mode of returning and impanelling, 786.

witnesses residing out of jurisdiction of, compelling attendance of,
806. (*f*.)

new trial of causes in, grantable by superior court, 905, 6.

execution in:

after removal, on stat. 33 Geo. III. c. 68, § 1, pp. 401, 995.

return days of writs of, 998. (*l*.)rule granted by, for inspection of *feri facias*, 1017, id. (*d*.)*testatum* writs of may issue against defendant in any county,
within the jurisdiction, 1022.*ejection* in;

not removable, without special application to the court, 399.

on stat. 1 Geo. IV. c. 87, pp. 1209, 1221; 2.

GROUND RENT,

payment of, may be pleaded in bar, in *replevin*, 664.

GROWING CROPS,

when liable to be taken on *feri facias*, and when not, 1001, 2.

GUARANTEE,

arrest on, 173.

GUARDIAN. See tits. *Appearance*, and *Infant*.in socage, *ejection* by, 1190.

GUILDABLE, 217. (*a.*)

H.

HABEAS CORPORA,

on return of *cepi corpora*, 314.

HABEAS CORPORA JURATORUM. See tit. *Jury*.

HABEAS CORPUS,

writs of, in what court moved for, 38.

in criminal cases, 286, 7; 347, 8, 9, 50.

when it lies, in K. B. and when not, 286, 7.

lies not, to remove prisoner in custody, on criminal account, in C. P.;
for rendering him in discharge of bail, 287.

charging him with declaration, in civil action, 345.
in execution, *id.*

to remove prisoner in custody on extent, without consent of
attorney-general, 287.

whence it issues, 286.

does not issue as a matter of course, 347.

prisoner may controvert truth of return to, *id.*

remanding defendant under, 286, 7; 348, 9.

bailing prisoners, on return of, 258. (*d.*)

in civil cases; 38.

what, and whence it issues, 348, 404.

different kinds of, 348.

ad respondendum, *id.* 349, 350, 356, 358.

lies not, for charging prisoner in custody on *criminal* pro-
cess, with declaration in *civil* action, 350.

satisfaciendum, 348, 350, 365, 6.

ordinary mode of charging defendant in execution, in C. P.
350, 365.

when used in K. B. 364.

prisoner cannot be charged on, after allowance of writ of
error, 350.

testificandum. See tit. *Witnesses*.

cum causâ, ad faciendum et recipiendum.

when it lies, 348.

form of, *id.* 404.

direction of, and how returnable, 349, 404.

to remove defendant;

from custody of sheriff, &c. 341, 2; 348, 350.

prison of inferior court, 348, 350.

Fleet prison to King's Bench, or *vice versâ*, 351.

evidence of commitment on, *id.* 352.

to bring up defendant to bar of C. P. or exchequer, 355, 358.

discharge party privileged from arrest, 197.

bail, 286, 292, 3; 348.

when issued on crown side, in K. B. 287.

proceedings thereon, *id.*

lies not on extents, *id.* 1049,

when crown is concerned, 287, 8; 1049.

remanding defendant, 286.

HABEAS CORPUS, continued.*cum causâ, ad faciendum et recipiendum, continued.*to discharge bail, *continued.*may be had, notwithstanding lunacy of principal,
216.

proceedings on, by commitment of, or remanding defendant, 286, 7.

prisoners removed by, not entitled to benefit of insolvent act, 394.

how defendant may be removed thereby, into custody of marshal
or warden, 350, &c.

how long he must remain in custody of marshal, 351.

marshal not compellable to file, *id.*

allowance to sheriff, for bringing up defendant on, 349.

remedy for, *id.* 404, 5.

to bring up sheriff, on attachment, 314, 481.

for removal of causes from inferior courts:

what, and for whom, and when it lies, and when not, 403, 4.

out of what court it issues, 404.

considered as *mesne* process, 279.

direction of, 349, 404.

form of, 404.

how returnable, 349, 404.

ground of removal by, 404.

effect of, *id.* 405.receipt and allowance, *id.*

in what stage of the cause, 405.

in causes under *five pounds*, *id.* 406.*fifteen pounds*, 406.

return of, when and how made, 407.

what is good, and what not, *id.*

effect of filing, 411, 12.

bail on. See tit. *Bail.**procedendo*;

what, and when it lies, and when not, 410, &c.

may be granted, after return is filed, 412.

declaration on;

de novo, 412, 13.

may be for any cause of action, 412.

in what time delivered, 413.

venue in, *id.**non pros*, *id.*time for pleading, *id.*replication of, to plea of statute of limitations, *id.* 414.

costs, 414.

HABERE FACIAS POSSESSIONEM,

what, and whence it issues, 1244.

præcipe for, *id.*direction and form of, *id.*how returnable, *id.*and *fi. fa.* or *ca. sa.* for damages and costs, after verdict, *id.*

against feme sole, who married before trial, 1011, 1244, 1249.

upon what judgments, 1244.

HABERE FACIAS POSSESSIONEM, continued

when issued ;

in general, *id.*

after judgment by default, *id.*

on nonsuit, for not confessing lease, &c. in K. B., *id.*
C. P., *id.*

after verdict against tenant, or landlord, *id.*

without taxing costs, 994, 1244.

pending error, 1234.

signing, and sealing, 1245.

delivery of to sheriff, and warrant to officer, *id.*

indemnity to sheriff for executing, *id.*

if sued in defendant's life-time, may be executed after his death, 1245.

mode of delivering possession on ;

in general, 1087, 1246.

of houses or land, in possession of one or different tenants,
1246.

land, according to customary measure, *id.*

being parcel of highway, *id.*

lessor of plaintiff must not take more than he is entitled to, *id.*

remedy for taking more, *id.* 1257.

disturbance in giving possession, 1247.

by attachment, *id.*

after possession given ;

by defendant, *id.* 1247, 8.

stranger, 1248.

restoring possession of premises improperly delivered, 490, 1246, 7.

de novo, when it lies, and when not, 1247, 8.

poundage on, 1248.

HABERE FACIAS SEISINAM,

poundage on, 1039.

HALF PAY,

of officer, not saleable, 381.

HEADBOROUGHES. See *tits. Constables*, and *Headboroughes*.**HEIR,**

privileged from arrest, 193, 4.

pleas by, 644, 5.

when and how liable, in case of alienation, 986, 7.

judgment against, on obligation of his ancestor, 936, 7.

general, 937, 8.

special, *id.*

of assets *in futuro*, 1113.

on issue of *riens per descent*, 937, 8.

altered by stat. 3 W. & M. c. 14, § 6, 988.

docketing, *id.*

execution against ;

on general judgment, 937, 8 ; 1089.

special judgment, *id.*

when charged as *tertenant*, 1120, 21.

scire facias against, 1113, 1120, 21.

when not necessary, 1121.

ejectment by, 1190.

HEIR and TERTENANTS,

- elegit* against, 1033, 4.
- scire facias* against, 1121, &c.
- into what county, 1122.
- returns to, 1124.
- declaration on, 1127, 8.
- pleas by, 640, 1121, 1128.

HERALD'S OFFICE,

- books of, when evidence, 801.

HEREFORDSHIRE,

- next English county to *South Wales*, 751.

HERIOT CUSTOM,

- seizure for, not within stat. 11 Geo. II. c. 19, § 22, p. 977.

HIGH BAR MONEY, 508, 9.**HIGH CONSTABLE,**

- mode of re-imbursing, for his expenses in defending actions, &c. on stat. 7 & 8 Geo. IV. c. 31, p. 124.
- penalty on, for neglect of duty, on that statute, 125, 6.
- exempted from serving on juries, 784.

HIGHWAY ACTS,

- limitation of actions by, for things done in pursuance of, 21.
- setting aside proceedings on, 528.
- distress for penalty on, 528. (*f.*)
- bringing money into court under, 621. (*h.*)

HIRE of CARRIAGES, &c.;

- affidavit of debt for, 183, 4.

HISTORY,

- books of, when evidence, 801, 2.

HOLYDAYS,

- what, and when allowed to be kept by law officers, and when not, 55, 6, 7.
- of the church, 55, 6.
- origin and history of, 55.
- by stat. 5 & 6 Edw. VI. c. 3, id. 56.
- of the state, 55, 6, 7.
- in Exchequer, 56, 168.
- in term time, 57.
- vacation, id.

- remedies against officers, for not opening their offices, &c. on, 58.

HOUSE of COMMONS. See tit. *Members of the House of Commons.*

- taxation of costs, on private bills, &c. in, 330.
- bringing witnesses before committee of, when in custody, 809.

HOUSE of LORDS,

- taxation of bill of costs in, 329, 30.
- judgment in, 801.
- how proved, 944.

- writ of error to, 1137, &c. 1139.

- lies not for error in fact, 1137.

- effect of, on execution against bail below, 1146.

- costs on affirming judgments in, 1184, 5.

HUE and CRY,

- statutes of, repealed by stat. 7 & 8 Geo. IV. c. 27, p. 122.
- proceedings, and evidence in actions on, id. (*a.*)

HUNDREDORS,

remedies against, on statutes of hue and cry, &c. abolished, 122.

for damages done by rioters consolidated, id.

in what cases liable for such damages, id. 123.

on what conditions, 123.

actions against;

limitation of time for, 21, 123.

must be commenced by original writ, 27, 37, 91, 102, 104, 145.

process in, 112.

arrest not allowed in, 193.

proceedings in, on stat. 7 & 8 Geo. IV. c. 31.

service of process, and mode of proceeding to judgment, 123.

judgment by default, id.

execution, id. 124.

mode of reimbursing high constable, for expenses in defending action, &c.
124.

county treasurer, id. 126.

summary mode of proceeding against, where damages do not exceed 30l.
pp. 124, 5, 6.

penalty on high constable, for neglect of duty, 125, 6.

execution against, on stat. 19 Geo. II. c. 34, § 6, pp. 126, 7.

HUSBAND AND WIFE. See tit. *Baron and Feme*.

I.**IDIOTS,**

appearance by, 93.

IMMATERIAL ISSUES. See tit. *Issues*.

IMPARLANCE,

what, 462.

general, id.

special, id.

not allowed, without leave of court, id.

except to prevent injustice, id.

general special, id.

by whom, and how granted, and entered, in C. P., id. 463, 639.

note for, in C. P., 463. (a.)

what may or may not be pleaded, or done after, 462, (g.) 463, 4; 587,
638, 9.

plea after, how taken advantage of, 463, 639.

in what cases formerly allowed, 464.

allowed at this day, 466, 7.

after removal by *pone*, or *recordari*, &c. 418.

when not allowed, 109, 464, 5, &c. 473.

after removal by *habeas corpus*, 413, 467.

when delay is occasioned by defendant, 467.

when allowed or not, on amending declaration, 469, 707, id. (i.)

rule for, not grantable, 467.

entry of, by bill, 720.

not necessary by original, 722.

in Exchequer, 723.

between plea and replication, 720.

when allowed, in *scire facias*, 1127.

IMPARLANCE, *continued*.*certiorari* for, how directed, 1170. (*i*.)**IMPARLANCE ROLL**, 462, 720, 729.**IMPRISONMENT**. See tit. *False Imprisonment*.

duress of, plea of, 643.

of custom-house or excise officers, when not allowed, 892.

INCLOSURE ACT,

costs in action on, 975.

references on, 819, 20.

mode of enforcing award on, 844.

INDEBITATUS ASSUMPSIT, 2.difference between, and *liability assumpsit*, id. (*e*.)**INDEMNITY**,

promises of, 3.

acts of, 64, 5, 6; 78.

by attorney, objection to bail, 268.

INDEMNITY BOND,

penalty of, when recoverable in action on, 880.

bail in error not required on, 1150, 51.

interest not allowed, on affirmance of judgment, for damages assessed on, 1183.

INDIA,salary of judges in, 39. (*g*.)**INDIA COMPANY**,

books of, 802.

inspecting, 593, 4.

INDICTMENTS,for preventing arrest, 237. (*a*.)conspiracy. See tit. *Conspiracy*.perjury. See tit. *Perjury*.attachment for non-payment of money on, not within stat. 48 Geo. III.
c. 123, p. 387.

against custom house or excise officers, 892.

plea of misnomer to, how concluded, 638. (*k*.)

costs for not proceeding to trial on, 758.

incident to, award of, 833.

setting aside award on, 821, 841.

trials on, 761.

in adjoining county, 724. (*a*.)

order of, where prosecutor and defendant both bring down records, 819.

jury discharged, when indictment is bad in point of law, id.

after quashing jury panel, for unindifferency of sheriff, 852.

special case not allowed on trial of, at sessions, 898.

for misdemeanor, *certiorari* lies not to remove, after conviction, 400.

prosecutor of, has no right to address jury, 860.

defence of at trial, in person or by counsel, id. 861.

new trial on, after acquittal, 911.

conviction, id. 912.

for some of the defendants, id.

reading affidavits, and hearing counsel, on bringing up defendant for judgment on, 507, 8.

INDICTMENT, *continued*.

amendment not allowed, of process on, 1162.

INDORSEMENT,

on bond, when evidence of payment of interest, &c. 19.

note or bill, &c. not evidence of payment, 19.

process, &c. 158, 9, 60.

writ, of day and hour of filing it, 308.

declarations, filed or delivered *de bene esse*, 457, 8.

by the bye, 425, 473.

notice of, in action on promissory note, need not be averred, 440.

of notice to plead, on declaration, 453, 457, 8; 473, 4.

INDUCEMENT,

to declarations, on contracts, 436.

for wrongs, 442.

certainty of, 451.

INFANCY,

plea of, in abatement, 635.

bar, 643.

a good plea to action on warranty, 10. (a.)

may be pleaded, after regular judgment set aside, 568.

or given in evidence, in *assumpsit*, 676, 7.

with *non assumpsit*, 655.

must be pleaded, in *debt* on bond, 650, 51.

not formerly signed, in C. P., 682, 3.

nolle prosequi cannot be entered on, 682, 3.

mode of replying to, 685.

INFANT,

contract of, when void, or only voidable, 650. (p.)

confirmation of promise by, must be in writing, *id*.

limitation of actions by, 15.

must sue by *prochein amy*, or guardian, 99.

unless as co-executor, with others, *id*.

cannot inform on penal statutes, *id*.

not privileged from arrest, 216.

must defend by guardian, 99.

what person is usually appointed *prochein amy* for, *id*. 100.

mode of appointing *prochein amy*, or guardian, 99, 100.

annexing copy of rule to declaration, or plea, 100.

order for admission of, in C. P., *id*.

changing *prochein amy*, or guardian, *id*.

at what age he may be outlawed, 130.

lessor of plaintiff, must give security for costs, in *ejectment*, 533, 4; 1232.

plaintiff, not obliged to give security for costs, 536.

appearing by attorney, error, 1136, 1169.

in what cases aided, and in what not, 923, 4; 1169.

warrants of attorney by, voidable, 548.

heir, parol demurrer by, 645.

costs in actions by or against, 100, 101, 536.

executions against, 1026.

cannot enter into recognizance of bail in error, 1252.

certiorari for admission of *prochein amy*, how directed, 1170. (i.)

INFERIOR COURTS. See *tits. Accedas ad Curiam, Certiorari, Habeas Corpus, Pone, Recognizances, and Recordari facias loquelam.*

what shall be deemed commencement of suit in, 27, 8; 413, 14.

plaint levied in, before cause of action, no ground of error, 92.

writ of privilege to, 81, 82.

process in, 92, 107.

custom to issue summons and attachment in, at same time, bad, 92, 110.

declare against defendant before appearance, bad, 419.

attorneys of, answerable for misconduct, in C. P., 89.

stamp duty on articles of clerkship to, 65.

removal of causes from, 397, &c.

return of proceedings in, 407. (*b.*)

pledges in, discharged by putting in and perfecting bail above, 404. (*b.*)

arrest in, for what sum, 407, 8.

after *supersedeas* in, 176.

detainer in, 177.

justification under process of, 646.

ejectment in, 1198, 1204.

removal of, by *certiorari*, 398.

in *Wales*, 399.

proceedings in, when amendable, 714, 15.

process in, not amendable in court below, 712.

aliter, it seems, in court above, *id.* 713. (*k.*)

putting off trial, in cause removed from, 770.

process in, must be stated in indictment for preventing arrest, 237. (*a.*)

new trials in, 905.

venire facias de novo not grantable, when proceedings originate in, 923.

judgments in;

before appearance, erroneous, 419.

of record:

evidence of, 943.

not of record, 801.

evidence of, 944.

costs on, 943, 966, 7.

execution on, after removal, 400, 401, 1106.

prisoner in, entitled to benefit of Lords' act, 376.

form of *scire facias* on, 1106.

error from, 1137, 8.

bail on, 1149, 50, *id.* (*d.*)

entries on, 1175.

INFERIOR TRADESMEN,

costs in actions against, 967, 8.

INFORMAL ISSUES. See *tit. Issues.*

INFORMATIONS,

effect of motion for, on action, 10.

affidavits for, or on showing cause against, when entitled, 498.

against magistrates, when moved for, 498.

on penal statutes;

where laid, 429, 30.

when brought in superior courts, 517, 18, 19.

at the assizes, *id.*

proceedings on, and manner of compounding, 557. (*b.*)

INFORMATIONS; *continued.*

on penal statutes, *continued.*

fine on compounding, how levied, 577, 8.

in Exchequer. See tit. *Exchequer, revenue side of.*

in nature of *quo warranto*;

considered in light of civil proceedings, 595.

cannot be consolidated, 614.

pleading double in, 655.

for misdemeanor, putting off trial of, 770.

mode of striking special jury, for trial of, 789.

counsel when allowed to defendant on, 860, 61.

for prosecution not entitled to reply, 861.

dispersion of jury, when verdict not vitiated by, 908.

of intrusion, double plea not allowed on, 655.

amendment not allowed, of process on, 1162.

INITIALS,

of christian names, in process, &c. 148, 301, 448.

INJUNCTION,

operation of;

in general, 461, 819, 1105.

in Chancery, 461.

Exchequer, id.

effect of, id.

breach of, what, and what not, id.

on declaration, id.

notice to plead, or reply, 468, 676.

of trial, 756.

proceedings against prisoners, 360, 370.

on proceedings by *scire facias*, 1105.

INNS,

justification under right to enter, 646.

of court, chambers in, not affected by register act for *Middlesex*, 941.

IN NULO EST ERRATUM,

plea or joinder of, 1169, 1170, &c. 1172, &c.

INQUESTS,

qualification of jurors on, 582. (*d.*)

INQUIRY, writ of, 570, 71, 72, 73, &c.

what, and when it lies, after interlocutory judgment, 573.

final judgment, id.

to recover interest, id.

necessary, in actions upon bonds, &c. by stat. 8 & 9 W. III. c. 11. § 8, id.

in *debt*, for not setting out tithes, id.

foreign money, id.

use and occupation, id.

unnecessary in general, after final judgment, id, 583.

award of, in general, 570.

when dispensed with, in actions on bills or notes, &c. 487, 570, &c.

direction and form of, 573.

to sheriff of *Welsh* county, id.

amendment of, 572, 3.

signing and sealing, &c. 574.

how returnable, id.

INQUIRY, writ of, *continued.*

when allowed, for supplying omission of jury at the trial, 574.

in *quare impedit*, 575.

on demurrer to evidence, *id.*

in actions against overseers, *id.*

replevin, *id.*

when not allowed:

in *detinue*, *id.*

replevin, *id.*

mandamus, *id.*

action for libel, *id.*, 575.

unnecessary, after final judgment, 573.

not allowed in *debt*, after judgment by default, *id.*

in *debt* on judgment, *id.*

on stat. 8 & 9 W. III. c. 11, § 8, 583.

to inquire of value of lands descended, on statute 3 W. & M. c. 14, § 6,
p. 938.

in error, on reversal of judgment, 1180.

when executed before chief justice, or judge of assize, 487, 576.

motion for good jury, 484, 486, 576.

cannot be executed before two under-sheriffs extraordinary, in C. P. 576.

notice of executing, 576, &c.

to whom given, 97, 576.

in joint action, 576.

country causes, in K. B., *id.*

C. P., *id.*

in Exchequer, 577.

entry and service of, 577.

what necessary, or sufficient:

in *London* or *Middlesex*, 576, 7.

country causes, *id.*

in *replevin*, 577.

after notice of trial, in K. B., 578.

C. P., *id.*

Exchequer, *id.* 579.

must specify the hour, and place of executing it, *id.*

when given for a wrong day, 579.

on demurrer or joinder, in C. P., 578.

Exchequer, *id.* 579.

issue of *nul tiel record*, in C. P., 578.

scire fieri inquiry, 1114.

before chief justice, or judge of assize, 486, 576.

short notice, 577.

term's notice. See tit. *Term's Notice*.

continuance, or countermand, in K. B., 97, 580.

C. P., *id.*

time of executing, 579.

place of executing, *id.* 580.

in *London*, *id.*

Middlesex, *id.*

other counties, *id.*

when left at sheriff's office, 580.

INQUIRY, writ of, *continued*.

- notice of attending by counsel, 580.
- witnesses on, *id*.
- execution of, may be adjourned, *id*.
 - privilege of party from arrest, in attending, 197.
- evidence on, 580, 81.
 - in action against hundredors, 127.
 - after judgment on demurrer, 585, 741.
- costs for not proceeding to execution of, 484, 580.
 - rule for, in C. P., 484, 580. (*q*.)
- return of, 581, 2.
- inquisition on;
 - rule for judgment, in K. B., 581.
 - when required, in C. P., *id*.
 - practice in latter court, *id*.
 - must be left with clerk of judgments, in C. P., *id*. 582.
 - setting aside;
 - grounds of, 582.
 - by defendant, *id*.
 - plaintiff, *id*.
 - motion for, 488.
 - when made, 582.
 - terms imposed on, *id*.
 - taxing costs, 581.
- certiorari* for, how directed, 1170. (*i*.)
- want of, aided, 583.
- new writ, and inquisition, ordered, *id*.
- costs on, in action for words, 962.
 - trespass, 965.

INQUISITIONS, 801.

- upon outlawry, 137.
 - writ of inquiry. See tit. *Inquiry*.
 - feri facias*, to determine property, 1008.
- upon *elegit*, and return, 1036.
 - commission for finding simple contract debts to king, 1046, 7, 8; 1063, 4.
- extent in chief, 1057.
 - in aid, *id*.
 - pro forma*, 1047, 1063, 4.
- setting aside. See tit. *Inquiry*.

INSANE PERSONS; See tit. *Lunatics*.

- not within statute of limitations, 15.
- relief of, on insolvent debtors' act, 394.

INSANITY; See tit. *Lunacy*.

- no ground for discharging defendant, 216.
 - bail, *id*.
- return of, to writ of *latitat*, *id*. 308.
- may be given in evidence, on *non est factum*, 650.

INSIMUL COMPUTASSENT, 2, 834.

- by or with executors, &c. 13.

INSOLVENT ACTS;

- occasional, 212, 13.

INSOLVENT ACTS, *continued*.

permanent, 213, 14, 15; 374, &c. 386, 7; 388, &c.

INSOLVENT DEBTORS,

when and how discharged, under Lords' act. See tit. *Prisoners*.

not entitled to discharge, for plaintiff's not proceeding, 371, 2.

compellable to deliver up their effects, 382, &c.

when in custody on attachment, for nonpayment of costs, pursuant to award, 385.

in execution for small debts, when and how relieved, 386, 7, 8.

rule for discharge of, in K. B. absolute in first instance, 388.

in C. P. only a rule *nisi*, id.

acts relating to;

occasional, 212. (*k.*) 388.

decisions on, 213, 388.

permanent:

53 Geo. III. c. 102, (Lord *Redesdale's* act) 388, 9.

1 Geo. IV. c. 119, id.

7 Geo. IV. c. 57, p. 389.

what persons entitled to benefit of, and what not, 394.

married women, id.

persons of unsound mind, id.

prisoners within walls of prison, id.

removed by *habeas corpus*, id.

discharged under insolvent acts, or uncertificated bankrupts, id. 395.

crown debtors, 395, 1065, 6.

relief of, on stat. 7 Geo. IV. c. 57, § 75, pp. 1066, 7.

discharge of;

proceedings for obtaining,

petition, 389, 90.

assignment to provisional assignee, 390.

schedule of debts, &c. id. 391.

effect of error in, without fraud, 395.

appointment of time and place for hearing petition, &c. 391.

notice to creditors, id. 392.

examining petition, and schedule, 392.

opposing, and proceedings thereon, id.

adjournment of hearing, id.

affidavits for, id.

interrogatories on, id.

reference of schedule and accounts, to officer of court or examiner, id.

adjudication of, id.

extends to process for contempt, in nonpayment of money, or costs, id. 393.

costs incurred by creditor, subject to taxation, 393.

sums payable by way of annuity, id.

previous decisions respecting, id.

effect of;

on *mesne* process, id. 394.

fieri facias, or *elegit*, 393.

INSOLVENT DEBTORS, *continued.*

discharge of, *continued.*

effect of, *continued.*

on Lord *Redesdale's* act, no bar to action for mesne profits, 389.

does not prevent prisoners from taking benefit of Lords' act, 376.

allowances to, when in prison, 372, 3.

privilege of, from arrest,

under occasional insolvent acts, 84, 212, 13; 388.

on stat. 7 Geo. IV. c. 57, pp. 213, 14, 15.

when liable to arrest, 213, 14.

for contingent debts, &c. 213.

on subsequent promises, *id.*

after adjudication of discharge, at future period, 214.

mode of relieving;

by application to judge, 214, 15.

plea of discharge, 394.

replication to, *id.*

sheriff not liable to action for arresting, 215.

not required to give security for costs, 536.

entitled to judgment, as in case of nonsuit, &c. 371, 2; 767.

warrant of attorney, or *cognovit actionem*, by;

to be filed with clerk of dockets, &c. 555, 561.

when not to be acted upon, 396.

to confess judgment, for amount of debts in schedule, 395.

proceedings on, 396.

cancelling, when debts are satisfied, 396. (*a.*)

future effects of;

liability of, 395.

mode of proceeding against, 396.

cannot maintain *ejectment*, after assignment of term to provisional assignee, 389.

actions against;

judgments in, 683, 1112.

executions in, 396, 1112.

scire facias in, 1112.

costs in, 393, 396.

assignees of;

actions by, 7.

not abated by death, or removal of assignees, 934, 5.

proceeding to judgment, &c. in name of insolvent, 934.

death or removal of, does not abate suit, *id.* 935.

judgments by, 395, 991.

costs on, 399.

may obtain sequestration of clergyman's benefice, 1024.

ejectment by, 1190, 389.

evidence in, 388.

amendment of recovery suffered by, refused, 707.

distress for rent on goods of, how far available, 1015.

INSOLVENT DEBTORS' COURT, 388, 9.

attorney's bill taxable, for business done in, 329.

privilege of parties attending, 195, 389.

proceedings in, not cognizable in C. P., 380.

INSPECTION,

of lease, &c. for declaring thereon, in K. B., 589, 90.
C. P., 590.

stamping it, in K. B., id.
C. P., id.

written instruments, not under seal, 586.

in what cases formerly demandable, 590, 91.

in actions upon policies, 591.

by grantor of annuity, id.

in other cases, id. 592.

when in custody of trustee, &c. 592.

books, &c. of private nature, 489, 586, 592, 3 ; 802, 806.

public nature, 586, 593.

books of sessions, &c. 801.

books and court rolls of manors, 594, 5 ; 802.

of corporations, 595, 802.

entries in, proof of, 802.

rule for, when made, 489, 592, 595, 6.

on information, 595, 6.

mandamus, 596.

in action, 595, 6.

of writ of *fiery facias*, rule for, 1017.

INSTALMENTS,

staying proceedings on payment of, 542, 3, 4.

bond for payment of, within stat. 8 & 9 W. III. c. 11, pp. 584, 1108.

scire facias in debt on bond, for payment of, 1102.

INSTANTER, meaning of, 567, 641.

INSURANCE. See tit. *Policy of Insurance*.

INSURANCE COMPANIES,

actions by or against, 8.

INTERESSE TERMINI,

how stated in pleading, 442. (b.)

INTEREST,

when formerly recoverable ;

on all liquidated sums, 871.

for money lent, &c. id.

on account stated, id.

when not ;

for goods sold, id.

work and labour, &c. id.

in what cases now recoverable, id. 872.

in what not ;

for money lent, 872.

had and received, id.

on account stated, id.

in action against auctioneer, for deposit money, id.

recoverable as special damage, against vendor, when title is defective, id.

not allowed for goods sold, though to be paid for on certain day, id.

on bills of exchange, or promissory notes ;

recoverable, and from what time, id.

proveable under commission of bankrupt, though not expressly reserved, 209, 10 ; 873.

INTEREST, continued.

- on bills of exchange, or promissory notes, *continued.*
 - considered as damages only, 873.
 - computing, on reference to master or prothonotaries, 487, 511, 570, &c.
- may be recovered for goods sold, to be paid for by bill, 873.
 - in trover, for bill, id. 885.
- not recoverable, on policy of insurance, 873.
 - in covenant, for non-payment of rent, id.
 - on foreign judgment, 874, 880.
- when recoverable, on award, 873.
 - in debt on bond, id. 874.
 - single bill, 874.
 - judgment, 573, 874.
 - on execution of inquiry, 581.
- rate of, on debts contracted in this country, 874.
 - abroad, id. 875.
- to what time computed, 875.
- effect of payment of, in debt on bond, 18, 19.
- when allowed, beyond penalty of bond, 541.
 - principal, on judgment, 1037.
 - or not, on balance of bill of costs overpaid, 26, 337, 1082.
- when not allowed, on paying money into court, 26.
 - taxing solicitor's bill, 337.
- count for, in action on bill of exchange, 617.
- staying proceedings, on payment of, 542, 3.
- bail not liable for, on sum recovered, subsequent to judgment, 281.
- on writs of error;
 - allowance of, in K. B., 1182.
 - Exchequer Chamber, id. 1183, 4.
 - allowance of, in House of Lords, 1184, 5.
 - on affirming judgments of Exchequer, 1184.
 - when not allowed, on affirming judgment, in Exchequer Chamber, 1182, 3, 4.
- how computed, 874, 5; 1184.
- bail in error, when not required for, 1155, 6.
 - liable for, 1183, 4.

INTERLOCUTORY JUDGMENT. See tit. *Judgment.*

INTERROGATORIES. See tit. *Witnesses.*

- on attachment, 237, 481, 2.
- under Lords' act, 380.
 - insolvent debtors' act, 392.
- costs on, 813.

IRA MOTUS, 645.

IRELAND;

- societies or partnerships in, how to sue or be sued, 9.
- commissions for taking affidavits, grantable by courts of, 166. (c.)
- affidavit made in, 166, 181, 187.
 - to hold to bail, on *Irish* judgment, 181.
 - to arrest in, made in *England*, id. (c.)
- privilege of peers of, from arrest, 192.
- acts relating to, 178, 216, 227, 809, 10.

IRELAND, *continued*.

effect of certificate, under commission of bankrupt in, 211.
 proceedings in, on stat. 43 Geo. III. c. 46, § 2, p. 227, &c. 892, 3.
 security for costs, when plaintiff resides in, 584.
 venue cannot be changed, when cause of action arises in, 611.
 witnesses in, bringing up, when in custody, 809, 10.
 damages in actions against justices in, 892, 3.
 judgments in ;

arrest on, 178.

plea of *nul tiel record* to, 742.

error from, 1140.

alleging diminution in, 1167. (*d.*)

writ to confess or deny seal, 865.

execution on, 1186.

ejectment for bog, &c. in, 1191.

IRREGULARITY,

in general, what, 512.

when and how taken advantage of, 169, 518, &c.

waived, 518, 14, 15.

in suing defendant as attorney, who is not so, 81.

affidavit to hold to bail, 188.

process, and when and how cured, and when not, 152, (*s.*) 160, 61;
 448, 512.

notice subscribed to, 167, 512, 13.

service of, 161, 218. (*b.*) 512, 13; 567, 513.

motions to set aside for, in K. B., 169, 514.

C. P., 514, 15.

Exchequer, 518, 515.

proceedings on bail-bond, 800, 801.

against sheriff, 816.

prisoners, how waived, 514.

delivery, filing, or notice of declaration, 149, 163, 512, 13; 567.

when cured, by accepting or keeping it, 845, 518, 567.

taking it, or plea, out of office, 160, 424, 5, (*l.*)
 518, 14.

not objecting in time, 455.

paying debt, and part of costs, 518.

admitting debt, *id.*

when not, *id.* 514.

notice to apply to wrong court, on Lords' act, not cured by opposing
 prisoner's discharge, 377.

of inquiry, &c. how cured, 579, 80.

want of rule to plead, 474, 5; 513, 567.

demand of plea, 513, 567.

judgments by default, *id.*

for want of bail or appearance, how waived, 242, 562, 567.

against principal, no ground for setting aside proceedings against
 bail, 1129.

notice of trial, or inquiry, 512.

in execution, 512, 13.

signing final judgment too soon, cured by attending to tax costs, 980.

service of rule, how cured, 502.

IRREGULARITY, continued.

setting aside proceedings for, 446, 7; 488, 9; 512, &c. 567, 8; 1032.

in Exchequer, 513, 515.

restraining defendant from bringing *trespass* on, 568, 1032.

plaintiff not bound to pay costs on, before commencement of fresh action, 538.

costs on, 515.

previous to judgment, no objection to referring note to prothonotaries, 573.

new trials for, 905.

distinctions between irregularity, and complete defect in proceedings, 152, (s.) 218, (b.) 515.

ISLE of THANET;

court of requests for, 957.

ISLE of WIGHT;

court of requests for, id. 959, 60.

ISSUABLE PLEAS,

what, 462, 470, 71, 2; 563.

demurrers, when so considered, 472.

judgment signed for want of, id. 478, 563.

when one of several pleas is not issuable, id.

aliter, if one of several pleas be merely demurrable, 563.

ISSUABLE TERMS, 106.**ISSUE MONEY, what, 727, 739.**

payment of, abolished, id.

ISSUE ROLL; 729, 733, 4.

from whom obtained, 728, 734.

of what term, 733, 4.

contents of, 730, 734.

numbering, 728, 731.

docketing, and filing, 731, 2.

entry of proceedings on;

in general, in K. B., 730, 733, 4.

C. P., id.

Exchequer, 730.

to judgment, in K. B., 931, 2.

C. P., 932.

ISSUES,

upon a *distringas*, &c., 110, 11; 119, 137, 8.

in K. B., 313, 416, 17; 486, 1021, 2.

C. P., 111, 417, 498.

motion to increase, or for sale of, on last day of term, 111, 498, 9.

Exchequer, 155.

pleadings, what, 717.

in law, id.

fact, id.

triable by the record, id.

country, id.

feigned, id.

several, in one cause, id.

by whom, when, and how made up, in K. B., id. 718.

C. P., 718.

ISSUES, *continued.*upon pleadings, *continued.*

- with, or without rule to rejoin, id. 719.
- contents of, 719, 20, 21.
- form of, in K. B., by bill, 719.
 - title, id.
 - memorandum*, id. 720.
 - entry of imparlance, 720.
 - pleadings, 721.
 - after judgment of *respondeat ouster*, id.
- by original, 722.
 - title, id.
 - declaration and pleadings, id.
- in C. P., by bill of a preceding term, 720, 21.
 - entry of imparlance, 720.
 - how entitled, 723.
- in Exchequer, id.
- how concluded;
 - on issue in fact, triable by the country, 721, &c.
- award of *venire facias*:
 - by bill, 721, 2.
 - original, 722.
- in Exchequer, 777.
- on several issues in fact, 721.
 - on *non est factum*, and suggestion of breaches, id. 722.
 - plea to part, and judgment by default to residue, 722.
- declaration and judgment by default to new assignment, id.
- against several defendants, who plead separately, id.
- when some defendants plead, and others let judgment go by default, id. 894, 5.
- on several issues, in fact and in law, 722, 895.
- when sheriff is interested, 723.
- in county palatine, id.
- Wales*, 724, 5.
- Berwick upon Tweed*, &c. id.
- when impartial trial cannot be had, 723, 4.
- entry of suggestions, 724, 5.
- on issue in fact, triable by record, 725.
- in law, id.

in King's Bench:

- general, 717, 725.
- delivery of, 725.
 - against several defendants, id.
 - after striking out special pleadings, 726.
- special, 717.
- paper-book, 718.
 - by whom, and when made up, 717, 18, 19.
 - delivery of, 725.
 - rule to return, id.
 - time for returning, id. 726.

ISSUES, *continued*.

upon pleadings, in King's Bench, *continued*.

special, paper-book, *continued*.

returning, and paying for entries, 726, 7.

striking out special pleadings, and giving general issue, 726.

similiter, and demurring, *id*.

proceedings thereon, *id*.

consequence of accepting issue, or returning paper-book, 727.

entering, *id*.

rule for, when and how given, *id*.

when to be entered, *id*. 728.

of what term, 733, 4.

in what manner, 734.

by defendant, *id*. 735.

in Common Pleas :

to whom delivered, 726.

entering ;

rule for, *id*. 727.

time allowed for, 728.

of what term, 733, 4.

in what manner, 734.

in Exchequer, 728.

must be re-delivered, after amendment, 708.

copies of, on trials at bar, 750.

directed by court of Chancery, trial of, 758.

from equity side of Exchequer, *id*.

when formerly tried, 764.

immaterial, what, 921.

not cured by verdict, *id*.

informal, what, *id*.

aided by 32 Hen. VIII. c. 30, *id*.

misjoining, aided by the above statute, 924.

in ejectment, 1231, 1236.

scire facias. See tit. *Scire Facias*.

error. See tit. *Error*.

J.

JEOfAILS, 574, 582.

statutes of, and decisions thereon, 919, 923, &c.

applicable to original writ, 923.

warrant of attorney, 924.

declaration, and pleadings, 451, 923.

issue, and *similiter*, 924.

jury process, 925, 6.

extended to all courts of record, in counties palatine, and *Wales*, &c. 298.

judgments by default, &c. 927.

not applicable to criminal cases, or penal actions, *id*. 928.

costs on amendment under, 715.

JOINDER,

of action, 10, &c.

upon contract, 11.

JOINDER, continued.of action, *continued.*

for wrongs, 11.

rules for, considered, *id.* 12.

in action, of different persons, 12, 13, 14.

writ, of several defendants, 148, 9.

demurrer, rule for, 696.

must have serjeant's hand, in C. P., *id.*

error, 1173, &c.

JOINT CONTRACTORS,

when and how discharged, by statutes of limitations, 27.

JOINT-TENANTS, 1, 635, 6.

actual entry, when necessary to be made by, 1198.

ejectment by, 1190.

demise in, how laid, 1205, 6.

confession by, of lease and entry only, 490, 1227.

JOURNALS,

of Lords, or Commons, 801.

JOURNEYS ACCOUNTS, 28.**JUDGES, 39.**salaries of, *id.* (g.)

sittings of in bank, out of term, 39, 40.

on circuits, authority for, 41.

attendance of, at chambers, in term time, 509.

authorized to grant summonses, and make orders, on their circuits, 510.

exempted from serving on juries, 784.

JUDGE'S CHAMBERS,

attendance at, in term time, 509, 10.

rules for showing cause at, in vacation, 502.

JUDGE'S NOTES, 713, 981, 984.**JUDGE'S ORDER,**

absolute in first instance, 510.

for drawing up rule in vacation, *id.*

after previous summons, 369, 470, 510, 11.

on first summons, 511.

three summonses, in.

nisi, 510.

in vacation, 511, 1225.

on circuits, 510.

for admitting plaintiff to sue in *formâ pauperis*, 97. (q.)holding to bail, in *trover* or *detinue*, 172, 186, 7.*supersedeas*, in C. P., 369, 70.

time to plead, &c. 469, &c.

staying proceedings on execution, in vacation, 511.

entering up judgment on warrant of attorney, against surviving defendant, not allowed, 551.

in policy causes, 591.

to produce papers, &c. how complied with, *id.*

for particulars, must be drawn up and served, 597.

how far a stay of proceedings, *id.*

staying proceedings, when not evidence of determination of suit, 681.

changing venue, in vacation, 609, 10.

JUDGE'S ORDER, continued.

- for consolidating actions, in C. P., 490, 615.
 - rule to bring money into court, 621, 2.
 - pleading several matters, in vacation, 658.
 - view, cannot be had without consent in vacation, in C. P., 797.
 - setting aside execution, &c. 511.
 - staying execution, on stat. 1 Geo. IV. c. 87, § 8, pp. 1244, 5.
- on amending declaration, 708.
- cannot be made at *Westminster*, in a cause entered for trial in *London*, 772.

- how far a stay of proceedings, 470.
- must be drawn up, and served, *id.* 471, 511, 598.
- signing judgment after, without giving rule to plead, 474.
- a proceeding, so as to prevent the necessity of a term's notice, 756.
- motion to set aside, 489, 511.
 - make it a rule of court, 485, 6.
- when final, 511.
- how appealed from, *id.*
 - enforced, *id.*
- evidence of, in action on award, 884.

JUDGE'S REPORT. See tit. *New Trials*.**JUDGMENT BOOK,**

- not evidence of judgment, 556, 943.

JUDGMENT PAPER,

- subpoena* to produce, 806, 7.
- not evidence of judgment, 943.

JUDGMENT RECOVERED,

- when pleaded, or given in evidence, 644, 649, 651.
- plea of, 644, 646, 651.
 - not issuable, when false, 471, 563, 4, 5, 6.
 - in fraud of judge's order, 563.
- scire facias*, on stat. 8 & 9 W. III. c. 11, § 8, pp. 1108, 9.

JUDGMENT ROLL, 729.

- on judgment by default, 568, 9.
- after verdict, 932.
- loss of, may be supplied by a new entry, 943.
- entering *quietus* on, for discharging sheriff, 144.

JUDGMENTS,

- what, 930.
- for king, 1044, 1050.
 - in *scire facias*, 1045.
 - for repealing letters-patent, 1095, 6.
 - on information for penalties, 1045.
 - proceedings on, 1044, 5.
 - from what time lands are bound by, 1050.
 - on traverse of office, 1081.
- against king, on same, 1082.
- arrest of. See tit. *Arrest of Judgment*.
- clerk of, in C. P., 45, 51, 2; 901, 932.
- when and how signed, in K. B., 568, 980.
 - C. P., 568, 9; 888, 9; 904, 980.

JUDGMENTS, *continued*.

- when court are equally divided in opinion, 930.
- entering, in what cases necessary, 931.
 - in what manner, and by whom done, 730.
 - who may compel it, 931.
- after death of parties;
 - at common law, 932, 3; 939.
 - nunc pro tunc*, 498, 932, 3; 939.
- by statute:
 - between verdict and judgment, 933, 4; 1116, 17.
 - after interlocutory, and before final judgment, 934, 1117.
 - death of one of several parties, 934.
 - feme covert, pending action, 763, 984, 1115.
 - plaintiff's bankruptcy, 934.
 - insolvency, *id*.
 - death or removal of assignees of bankrupt, *id*.
 - insolvent debtors, *id*.
- 935.
- relation and effect of, at common law, 554, 932, 3; 935, &c.
 - upon statute of frauds, 938.
 - as to freehold lands, 935.
 - leasehold property, *id*.
 - against obligor, and his heirs, &c. 935, &c.
 - in case of bankruptcy, 936.
 - against heir, on obligation of his ancestor, 936, &c.
 - restrained, as against purchasers, 938, 941.
 - restrained, as against mortgagees, 939, 941.
- docketing what, and by whom, when, and how done, 731, 2; 939, &c.
 - want of, when relieved against in equity, 940, 41.
- bringing in rolls of, 730, &c.
 - consequence of neglect, 941.
- registering, *id*.
- amendment of, 942.
 - on common recovery, 706, 7.
- in abatement,
 - for plaintiff;
 - on issue in fact, 641.
 - law, *id*.
 - defendant, 642.
 - on plea of non-joinder in abatement, 27, 636.
 - of *cassetur billa, vel breve*, 677, 683.
- in bar,
 - for plaintiff;
 - form of:
 - in *assumpsit*, &c., 931.
 - covenant, *id*.
 - debt, *id*.
 - annuity, *id*.
 - detinue, *id*.
 - replevin, *id*.
 - trespass, *id*.

JUDGMENTS, *continued.*

in bar, for form of, *continued.*

by default, *continued.*

confession. See tit. *Cognovit actionem.*

default, what, 562, 3.

creditor of bankrupt when not entitled to execution on, 570,
1009, 10.

non sum informatus, id. 930.

when signed, and entered, 568, 9.

entry of, in C. P., id.

taxing costs on, in C. P., 569.

nil dicit, 562, 3.

for not pleading to declaration, 465, 477, 562, 3.

new assignment, 563.

issuably, when under terms, 562, 3.

delivering plea in form, in C. P., 566.

giving *oyer*, 588.

setting forth the whole deed, on *oyer*, 565, 589.

rejoining, 563, 693.

joining in demurrer, 563, 851.

returning paper-book, 563, 725.

appearing to *scire facias*, 1126.

for want of issuable plea, when under terms, 472, 3; 562, 3.

plea not adapted to nature of action, 563, 4.

manifestly absurd, 564.

of set-off, for money due on recognizance, &c. in
wrong action, id.

plea of statute of additions, in C. P., 564.

tender, without paying money into court, 565.

subtle and ensnaring pleas, in C. P., 564.

sham pleas, in K. B., 565.

C. P., 674, 5.

of judgment in court of *pie poudre*, 564.

requiring different modes of trial, 565.

making it necessary to consult counsel, id.

costs of, id.

affidavit and motion for leave to sign judg-
ment on, id. 566.

for pleading before appearance, or taking declaration out of
office, 566.

in bailable action, before bail perfected, 465,
6; 566; but see 567.

in abatement, after imparlance, 463, 476, 639,
677.

out of time, 566, 640.

without affidavit, 565, 640.

aliter, if affidavit sworn before
defendant's attorney, 565.

by attorney of another court, in C. P., 566.

for entering special plea in general issue book, in K. B.,
566.

JUDGMENTS, *continued.*for plaintiff, *continued.*by *nil dicit*, *continued.*

filing pleas that ought to be delivered, in K. B., 566.

without rule to plead several matters, in K. B.,
id. 567.*aliter*, in C. P., 567.two pleas, at different times, on same day, in C. P.,
566.if plea, when necessary, be not signed by a counsel or ser-
jeant, 567, 640, 672, 8.

after judge's order, without giving rule to plead, 474.

rule to abide by plea, 672.

in what cases it cannot be signed, 471, 2; 563, 566. (n.)

when plea, though informal, goes to substance of ac-
tion, 563.for pleas not manifestly absurd on the face of them,
564, 5.false pleas, without showing them to be vexatious,
565.

insensible plea in abatement, 641.

want of appearance, 567.

when plaintiff takes plea out of office, and keeps it,
566. (n.)

when signed, 465. (p.)

in King's Bench, 465.

after summons for time to plead, 469, 70, 71.

rule to plead, 474, 5.

after demand of plea, 477.

Common Pleas, 466, 568, 9.

after rule to plead, 475.

demand of plea, 477.

Exchequer, 455.

on demurrer, 740.

summons unattended must be first discharged, in C. P., 471.

aliter, in K. B., id.

after delivering bill of particulars, 468, 9.

giving security for costs, 469.

how signed, between essoin and first day in full term, 241.

entry of, in K. B., 569.

C. P., 568, 9.

taxing costs on, in C. P., id.

in what cases irregular, 512, 13; 567.

when defendant is not served with process, 518.

no declaration delivered, or filed, &c. id.

signed before appearance, id.

without rule to plead, id.

demand of plea, id.

before time for pleading is expired, id.

after plea pleaded, id.

when it cannot be set aside, for want of appearance, 567.

JUDGMENTS, *continued.*for plaintiff, *continued.*by *nul dicit*, *continued.*form of, on reference to master or prothonotary, in action
on bill, &c. 570. (i.)

waiving, 567.

setting aside;

when signed contrary to good faith, 567.

for irregularity, *id.*

motion for, when and how made, 488, 503.

not generally allowed, the last day of term,
in C. P., 499, 567.

upon affidavit of merits, 567.

in what cases not allowed, 568.

in Exchequer, on last day of term, 499.

motion in arrest of judgment after, 927.

interlocutory:

when action sounds in damages, 568.

on demurrer, *id.**nul tiel record*, *id.*how signed, and entered, *id.* 569.*Qu.* if *scire facias* necessary thereon, after year and day, 1103.

final, 568.

when and how signed, *id.*by default, *id.*

on return of inquiry, in K. B., 581, 2.

C. P., *id.**postea*, in K. B., 903, 930.

C. P., 903, 4; 930.

no rule for judgment necessary, 581.

for damages, with plaintiff's assent, without inquisition, 583.

rule for judgment on, unnecessary, 568.

admission of cause of action, 580, 81.

within statutes of jeofails, 927.

on 8 & 9 W. III. c. 11, § 8, pp. 583, 4, 5.

intent and construction of that act, 584, 5.

to what cases it does not extend, *id.*

proceedings thereon, 585.

in actions against hundredors, on stat. 7 & 8 Geo. VI. c. 31, p. 123.

by assignees of insolvent debtors, 395, 991.

against insolvent debtors, 683, 1112.

on warrant of attorney, 484, 5, 6, 7; 556.

when signed, 569.

how signed, 555.

effect of, by stat. 6 Geo. IV. c. 16, § 108, pp. 1099, 1100.

on demurrer;

in abatement, 740.

bar, *id.* 741.

rule for, 486, 740.

interlocutory, 568, 740.

must be signed in K. B., as well as C. P., 740.

motion in arrest of judgment not allowed after, *id.* 918.

JUDGMENTS, *continued.*for plaintiff, final, *continued.*on demurrer, in bar, *continued.*

final, 740, 41.

how signed in K. B., 740.

C. P., id. 741.

after award in plaintiff's favour, 838.

non obstante veredicto, 660, 904.

in what cases given, 920, 21.

in what not, 575, 920, 21.

how entered, 920.

motion for, when made, 928.

how it differs from repleader, 922.

on extents, 1081.

against bankrupts, 1110.

insolvent debtors, 1112.

for defendant;

on demurrer, 740, 41.

form of, in replevin, 931.

other actions, id.

of *non pros.* See tit. *Non Pros.*

discontinuance, 677, 678, &c. 930.

nolle prosequi, 677, 681, &c. 930.*cassetur billa vel breve*, 677, 683, 930.*stet processus*, 682, 3; 767, 8; 829, 930.*retraxit*, 930.

nonsuit, id.

not within stat. 17 *Car.* II. c. 8, p. 933.

motion to set aside, 487.

as in case of nonsuit, 930, 1236.

origin and foundation of, 762.

in what cases given, and in what not, id. 763.

after bringing money into court, 624, 627.

withdrawing record, 763.

cause carried down to trial, and made a *remanet*,
&c. id.

for one of several defendants, 762.

insolvent debtors not entitled to, 371, 2; 766.

at what time it may be moved for, 763, &c.

in King's Bench, 763, 4, 5.

in town cause, 764, 5.

country cause, id.

issuable term, id.

in Common Pleas, id.

Exchequer, 760, 765.

motion for, 488.

after moving for costs, for not proceeding to trial:

in K. B., 759, 60; 769.

C. P., id. 770.

Exchequer, 760.

pending, and after demurrer, 763.

may be made, same term issue is entered, 765.

JUDGMENTS, *continued.*for defendant, *continued.*

as in case of nonsuit, motion for, *continued.*

notice of, 491, 765, 6.

roll must be in court, when made, 766.

rule for, *id.*

affidavit in support of, 764, 5, 6.

making absolute, 766.

proceedings thereon, 768, 9.

showing cause against, 766.

obtaining office copy of rule and affidavit on, *id.*

grounds of, *id.* 767, 768, 811.

plaintiff's illness, 766, 768.

insolvency of defendant, 766, 767.

plaintiff, 767.

absence of material witness, 766, 768.

want of documentary evidence, 766.

some cause must be assigned, for not proceeding to trial, *id.* 768.

slight cause sufficient, on first application, *id.*

affidavit in support of, 766, 7; 768.

discharging, 766.

for irregularity, 763.

without peremptory undertaking, 766, 7, 8.

on peremptory undertaking, 766.

when required, 767, 8.

when not, in C. P., 768.

proceedings thereon, *id.* 769.

excuses for not proceeding to trial, 769.

enlarging time after, 769.

on entering *stet processus*, &c. 767, 8.

terms of, in Exchequer, 768.

costs on, by stat. 14 Geo. II. c. 17, pp. 762, 769.

when not allowed, 769, 979.

for not proceeding to trial, allowed in C. P., and Ex-

chequer, on discharging rule for, 759, 60; 769.

aliter, in K. B., 759, 769.

of application for, 769, 70.

on *nul tiel record*;

quod perfecit recordum, 744.

defecit de recordo, *id.*

in abatement, 746.

interlocutory, or final, *id.*

evidence of, 943, 4.

on demurrer to, or counter-plea of *oyer*, 588.

evidence, 866.

special verdict, motion and rule for, 486, 898.

bill of exceptions, 864, 5.

of forejudger, 828.

repleader, 921, 2.

in *ejectment*. See tit. *Ejectment*.

motion for, against casual ejector, 489, 1218, 19, 20.

JUDGMENTS, *continued*.in *ejectment*, *continued*.

on stat. 1 Geo. IV. c. 87, § 1, pp. 1209, 1221, 2.

after nonsuit, for not confessing lease, &c.

when signed in K. B., 1240, 1244.

C. P. *id*.

in actions against executors and administrators. See tit. *Executors* and
bankrupts, 1110. *Administrators*.

insolvent debtors, and fugitives, 682, 3; 1112.

heirs and devisees. See tit. *Heir*, and *Devisee*.

on extents;

for the crown, 1081.

proceedings on, *id*.

for the party:

of *amoveas manus*, 144, 1076, 1081.

proceedings on, 1081.

in *scire facias*. See tit. *Scire Facias*.

error. See tit. *Error*.

by judges in vacation, how entered up, 40.

debt on, when barred by certificate of bankrupt, 210.

outstanding, plea of, 644.

replication to, 685.

actions on. See tit. *Debt on Judgment*.

costs in, 969.

avowry or cognizance on, 645.

setting off costs on, 991, 2.

may be set off, though error be pending thereon, 664.

satisfaction of, when presumed from lapse of time, 18.

evidence of, 556, 800, 902, 943, 4; 556, (*b.*) 943. (*m.*)

erroneous and irregular, in what cases a justification, 1032, 3.

reversed, as to costs, &c. 1179.

JURAT, of Affidavits, 179, 80, 81; 491, 2; 494, 5, and see tit. *Affidavits*,
ante pp. 1275, 1277.

rectifying mistakes in, 264, 272, 3; 495.

JURATA, 775, 917, 18.

JURISDICTION,

of King's Bench, in personal actions, 37.

in trespass, *id*.

by original writ, *id*.

attachment of privilege, *id*.

bill, *id*.

over attorneys, and their clerks, 68.

to order inspection, or particulars from defendant, without his con-
sent, 487, 589, 90; 592, 3; 598.

review judgment of Quarter Sessions, 898, 9.

of Common Pleas, in personal actions, 37.

by original writ, *id*. 88.

capias quare clausum fregit, 38.

attachment of privilege, *id*.

bill, *id*.

on removal from inferior courts, *id*.

in real and mixed actions, *id*.

JURISDICTION, *continued*.

- of Common Pleas, in personal actions, *continued*.
 - on writs of *habeas corpus*, and prohibition, 38.
- of Exchequer of Pleas, *id*.
 - ecclesiastical courts, does not extend to trusts, 373. (c.)
- pleas to. See tit. *Pleas and Pleading*.
- different kinds of, and when claimed or pleaded, 630, 31.
- of court of requests for *London*, &c. 954, &c.

JURY,

- of officers, clerks, and attorneys, 88.
 - matters inquirable by, *id*.
- trials by. See tit. *Trial*.
- process:
 - venire facias*, what, 777, 8.
 - history of clause of *nisi prius*, 778.
 - when issued, 779.
 - after *distringas*, or *habeas corpora*, *id*.
 - by stat. 6 Geo. IV. c. 50, § 16, p. 780.
 - on new trial, 917, 18.
 - in *ejectment*, 1236.
 - in King's Bench:
 - distringas*, what, 779.
 - alias* and *pluries*, *id*.
 - when necessary to be re-sealed, 781, 2.
 - on new trial, 917, 18.
 - in Common Pleas;
 - habeas corpora juratorum*, 778, 9.
 - by whom signed, 781.
 - alias* and *pluries*, 779.
 - when necessary to be re-sealed, 781, 2.
 - on new trial, 918.
 - to whom directed:
 - sheriff, 723, 780.
 - coroner, *id*. 852.
 - elisors, 723, 780.
 - when impartial trial cannot be had, 723, 4.
 - in *Wales*, 724, 5.
 - Berwick upon Tweed*, *id*.
 - county palatine, 723, 780, 81.
 - mittimus* to, *id*.
 - form of, 777, 8; 781.
 - tam ad triandum, quàm ad inquirendum*, 781, 894, 5
 - by *proviso*, 781.
 - teste* and return of, *id*.
 - suing out, signing, and sealing, *id*.
 - for special jury, in K. B., 793.
 - need not be signed, in K. B., 781.
 - by whom signed, in C. P., *id*.
 - on trial at bar, 750, 51.
 - new trial, 917, 18.
 - in what cases aided, by statute of jeofails, 926.
 - not amendable, *id*. 927.

JURY, continued.

qualifications of; 782, 858.

in *England*, 782.

Wales, id.

counties palatine, id.

liberties, &c. 783.

London, id.

on inquests, 582, (*d.*) 783, 4.

disqualifications;

of aliens, 788.

persons attainted of treason or felony, &c. id.

under outlawry, or excommunication, id.

de medietate lingue, id.

on extent, 1050.

exemptions from serving on, 784, 5.

common, 785.

mode of returning, and impanelling;

in general, id. 786.

counties palatine, 786.

Great Sessions in *Wales*, id.

two sets of jurors may be summoned at assizes, 787.

copy of panel to be kept in sheriff's office, 786, 7.

fee for making returns and panels, 786.

time and mode of summoning, 793, 4.

good, 484, 486, 576, 787.

special, 785.

origin and history of:

on trials at bar, 750, 787, 8.

in other cases, 788.

by stat. 3 Geo. II. c. 25, § 25, id.

ancient method of striking, id. 789.

in criminal cases, 789.

by stat. 6 Geo. IV. c. 50, § 30, &c. id. 790, 91.

qualifications of, in *English* and *Welsh* counties, and in *London*, 790.

method of striking, id. 791, 792, 3.

in county of city or town corporate, except in *London*, 791, 2.

fees on striking, 791.

to special jurors, 792.

may be struck, by consent, according to ancient mode, 791.

time and mode of summoning, 793, 4.

none to be summoned, but those named in warrant, 794.

extra expenses of summoning, 793.

no money to be taken, to excuse persons from serving on, 794.

may try, by consent, any number of causes, 856.

discharging, id.

costs of, 792.

certificate for, id.

rule for;

in King's Bench, 485, 6.

by whom, when, and how drawn up, 486, 792.

service of, 793, 817.

JURY, continued.special, *continued.*rule for, *continued.*

in Common Pleas, 485.

by whom drawn up, 792.

Exchequer, *id.* (*k.*)

discharging, 794, 5.

appointment on, 792, 3.

in term time, 794.

facility in obtaining, how restrained;

in K. B., *id.* 795.

C. P., 795.

notice to, on trials at bar, 750, 51.

once appointed, cannot be changed, 779.

exception to this rule, *id.*views by. See *tit. Views.*

challenges of, 851, &c.

to the array, 851, 2.

for unindifferency in sheriff, or his officer, 852.

master of crown office, not allowed,

*id.*objections to master's conduct, in striking jury, over-
ruled, *id.*polls, *id.* 853, 4.*propter honoris respectum*, 852.*defectum*, *id.* 853.

want of qualification of estate, 853.

propter affectum, 853.principal, *id.*to favour, *id.*triers, *id.**delictum*, *id.**voire dire*, *id.*

by king, can only be for cause, 854.

cannot be taken until full jury have appeared, *id.*demurring to, counter-pleading, or denying matter of, *id.*disallowing, not a ground for new trial, but for *venire de novo*, *id.*
906.

balloting and swearing, 854, 5.

after view, 856.

fining, for non-attendance, 582, (*d.*) 855, 6.

talesmen, 857.

at common law, *id.*by statute, *id.* 858.

how selected, 858, 926.

allowance to, 858.

withdrawing juror, 861, 2.

costs on, 827, 862.

no bar to future action for same cause, 862.

withdrawing from the bar, 867.

what they may take with them, *id.*

discharging from giving verdict, on bad indictment, 819.

JURY, continued.

discharging from giving verdict, in action for wager, on event of dog fight, 819. (c.)

replevin, 869.

assumpsit on immaterial issues, id.

misbehaviour of, ground for new trial, 908, 9; 926.

affidavits of, when not allowed, 908, 9.

dispersion of, when verdict not vitiated by, 908.

objections to, or mode of returning them, 582.

JURY ACT,

costs in actions for things done in pursuance of, 988.

JUSTICES,

of assize, 807.

in eyre, id.

of the peace,

actions against, 28, &c. 892, 8.

limitation of, 19, 20.

notices of, 28, 9; 30.

venue in, 430, 31.

pleading tender of amends in, 646. (a.)

bringing money into court in, 621, 622. (b.)

pleas in, 653.

damages in, 892, 3.

costs in, id. 969, 988.

may plead general issue, 653.

bring money into court, 621.

information against, when moved for, 498.

evidence of examinations before, 598.

warrant of, id.

JUSTICES, 78.

attachment on, in county palatine, not within stat. 7 & 8 Geo. IV. c. 71,
§ 5, p. 115.

JUSTIFICATION,

in case, for libel or words, 645.

replevin. See tit. *Replevin*.

trespass. See tit. *Pleas and Pleading*.

matter of, must be pleaded in *trespass*, 652.

K.**KING,**

warrant of, for sitting of judges in bank, out of term, 89, 40.

and queen *regent*, privileged from arrest, 190.

servants in ordinary to, when so privileged, id. 191.

not allowed to be bail, 247.

household servants of, exempted from serving on juries, 784.

writ of protection by, 190, 91.

palaces of, how far privileged, 219.

finis to, on original writs, 105.

deposit to answer, 227, &c.

indictments, or informations:

roll of, in K. B., 728.

by stat. 28 Geo. III. c. 87, § 24, p. 892.

KING, *continued.*

fines to, on indictments, or informations, *continued.*

for contempt by defendant, in addressing jury on, 860.

levari facias for, 1042, 1045.

application of, 1043.

suing out process on recognizance, in nature of statute staple,
1088.

forfeitures to ;

of goods, or issues, on *mesne* process, 110, 11.

on outlawry, 181.

of issues, 137, 8.

levari facias for, 137, 8.

lease or grant of, 138.

penalties to ;

relating to customs and excise, lotteries, and stamp duties, how re-
covered, 519.

compounding, in penal action. See tit. *Compounding penal Action.*

how levied, 558, 1051.

applied, 1043.

taxes to ;

must be paid to collector, under execution, &c. 1013, 14; 1016, 17.

levari facias for arrears of, 1042, 3.

costs in actions relating to, 988, 9.

seisin of, how stated in pleading, 442. (b.)

debts to ;

of record, 1044, 1050.

judgments, id.

recognizances, 1044, 1050.

inquisitions on commissions, id.

not of record, id.

bonds, 1044, 1051.

simple contracts, 1044, 1050, 51, 2.

from what time they bind the lands :

generally, 1044, 5; 1050, 51; 1059.

on judgments, 1050, 51.

recognizances, id.

bonds, 1051.

simple contracts, 1050, 51, 2.

remedy for recovery of ;

by action of *debt*, 1046.

commission, and inquisition thereon, id. 1047, 1063, 4.

levari facias, 1042, 3.

extent. See tit. *Extent.*

scire facias, 1045, 6; 1068, 1091.

priority of execution for ;

as to lands, 1051, 2.

goods, 1052, &c.

on *fieri facias*, 1054, 5.

debts, 1056.

debtors to ;

privilege of, at common law, 190, 91.

by stat. 25 Edw. III. stat. 5, c. 19, id.

KING, continued.

debtors to, *continued*.

removal of, by *habeas corpus*, 287, 8; 1049.

relief of, on stat. 7 Geo. IV. c. 57, § 75, pp. 1066, 7.

assignment of bail bond to, 298.

debts to, 1067.

not bound by stat. 29 Car. II. c. 3, § 16, pp. 1001, 1053.

8 & 9 W. III. c. 11, § 8, pp. 1095, 6.

8, p. 585.

4 Ann. c. 16, § 4, 5; pp. 655, 1078.

8 Ann. c. 14, § 1, 8; pp. 1014, 1054.

5 Geo. II. c. 30, pp. 201, 1054.

proceedings for;

by indictment. See tit. *Indictments*.

information. See tits. *Exchequer*, and *Informations*.

in nature of *quo warranto*. See tit. *Quo warranto*.

mandamus. See tit. *Mandamus*.

prohibition. See tit. *Prohibition*.

proceedings by;

to repeal letters patent, 1090, 1094, 5, 6.

pleading double in, 655, 1078.

proceedings against;

by petition of right, 1072, 1075, 6.

monstrans de droit, id.

traverse of office, id. 1076.

proceedings on. See tit. *Extent*.

may traverse title, or maintain inquisition, on extent, 1079.

all the facts pleaded, id.

and also confess and avoid, id.

maintain all, or one of his titles, when traversed, id.

waive replication, or demurrer, id.

issue, 1080.

demand trial at bar, 748, 753, 1080.

though out of common course, 749.

try his cause in what county he pleases, 753, 1080.

need not assign breaches, on stat. 8 & 9 W. III. c. 11, § 8, p. 585.

cannot be ruled to reply, 1078.

compelled to proceed to trial, 1080.

notice of trial cannot be given to, id.

not subject to trial by *proviso*, id.

can only challenge jury, for cause, 854.

cannot be nonsuited, 868.

compelled to join in demurrer to evidence, 1080.

does not in general pay, or receive costs, 1081, 2.

writ of error against, lies not in Exchequer Chamber, 1139.

fiat of attorney general for, 1141.

KING'S BENCH;

jurisdiction of, in personal actions, 37.

prosecution in, for offences committed abroad, 818, 14. (*g*.)

error in, on judgment of same court, 1186, 7.

to, from other courts, 1137.

from, to Exchequer Chamber, 1138, 9.

KING'S BENCH, *continued*.

error from, to House of Lords, 1139.

KING'S BENCH PRISON;

rules of. See tit. *Rules*.

and orders, for government of, 52, (*d.*) 372.

turnkey of, not allowed to be bail, 247.

prisoners supersedeable for *six* months, to be discharged from, 360.

KING'S COUNSEL, 42.**KINGSTON** upon **HULL**;

court of requests for, 957.

KNIGHTS;

attendance of, necessary on trial of writ of right, 748.

L.

LABEL,

on process in Exchequer, 156.

LACERAVIT, 965.**LANCASTER**; See tit. *County Palatine*.

court of requests for part of Duchy of, 957.

LANDLORD;

justification by, under right of entry, 646.

ejectment by, against tenant, 1190.

on stat. 4 Geo. II. c. 28, § 2, pp. 1197, 8; 1217, 18, 19.

1 Geo. IV. c. 87, § 1, pp. 489, 1207, 1209, 1221, 2, 3.

2, pp. 1238, 9.

3, pp. 1244, 5; 1253.

4, p. 1222.

5, p. 399.

6, p. 988.

7, p. 1222.

appearance in, 1223.

appearance of, in *ejectment*, before and on stat. 11 Geo. II. c. 19, p. 1227, &c.

claim of, for rent, under execution, 1013, &c.

how enforced, 1015, 16.

remedy of, by distress, in case of bankruptcy, 1015.

LANDS,

liable to king's execution, at common law, 1044, 1050, 1067.

what may or may not be taken, on extent, 1050, 51.

from what time bound, *id.*

priority of execution on, 1051, 2.

sale of, on stat. 25 Geo. III. c. 35, pp. 1045, 1068, 9.

ejectment for, and how described, 1190, 91.

LAND TAX;

payment of, when pleadable in bar, in *replevin*, and when not, 664.

LANGUIDUS;

return of, on *mesne* process, 308.

to *capias ad satisfaciendum*, 1028.

LARCENY. See tits. *Costs*, *Limitation of Actions*, *Notice of Action*, *Venue*, *Tender*, *Bringing money into court*, *Pleas and Pleading*.**LAST DAY** of Term. See tit. *Motions and Rules*.

LATITAT; See tit. *Process*.

what, 145, 147.

may be issued in first instance, id.

might formerly have been sued out, before cause of action, 145, 358.

cannot now be issued, for a debt not due, 146.

need not be sued out against casual ejector, in *ejectment*, 1224.

lies not against peers, &c. 145.

how far considered as commencement of suit, 27, 146, 353.

considered as continuance of bill of *Middlesex*, 27, 147.

by whom issued, and signed, 149.

issuing, on office copy of affidavit for bill of *Middlesex*, 179.

several writs of, into different counties, 147.

must be sealed, 149.

common, or special, id. 150.

direction of, 151.

cannot be directed to sheriff of *Middlesex*, 147, 151, 168.

teste and return of, 152, 3.

may be served at any hour, however late, at night, 168, 499.

must be served in county, to sheriff of which it is directed, 168.

LEASE;

action against assignee of, 6.

of king's right to levy profits, on outlawry, 188.

or demise, how stated in pleading, 442. (b.)

entry under, id.

of tithes, &c. how stated, id.

in *ejectment*. See tit. *Ejectment*.

enrolment of, when not evidence, 801.

at rack rent, &c. not within register acts, 941.

in what case seizable under execution, 1002, 1004, 1011.

how assigned by sheriff, 1004.

expelling lessee, id.

sale of, under execution, id.

may be extended or sold, on *elegit*, 1034, 5.

extent, 1052.

LEASE and RELEASE,

how stated in pleading, 442. (b.)

LEGAL ESTATE,

necessary to maintain *ejectment*, 1193, 4.

LEGAL PROCESS,

justification under. See tit. *Pleas and Pleading*.

LETTERS PATENT. See tit. *Patent*.

matter of record, 800.

LEVARI FACIAS,

what, 1042.

for king, id.

for levying fine, or debt due to him, id.

penalties, id. 1043.

arrears of taxes, 1042.

issues of lands, returned on special *capias utlagatum*,

187, 8; 1042, 3.

extent, 1042, 8; 1068, 9.

sheriff not entitled to poundage on. 1040, 1057.

LEVARI FACIAS, continued.

for king, *continued.*

sheriff how to dispose of property taken under it, 1043.

for subject, *id.*

de terris et catallis, 993.

on recognizances, 1043, 1086.

against bail, 1043, 1182, 3.

against clerk, on statute merchant, *id.*

de bonis ecclesiasticis, 1023, 4; 1043.

et catallis, 1043.

in county court, *id.*

LIABILITY ASSUMPSIT, 2.**LIBELS,**

actions for;

variances between declaration and evidence in, 434, 5. (*f.*)

inducement to declaration in, 442. (*a.*)

staying proceedings in, 528.

changing venue in, 605.

justifications in, 645.

evidence in, on general issue, 652.

putting off trial in, 770.

verdict and judgment in, 574, 5; 920, 21.

costs in, 962.

abate by death of plaintiff, after interlocutory, and before final judgment, 1117.

LIBERATE,

writ of;

what, 1087.

proceedings on, *id.*

on re-extent, 1088.

poundage on, *id.* 1089.

LIBERTY, or FRANCHISE,

bailiff of, 216.

arrest in, 217.

on extent, 1049.

LIBERUM TENEMENTUM,

plea of, in defendant, 645.

third person, *id.*

when not necessary to new assign on, 690.

need not be signed, in K. B., 671.

must be delivered, *id.* 672.

may be given in evidence, on general issue, 652.

pleaded with not guilty, 656.

how pleaded, 690, 91.

new assignment and evidence on, *id.*

issue on, by whom made up, 717.

LICENSE,

plea of, 646.

must be pleaded, in *trespass*, 652.

costs on plea of, 966.

LIEN,

of attorneys and solicitors, for balance of their bills, 87, 887, 8, 9, 40;
991, 2.

LIEN, continued.

- of attorneys and solicitors, &c., *continued.*
 - on deeds, &c. see tit. *Attorneys.*
 - when subject to equitable claims of parties, 339, 992.
- of factor, on extent, 1053.

LIFE GUARDSMAN,

- place of, saleable under Lord' act, 381.

LIMITATION OF ACTIONS,

- penal, 14, 15.
- in general, *id.*
- on bill, payable after sight, 17.
 - on demand, *id.*
- Lords' act, 16.
- in action by or against executors or administrators, 17, 18, 22, 24, 5, 6.
 - against baron and feme, &c. 23.
 - on joint and several note, or bill, *id.*
- debt on bond, 18, &c.
 - judgment, 18, 19.
- actions for breach of contract;
 - attended with special damage, 17.
 - when once barred, 27.
- wrongs, 19, &c.
 - against justices, and constables, &c. 19, 20.
 - officers of customs, or excise, 20.
 - army, navy, or marines, *id.*
 - West India, or London Dock Company*, 20.
 - against hundredors, on stat. 7 & 8 Geo. IV. c. 31, p. 21.
 - on highway, turnpike, and building acts, *id.*
 - bankrupt act, *id.*
 - acts relating to taxes, *id.*
 - larceny, &c., *id.*
 - of trover, *id.*
 - case, against attorney, for misconduct, *id.*
- ejectment*, 1194, 5, 6.
- quo warranto*, 656, 952.
- after reversal of judgment, by error, 15.
 - outlawry, *id.*
 - arrest of judgment, *id.*
- exceptions in favour of infants, &c. *id.*
 - persons beyond sea, *id.*
- actions, and cases, not within statute, 15, &c.
- statute of;
 - plea of, 644, 646.
 - how pleaded, 17.
 - in case, founded on *tort*, 20, 21.
 - replication to, 22.
 - considered as a plea to the merits, 568.
 - must be signed, in C. P., 672.
 - to information in nature of *quo warranto*, 656.
 - in error, 1174.
 - presumption of payment, when not pleaded or replied, 18.
 - when it begins to run, 16, 17.

LIMITATION OF ACTIONS, *continued.*

statute of, *continued.*

ac etiam writ, 151.

when pleaded, or given in evidence, 647, 8, 9; 651.

not formerly allowed, after general issue withdrawn, in C. P., 671.

what in general sufficient to take case out of, in *assumpsit*, 22.

acknowledgment of debt, &c. id. 23, &c. 27, 22. (*h.*)

in action on note, or bill, 23, 4.

in other cases, 24.

what not sufficient, 22, 24, 5.

qualified admission, &c. 25, 6.

effect of paying money into court, &c. 26, 626.

conditional promise, 22, 26, 7.

acknowledgment of breach of contract, 27.

subsequent admission, in *trespass*, 22.

written *memorandum*, when necessary to take case out of, 27.

may be avoided by *latitat*, or *capias*, in C. P., 27, 146, 153.

attachment of privilege, how replied to, in K. B., 162, 319.

C. P., 320.

debt of petitioning creditor, when not barred by, 27. (*i.*)

barred by, cannot be set off, 664.

LINCOLN;

court of requests for, 957.

LIQUIDATED DAMAGES. See tit. *Stipulated Damages.*

LIVERPOOL;

court of requests for, 957.

LONDON;

attorneys of mayor's court, &c. excepted out of stat. 22 Geo. II. c. 46, p. 62.

customs and bye-laws in, when and how tried, 411.

trial at bar in, 749.

qualification of jurors in. See tit. *Jury.*

striking special jury in. *Same title.*

court of requests for, 954, &c.

costs on, id. 961. (*n.*)

distinctions on, 955, 6.

error from courts of, 1187, 8.

LONDON DOCK COMPANY;

actions by or against, 8.

limitation of actions against, 20.

notice of action to, 31, 2.

LONDON GAZETTE,

for what purpose evidence, 801.

LORD of MANOR;

justification by, to take wreck, 646.

LORDS. See tit. *House of Lords*, and *Peers.*

LORDS' ACT, 229, 30; 375, &c.

construction of, 375, 6, 7.

to what prisoners it extends, 375, 6.

it does not extend, 376.

insolvent debtors when and how discharged under. See tit. *Prisoners.*

proceedings under, 376, &c.

bringing prisoners into court on, 378.

LORDS' ACT, continued.

- note for allowance on; 380, 81, 2.
 - by several plaintiffs, 881.
- judge's order under, final, 382, 511.
- compulsive clauses in, 382, &c.; and see tit. *Prisoners*.
- construction of, 385, 6.

LOTTERY ACT;

- process on, 150.
- affidavit to hold to bail on, 187.
- actions, &c. for penalties on, by whom brought, 519.

LUNACY; See tit. *Insanity*.

- disobeying order in, for payment of money, an act of bankruptcy, 117.

LUNATICS;

- appearance of, 93. (b.)
- relief of, on insolvent debtors' act, 894.
- affidavit of, dispensed with, 554.
- bond to crown by committee of, 1046.

M.**MACHINERY;**

- action against hundred, for destroying, 122.

MAINTENANCE, 1197, 1201.**MALFEAZANCE, 4, 441, 2.****MALICIOUS ARREST,**

- action for, 174.
- lies not for taking defendant, after taking his bail in execution, 1133. (c.)
- evidence in, 229, 680.

MALICIOUS PROSECUTION,

- action for;
 - evidence in, 593.
 - against justices, 893.
 - variance of, from declaration, 434, 5. (f.)
- damages in, 882. (e.)

MAN, Isle of, 179. (o.)**MANCHESTER,**

- court of requests for, 403, 957.

MANDAMUS, 762, 927.

- to deliver up court rolls, &c. 87.
- compel sheriff to enter plaint in *replevin*, 415.
- magistrate to produce depositions, 593.
- inferior court to grant new trial, 905.
- inspect court rolls, 594.
 - and take copies of corporation books, when no action is pending, 595.
- examine witnesses in *India*, &c., 813, 14.
- enforce award of commissioners, under inclosure act, 844.
- re-hear appeal, at Quarter Sessions, refused, 508, 898, 9.
- special case not grantable after decision of court on rule *nisi* for, 502.
- an action within statute 43 Geo. III. c. 46, § 5, p. 997.
- damages in, 574, 949, 50.
- costs in, 946, 949, 50, 51.

- MANDATE**, to sheriff, 216, 312.
by sheriff, 217, 309, 1018.
- MANDAVI BALLIVO**,
return of, 309, 1018, 1025, 1028.
- MANOR**,
ejectment lies for, 1191.
- MARINES**,
arrest of, 198, 9.
acts relating to, *id.* 200.
arrest of, *id.*
actions against officers of;
limitation of, 20.
notice of, 30, 31.
where laid, 431.
bringing money into court in, 621.
pleading tender of amends in, 646. (*a.*)
costs in, 988.
- MARKET**,
justification under right to enter, 646.
overt, justification under sale in, 654.
- MARRIAGE**. See *tit. Feme covert*.
promise in consideration of, 3.
arrest on bond, for performance of promise of, 174.
affidavit of debt, on contract of, 186, 6.
when a revocation of warrant of attorney, 551, 2.
submission to arbitration, 822, 3.
scire facias after, 1114, 15.
- MARSHAL**, of King's Bench;
office of, 52.
officers appointed by, 53.
book of, 289, 357, 364.
acknowledgment of, 363, 4.
refusing to show prisoner, deemed an escape, 366.
give note of his being a prisoner, or not, *id.* 367.
list by, of prisoners supersedeable, &c. 367, 8.
granting rules, to prisoner in custody for contempt, 373.
action against, for escape;
amendment of bill in, 427.
particulars of demand in, 597.
- MASTER** of KING'S BENCH Office, 48.
COURT of PLEAS, in Exchequer, 58.
- MASTER** of the ROLLS,
salary of, 39. (*g.*)
- MASTER'S Allocatur**. See *tit. Allocatur*.
Appointment. See *tit. Appointment*.
Report on interrogatories, motion for, 481, 486.
Rules. See *tit. Rules*.
- MAYHEM**, damages in action for, 870, 888, 896.
- MAYOR COURT** of LONDON,
notice of exception to bail entitled in, by mistake, a nullity, 256.
return of proceedings in, 407. (*d.*)

MAYOR'S COURT OF LONDON, continued.

scire facias to disprove debt in, after judgment and execution on foreign attachment, 1107. (c.)

MELIUS INQUIRENDUM, 187.**MEMBERS of CONVOCATION,**

privilege of, from arrest, 193.

MEMBERS of the HOUSE of COMMONS,

how sued, 27, 87, 91, 2; 102, 104, 5; 116, 17; 145.

jointly with others, 118.

original writ against, 118.

præcipe for, in *debt*, or *case*, *id.* (n.)

how it differs from that against other persons, 118.

process against, by original, *id.* 119.

teste and return, 119.

how served, 118.

on statute 45 Geo. III. c. 124, § 3, p. 119.

bill against;

its commencement, 482.

conclusion, 120, 446.

how filed in K. B., 120.

C. P., *id.*

Exchequer, *id.*

process on, *id.*

form of, *id.*

teste and return, *id.*

difference between process by *bill*, and by *original*, *id.*

entry of bill and process against, 121. (a.)

note of appearance for, *id.*

appearance by, 119, 20.

with whom entered in K. B., *id.*

C. P., 119, 20.

Exchequer, *id.*

by plaintiff, according to statute 45 Geo. III. c. 124, § 3 pp. 119, 20, 21.

beginning of, by *original*, *id.* (a.)

bill, *id.*

cannot cast *essoin*, 109.

be arrested, 192, 3.

bail, 247.

attached, for non-payment of money, 198.

non-payment of award, 885.

taken in execution, 121, 1025, 6.

proceedings against, when traders, on stat. 6 Geo. IV. c. 16, § 9, pp. 116, 17; 205.

acts of bankruptcy by, on statute, 116, 17.

bond given by, on 4 Geo. III. c. 33, analogous to recognizance of bail
bail of, discharged, 290. in error, 117.

new writ of execution against, after discharge by privilege, 1080, 81.

MEMORANDUM,

of bill, what, 719, *id.*

reason for, and different kinds of, 719.

general, to what time it relates, *id.*

MEMORANDUM, continued.

general, how controlled or rectified, 719.

special, against attorneys, 321, 2; 463.

prisoners, 857, 8.

not used, in actions by *original*, 720.

in Exchequer, 723.

of time of filing, and receiving copy of bill, against warden of *Fleet* in vacation, for escape, 324.

of payment, on notes, &c. not sufficient to take case out of statute of limitations, 19.

of minute of warrant. See tit. *Warrant*.

MEMORIAL, of Annuity, 520, &c.

on stat. 53 Geo. III. c. 141, pp. 522, 3, 4.

pleadings respecting, 688.

MESNE PROCESS,

execution of, 164, &c. 216, &c.

MESNE PROFITS,

action for;

arrest in, 166.

discharge of insolvent, on stat. 53 Geo. III. c. 102, no bar to, 389.

proceedings stayed in second *ejectment*, till payment of costs of, 538.

aliter, of damages, *id.* (c.)

release in, by nominal plaintiff in *ejectment*, a contempt, 1236.

damages for, in *ejectment*, on stat. 1 Geo. IV. c. 87, pp. 1238, 9; 1253.

costs in, 964.

writ to inquire of, 1153, 1251, 2.

bail in error, when not chargeable for, 1253.

MESSENGER,

under commission of bankrupt, remedy for fees of, 331.

MESSUAGES,

ejectment for, and how described, 1190, 91.

MIDDLESEX,

bill of. See tit. *Bill of Middlesex*, and *Process*.

county court of, 957.

costs on act relating to, 988.

MILITIA,

attorneys how far exempted from serving in, 82.

MILLS, demolishing, 122.

limitation of actions for, 15, 123.

MINES,

ejectment for, 1191.

MISBEHAVIOUR,

of party or jury, ground for new trial, 773, 4; 906, 908, 9.

MISCONTINUANCE, 569.

aided by statute of jeofails, 924.

MISCONVEYING of PROCESS,

aided by statute of jeofails, *id.*

MISDEMEANORS,

indictment for. See tit. *Indictments*.

MISDIRECTION. See tit. New Trial.**MISERICORDIA,**

judgment of, in penal action, not erroneous, 942, 3.

mistake in, of plaintiff for defendant, 943.

MISERICORDIA, *continued*.

want, or wrong addition of, aided, 948.

MISFEAZANCE, what, 4, 441, 2.

action for, 9, 10.

declaration in, 445.

MISJOINDER,

of action;

what, and how taken advantage of, 10, 11, 12, 13, 14.

not cured after demurrer, by entering *nolle prosequi*, 681.

when cured by verdict, 918, 19.

amendment of verdict, 919.

of issue, aided by 32 Hen. VIII. c. 30, p. 924.

MISNOMER,

of one of several plaintiffs, 6.

parties, on putting in bail, 253.

consequences of;

on bailable process, 148, 301, 447, 449, p. 294.

process not bailable, 148, 242, 447, 8, 9, 50.

distringas, 110.

notice on, 167.

putting in, and justifying bail, 252, 3; 265, 6; 409, 10.

jury process, 926.

in real actions, 699.

finer and recoveries, id. 700, 701, 2, 3.

how taken advantage of, 636.

by application to set aside proceedings, 447.

plea in abatement, id.

mode of beginning, and concluding, 637, 8.

must state defendant's surname, 637.

amendment after, 697.

replication to plea of, that defendant is called as well by one name as another, 636. (n.)

how cured;

by altering writ, and getting it resealed, 148, 155.

amending writ, 448, 9.

declaration, 697.

appearance, 242, 3.

declaring in right name, in C. P., id. 449.

statutes of jeofails, 923, 4.

no ground of nonsuit, at trial, 449.

not material, after judgment, 242, 449, 50; 1025, 450. (a.)

of parties, in writs of error, 1143.

MISPLEADING,

aided by statute of jeofails, 924.

MISREPRESENTATION;

effect of, in obtaining warrant of attorney, 547.

MISTRIAL;

judgment arrested for, 925, 6.

MITTIMUS. See tit. *Certiorari*.

to county palatine, 607, 723, 777, 780, 81.

MIXED ACTIONS, 1; and see tit. *Actions*.

jurisdiction over, in C. P., 38.

MIXED ACTIONS, continued.damages in. See tit. *Damages*.costs in. See tit. *Costs*.**MODERATE CORRECTION;**

plea of, 645.

MOLLITER MANUS IMPOSUIT;plea of, in defence of *real* property, 645.*personal* property, id.

to preserve the peace, id.

prevent damage, id.

costs on, 965.

MONEY,

had and received, and paid, &c., affidavit of debt for, 184.

interest not in general recoverable in action for, 872.

lent, by married woman, affidavit of debt for, 184.

interest not in general recoverable in action for, 872.

bringing into court;

in lieu of special bail, 244, 5.

origin of, 619.

in what cases allowed:

in *assumpsit*, 619, &c.

case, for navigation calls, 620.

covenant, 619.

debt on bond, 542.

for rent, 619, 20.

on policy of assurance, 620, 625, 6; 628.

in actions for non-residence, 620.

by executors or administrators, id. 621.

against justices of peace, 621, 622. (*b.*)

officers of excise, or customs, 621.

commissioners of bankrupt, id.

officers of army, navy, or marines, id.

persons acting under general highway, or turnpike
acts, id. (*h.*)

laws relating to larceny, &c. id.

stat. 7 & 8 Geo. IV. c. 29,

§ 75, &c. 80, § 41, p. 621.

after verdict in *trover*, to abide event of petition to Chancellor, 620.

in what cases not allowed;

for one of several defendants, 621.

in actions for general damages, 620.

dilapidations, id.

freight by foreigner, to abide event of cross action, id.

debt, for penalty of charter-party, 621.

when defendant demurs to one count, id.

upon several counts, or breaches, id.

costs on taking it out, id.

under statute 43 Geo. III. c. 46, § 2, pp. 227, 8.

proceedings thereon, 228.

effect of, on same statute, § 8, p. 984.

in *London*, when debt was originally under 5*l.* p. 959.

motion for, 484, 5.

MONEY, continued.

motion for, *continued.*

when and how made, 621, 2.
after granting new trial, 622.

rule for;

in King's Bench, 484.

by whom, when, and how drawn up, 622.

judge's order for, in vacation, 486, 510.

commonly drawn up with costs, 622.

exceptions to this rule, 623.

in Common Pleas, 484, 5.

by whom, when, and how drawn up, 622.

side-bar rule, under *five* pounds, 484, 622.

how, when it amounts to, or exceeds that sum, 485, 622.

judge's order for, in vacation, 486, 510, 621, 2.

in what cases it may be drawn up with costs, to a certain time only, 623.

in Exchequer, *id.*

after general issue pleaded, 673.

issue joined, 622. (*b.*)

service of copy of, 624.

on plea of tender, 565, 622.

putting off trial, 770, 773.

how far an acknowledgment of right of action, 624.

in *trespass* against justices, &c. *id.*

does not take case out of statute of limitations, 26, 626.

an admission of legal demand only, *id.*

in what cases an admission of contract, and in what not, 625, 6.

in actions on policies, *id.*

when several breaches are assigned, 625.

by farmer of tithes, on stat. 2 & 3 Edw.

VI. c. 13, *id.*

can only be proved, by rule for bringing it in, 624.

plaintiff may be nonsuited after, *id.* 625, 868.

brought into court;

to whom, and how paid, in K. B., 622.

C. P., *id.*

receipt for, *id.*

cannot be recovered back, 624.

in general be restored, *id.* 623.

in what cases it may be paid back, 628, 9.

taking out of court;

breach of injunction, against proceeding at law, 461.

waiver of irregularity, in bringing it in, 620.

with costs, in discharge of action, 626.

proceedings thereon, *id.* 627.

for recovery of costs, *id.*

Qu. if a bar to a new action, after nonsuit? 627. (*f.*)

proceeding in action, for greater sum, 627, 8.

consequences of, 627.

when plaintiff proceeds further, without going to trial, *id.*

after judgment as in case of nonsuit, &c. *id.*

MONEY, continued.

proceeding in action, for greater sum, *continued.*

consequences of, *continued.*

in Exchequer, 627.

in policy causes, 628.

proceeding in action for non-payment of costs, 627.

foreign, value of, how ascertained, 571, 573.

depositing in sheriff's hands. See tit. *Deposit.*

in defendant's hands, may be taken in execution, 1003.

aliter, of money in the hands of sheriff, under former execution, *id.*

taking, on extent, 1056.

MONSTRANS DE DROIT, 1072, 1075, 6.**MORT D'ANCESTOR,**

assize of, damages in, 878.

MORTGAGEE,

of estate in *Ireland*, allowed to be bail, 246.

lease, may stay proceedings in *ejectment*, for non-payment of rent,

1198, 1234.

ejectment by, 1190.

staying proceedings in, on payment of mortgage money, &c. 1235, 6.

how far affected by judgments, 936, 989, 40.

MOTIONS,

what, 478.

in King's Bench;

on crown side, *id.*

for attachments, *id.* 479.

how entitled, 815, 480, 81; 498.

when made on last day of term, 308, 814, 480, 497.

setting aside rule to return writ, 306.

notice of; 491, 494.

not necessary for judgment as in case of nonsuit, in K. B., 491,

755, 6.

aliter, in C. P., *id.*

what may or may not be made, on last day of term, 308, 497, 8, 9;

706, 813, 14.

in Common Pleas;

no crown side, 478.

for attachments, *id.* 479, 80; 498.

how entitled, 814, 481, 498.

justifying bail, 264.

on their own motion, 271, 2.

judgment as in case of nonsuit, 762, &c. 765, 6.

notice of, 308, 491, 500, 502, 3; 928, 9.

necessary for judgment as in case of nonsuit, 491, 765, 6.

what may or may not be made, on last day of term, 480, 498,

499, 928.

in Exchequer, 397, 474, 5; 478, 480, 81; *ante*, 1363.

on extents, 1059, 1072, 3, 4.

in King's Bench, and Common Pleas;

when action is depending:

on behalf of plaintiff, 487.

defendant, *id.* 488, 9.

MOTIONS, continued.

in King's Bench, and Common Pleas, *continued.*

when action is depending, *continued.*

of course, requiring only counsel's signature, 484, 5; 759.

when no action is depending:

to strike attorney off roll, for misconduct, 89, 490.

at his own instance, id.

re-admit attorney, who has neglected to take out certificate,
&c. 79, 80, 490.

has been struck off the roll, at his
own instance, 89.

make submission to arbitration a rule of court, 490.

set aside annuity, 490, &c.

affidavit in support of, 491, &c., and see tit. *Affidavits.*

attendance of attorneys on, 86.

cannot be made by a different attorney, without order for changing
former one, 98.

for rules. See tit. *Rules.*

course observed on hearing, in K. B., 506, 7.

C. P., 507.

Exchequer, id.

what counsel are heard on, 507, 8.

for *concilium*, 484, 5; 507, 8; 736, 7, 8.

argument of causes on, 504, 738, 9.

when and how brought on, id. 1176.

what counsel are heard on, 507.

for costs, on court of conscience acts, 960, 61.

in arrest of judgment, 922, 928, 9.

when appointed for particular days, 504.

to come on peremptorily, 482, 505, 6.

costs on, 503, 522.

and rules, in *ejectment*. See tit. *Ejectment*, and *Rules*.

on behalf of lessor of plaintiff, 489.

for judgment against casual ejector, id. 1218, 19.

tenant, &c. 489, 90.

in court of Great Sessions, in *Wales*, 510.

what counsel are heard on, 507.

MOUNTAIN,

ejectment lies for in *Ireland*, but not in *England*, 1191.

MUTINY ACTS, 198, 9, 200; 244, 988.

MUTUAL ACCOUNTS,

will take the case out of statute of limitations, 24.

MUTUAL CREDIT, 667.

MUTUAL DEBTS. See tit. *Set off*.

arrest for balance of, 174.

MUTUAL PROMISES, 2, 3; 438.

actions on, 2, 3.

N.**NAVIGATION CALLS,**

money may be brought into court, in action for, 620.

NAVY,

- officers of, on full pay, exempted from serving on juries, 784.
- actions against,
 - limitation of, 320.
 - notice of, 30, 81.
 - where laid, 431.
 - bringing money into court in, 621.
 - tender of amends in 646. (*a.*)
 - costs in, 988.

NAVY OFFICE,

- books of, 802.

NECESSITY,

- way of, 646.
- justification by inevitable, *id.*

NE EXEAT REGNO,

- application for, no ground for discharging defendant, 177.

NEGLIGENCE,

- actions for, 5, 441, 2.
- variance between declaration and evidence in, 434, 5. (*f.*)

NE RECIPIATUR, 758, 816, 17.

NE UNQUES EXECUTOR, &c. 644.

- plea of, not formerly signed, in C. P., 672.
- verdict on, 869.

NEW ASSIGNMENT. See *tit. Pleas and Pleading.*

- judgment for not pleading to, 563.
- plea of not guilty to;
 - need not be signed, or filed, 671, 2.
 - issue on, by whom made up, 717.
- costs on, 966.

- on judgment by default on, 973.

NEW TRIALS,

- origin and necessity of, 904, 5.
- in what cases granted, *id.* 906, &c.
- in *ejectment*, 905, 1240.
- after trial at bar, 751, 905.
- nonsuit, 905.
- for defect in bill of particulars, 599.
- concurring verdicts, 905.
- contrary verdicts, *id.*
- bill of exceptions, 863, 913.
- special case, defectively stated, 900.
- for not drawing up special case, 899.
- in inferior court, 905.
- of causes in Great Sessions, in *Wales*, *id.* 906.

grounds of moving for;

- want of due notice of trial, 906.
- proper jury, *id.* 926, 7.
- variance between issue or paper book, and record of *nisi prius*, 906.
- misbehaviour of prevailing party, towards jury or witnesses, *id.*
- absence of attorneys, or witnesses, *id.*
- distributing hand bills, reflecting on plaintiff's character, *id.*
- discovery of material evidence, after trial, &c. *id.* 907.

NEW TRIALS, continued.

grounds of moving for, *continued.*

conviction of witnesses for perjury, 907.

misdirection of judge, *id.* 908.

rejecting witnesses, 907.

admitting or refusing evidence, contrary to law, 599, 600, 907, 8.

error or mistake of jury, 908.

misbehaviour of jury, *id.* 909.

in penal, hard, or trifling action, 910.

after point reserved, 900, 904, 910, 900, (*d.*) 904. (*d, e, f.*)

when defence is unconscionable, 910.

after plea in abatement, *id.*

excessive damages, 909, *id.* (*f.*)

smallness of damages, 909, 10.

when granted on terms, 910.

cannot be had, for disallowing challenge, 854, 906.

trying cause out of its turn, 818, 19; 906.

in civil cases, for one of several defendants, 911.

part of cause of action, *id.*

on the whole, or part of record, *id.*

in criminal cases, 400, 911.

after acquittal, 911.

conviction, *id.* 912.

motion for, when and how made, in K. B., 904, 912.

C. P., *id.* 913.

not allowed after *four* days, though by consent of parties, 912.

moving in arrest of judgment, 913.

on feigned issue, directed by Chancellor, *id.*

issues from equity side of Exchequer, *id.* 914.

extents, 1081.

affidavit in support of, 914.

when made, in K. B., *id.*

after death of chief justice, 914.

judge's report on, *id.*

rules for, 505, 6.

to show cause, 914.

what counsel are heard on, 507. (*d.*)

absolute, 917.

proceedings on, in K. B., 914, 917, 18.

C. P., 918.

when set down in peremptory paper, in C. P. 505, 6.

showing cause against, no breach of injunction, in Exchequer, 461.

bringing money into court after, 622.

costs on. See *tit. Costs.*

NIENT DEDIRE, 605, 6; 723.

NIL CAPIAT, judgment of;

when given on demurrer, 741.

NIL DEBET,

plea of, 648, 650. (*c.*)

in what actions, and how pleaded, 563, 4.

per patriam, 649.

legem, *id.*

NIL DEBET, *continued.*

plea of, *continued.*

how concluded, 649.

what may be given in evidence on, and what not, 650.

a nullity, in *assumpsit*, 476, 563.

aliter, in *debt* on judgment, 564.

in *debt* on bond, bad on general demurrer, 650.

NIL DICIT, judgment by. See tit. *Judgments.*

NIL HABUIT in *Tenementis*, plea of, 649.

NISI PRIUS;

authorities for trials at, 41.

clerk of, in *London*, &c. 43.

for *Middlesex*, id.

clause of, in jury process. See tits. *Grand Assize* and *Jury process.*

order of. See tit. *Arbitration.*

record of, what, 775, &c. 1236.

contents of, 721, 775.

placita, 775.

jurata, id.

sciendum, id.

in King's Bench:

by whom, and how made up, id. 776.

sealing, and passing, 734, 776, 7.

in *London* and *Middlesex*, 776.

at the assizes, id.

resealing, id.

Common Pleas, 775.

by whom, and how made up, 776, 7.

• signing, and sealing, id.

not to be signed, till issue entered, 734, 777.

cause may be set down for trial, before it is brought in, 817.

cannot be entered for trial at assizes, after regular time, 818.

withdrawing, 851.

on new trial, in K. B., 917, 18.

C. P., 918.

amendment of, 713.

evidence of commencement of action, 335.

trial of cause, 944.

day of trial, 777, 944.

not evidence of verdict, 944.

in error, 1167.

trials at. See tit. *Trial.*

evidence at, must be confined to strict legal rights, 678.

NOLLE PROSEQUI, 571, 677, 681, 2.

what, 681.

on plea of coverture, &c. id.

by attorney general, on information for penalties, 519. (*g.*)

of the whole, or part of cause of action, 582, 3; 681, 974.

where there is a demurrer to part, and issue to other part, 571, 682.

when to be entered, 571.

in actions against several defendants, 682, 896.

costs on, 682, 981.

NON ASSUMPSIT,

plea of, 653.

in what actions, and how pleaded, 563, 4.

what may be given in evidence on, 646, 7.

or may not be pleaded with, 655, 6.

in *debt*, a nullity, 476, 563.

infra sex annos, plea of, must be signed, in C. P., 672.

NON CEPIT;

plea of, 645.

NON COMPOS MENTIS. See tit. *Insanity*.

NON DAMNIFICATUS, plea of, 651.

NON DETINET,

plea of, 645, 648.

what may be given in evidence on, 648, 652.

NON DIMISIT, plea of, 650.

NON EST FACTUM,

plea of, 643.

cannot be pleaded with a tender, or other inconsistent plea, 655.

what may be given in evidence on;

in covenant, 648.

debt on bond, or other specialty, 650.

special, must be delivered, in K. B., 671, 2.

need not be signed, 671.

notice of set-off cannot be given with, 667, 8.

suggestion of breaches after, 585, 687.

evidence on, 650. (*k.*)

issue on, by whom made up, 717.

assessing damages on, 879.

NON EST INVENTUS,

return of, 308, 9; 1828, 1097, 8.

when good, to *ca. sa.*, 1098.

NONFEAZANCE,

what, 441, 2.

action for, 4.

declaration in, 444, 5.

not within statute 7 *Jac.* I. c. 5, p. 988. (*c.*)

NON INFREGIT CONVENTIONEM,

a bad plea, 648.

NON-JOINDER;

plea of, in abatement, 635, 6.

form of, 636.

evidence on, *id.*

finding on, when party named is not liable, 636.

NON MOLESTANDO;

writ of, when granted, 139.

NON OBSTANTE VEREDICTO. See tit. *Judgments*.

NON OMITTAS. See tits. *Capias ad satisfaciendum*, *Fieri Facias*, and *Process*.

NON-PERFORMANCE,

of condition precedent, plea of, 643.

NON PROS,

judgment of;

for not adjourning *esso*, 109, 460.

NON PROS, *continued*.judgment of, *continued*.on removal by *certiorari*, or *habeas corpus*, 413.*pone*, or *recordari*, &c. 418.

for not declaring, 162, 458, &c.

in K. B. by original, 421, 2; 463.

bill, 420, 21, 2.

C. P., 421, 2; 424, 463.

after reversal of outlawry, 423.

in joint action, 459, 676, 7.

pending injunction, 460.

cannot be signed before appearance, 459.

of what term appearance to be entered, and when complete, *id.*must be signed within a year after return of writ, *id.*

with whom, and how signed, in K. B., 460.

C. P., *id.*regular, or irregular, *id.*pleading in bar, in *replevin*, 672.

replying, &c. 676, 7; 693.

by one of two defendants in *trespass*, who pleaded separately, 676, 7.

entering issue, 727, 8; 761, 2.

by one of two defendants in *trespass*, who pleaded separately, 727, 8.

to plea, as to one of several counts, 677.

of bankruptcy, *puis darrein continuance*, 851.in *ejectment*, 1231.

certifying record, 1160.

alleging diminution, 1167.

assigning errors, 1168.

entry of, 1175.

proceeding after original sued out, 1171, 2.

form of, 930.

not allowed, for non-delivery of particulars of demand, 598.

in second *ejectment*, for non-payment of costs of former one, 1233.

costs on, 418, 460, 851, 976, 979, 980, 81, 2.

how recovered in Exchequer, 991.

motion to set aside, 487.

arrest after, 175.

NON-RESIDENCE;

statutes relating to, 519.

actions for;

notice of, 82, 3.

venue in, where laid, 430.

staying proceedings in, 519, *id.* (*d.*)

security for costs in, 535.

bringing money into court in, 620.

double costs in, for defendant, 988.

execution in, 1026.

NONSUIT;

- origin and history of, 867, 8; 869.
- for what causes, *id.*
 - defect of evidence in a particular county, 868.
 - objections appearing on record, 867.
- after plea of tender, 868.
 - bringing money into court, 624, 5; 868.
 - Qu.* if a bar to new action? 627. (*f.*)
- in joint action, as to one of several defendants, 868.
- on trial by *proviso*, 762, 868.
 - point of law, 867.
 - question of fact, *id.*
 - point reserved, 900, 904, 900, (*d.*) 904, (*d, e, f.*)
- how avoided, 867, 8.
- not allowed, for non-joinder of parties, 9.
 - in king's case, 868.
 - when objection is over-ruled, without reserving point, 904.
- advantage of, 868.
- can only be at the instance of defendant, *id.*
- in undefended cause, *id.*
 - with liberty for plaintiff to move to enter verdict, *id.*
 - amendment after, 697.
- in *replevin*, 868, 9.
 - scire facias*, *id.*
 - ejectment*, for not confessing lease, &c., 1237, 8.
 - against several defendants, 1238.
 - on stat. 1 Geo. IV. c. 87, § 2, *id.*
 - on merits, 1238.
- on *Welch* judicature act, 969, 70.
 - extents, 1076, 1080.
- damages on, in *replevin*, 869.
- rule for judgment, not necessary on, 903.
- motion for, after point reserved, 904.
- second arrest after, 175.
- new trial after, 905, 907, 8.
- death of party after, not within statute 17 *Car.* II. c. 8, p. 988.
- judgments on. See tit. *Judgments.*
 - as in case of. Same title.
- staying proceedings on judgment of, pending error, 581, 1147.
- costs on, 977, 8; 980, 81.
- prisoner in execution for, entitled to be discharged, under 48 Geo. III. c. 128, p. 387.

NON SUM INFORMATUS,

judgment by. See tit. *Judgments.*

NON TENURE, plea of, 645, 1128.

NOT GUILTY,

- plea of, in *assumpsit*, 563, (*i.*) 733.
 - debt on statute, 564.
 - case, 645.
 - trespass*, *id.*
 - ejectment*, 1227, 1230, 81.
- what may be given in evidence on, 652, &c.

NOTICE,

for completing cause of action, 28.

of action, *id.* 29.

to justices, 29, 80.

when necessary, and when not, *id.*

must state process intended to be sued out, 29.

need not specify form of action, *id.* 80.

cause of action, how stated in, 80.

indorsement on, 80.

attorney giving it, how described, *id.*

officers of customs, or excise, *id.* 81.

when served, 81.

army, navy, or marines, 80, 81.

decisions on stat. 28 Geo. III. c. 37, § 23, p. 81.

West India dock company, *id.* 82.

London dock company, 82.

clerk to two public bodies, 88.

toll-gate keeper, bad for uncertainty, *id.*

in actions relating to taxes, 82.

when not necessary, *id.*

for non-residence, *id.* 83.

against commissioners of bankrupt, 83.

relative to larceny, &c. *id.*

separate, sufficient to found joint action, *id.*

not deemed a commencement of suit, 556.

to attorneys, when and how served, 71, 2; 500.

agents, when given, 96, 7.

to landlord, of service of declaration in *ejectment*, 1227, 8.

for admitting, or re-admitting, attorney, 69, 70; 78, 9; 89, 90.

to commissioners of stamp duties, 80.

by attorney, not to pay money to his client, 838.

on summons or attachment, and *distringas*, by original, 113, 14.

copy of *capias*,

when necessary, 167.

need only be on copy, and not on writ, *id.*

its direction, 148, 167.

form, 167.

in K. B. or C. P., *id.*

want of, *id.*

mistake in, how taken advantage of, *id.* 169.

irregularity in. See tit. *Irregularity*.

Lords' act; See tit. *Lords' act*.

service of, 885.

on insolvent debtors' act, 891, 2.

of bail. See tit. *Bail*.

render, 288.

declaration, 455, &c.

when given, in K. B., 455, 6.

C. P., *id.*

Exchequer, 456.

title and form of, 457.

how served, in K. B., *id.*

NOTICE, *continued.*of declaration, *continued.*

- how served, in C. P., 457.
- Exchequer, *id.*
- cannot be given, when writ served, in K. B., 455.
- aliter*, in C. P., *id.*
- in Exchequer, 458.
- before essoin day, a nullity, 456.
- form of, 457.
- need not it seems be dated, in K. B., *id.*
- sticking up in office, in C. P., *id.*
- in bailable actions, in C. P., 454.
- plea, 347, 676.
- cannot be served on *Sunday*, 218.
- to plead, 322, 453, 466, 7; 473.
- after four terms, 468.
- necessary, on declaration *de bene esse*, 473.
- need not be indorsed on, or given at time of declaration, 467, 473, 4.
- what sufficient, in C. P., 473, 4.
- in *ejectment*, on vacant possession, in K. B., 1202, *id.* (*b.*)
- appear to declaration in *ejectment*, 1203, 4; 1207, 8, 9; and see tit. *Ejectment.*
 - on vacant possession, 1202.
 - on stat. 1 Geo. IV. c. 87, § 1, pp. 1207, 1209.
 - amendment of, 1208.
- compute principal and interest, on bill of exchange, 571.
- need not be given, in K. B., 570.
- of prothonotary's appointment, must be given, in C. P., *id.*
- to produce deeds, &c., 802, 3, 4, 5.
- general object and effect of, 802, 3.
- when necessary and when not, *id.* 803.
- to whom given, 802.
- title of, 803.
- service of, *id.*
- at assizes, *id.*
- regular time of calling for their production, 804.
- when deeds, &c. are produced on, *id.*
- if not used, *id.*
- proving execution of deeds, &c. *id.*
- impounding them, *id.*
- when not produced, *id.* 805.
- proof of notice, *id.*
- deeds, &c. being in possession of the other party, *id.*
- secondary evidence of their contents, 802, 3, 4, 5.
- produce inquisition, on moving in arrest of judgment, in C. P., 928.
- of bill filed against attorney, in C. P., 823.
- writ of error, &c. for detaining prisoners in custody of marshal, 367.
- prisoner's intention to take benefit of insolvent act, will prevent his discharge, 371.
- petitioning, &c. on Lords' act, 377, 8; 383, 4.
- motion, 303, 491, 494, 512, (*a.*) 765, 6; 772, 928, 1184.
- abandoning rule *nisi*, 512. (*a.*)

NOTICE, *continued*.

of irregularity in process, 514.

computing principal and interest, unnecessary, in K. B., 572.

attending by counsel, on execution of inquiry, 580.

set-off. See tit. *Set-off*.

intention to dispute petitioning creditor's debt, &c., 668, &c. 670.

form of, 669.

when given, id. 670.

on whom, and how served, 670.

of intention to dispute petitioning creditor's debt, &c.:

proof of, 670.

evidence on, id. 671.

costs on, 669.

rule, on pleading double, 657.

striking out rejoinder, &c. 726. (*f*.)

trial. See tit. *Trial*.

want of, ground for new trial, 906.

inquiry. See tit. *Inquiry*.

rent in arrear, on stat. 8 Anne, c. 14, § 1, pp. 1015, 16.

executing *elegit*, unnecessary, 1086.

judgments, what, and when material, 985, 940, 41.

will affect purchasers in equity, though not registered, 941.

docketing, does not amount to constructive notice, id.

moving for interest on affirmance of judgment, 1184.

scire facias, to defendant, in C. P., 1105, 6.

bail, 1123, 4.

allowance of writ of error, 1145.

how given in Exchequer, 500.

when necessary to be shown in pleading, 439, 40.

to quit, *ejectment* on, 1190.

NOVEL DISSEISIN,

assize of, damages in, 878.

NULLA BONA,

return of, 1018.

proceedings on, 1022.

NUL TIEL RECORD,

plea of, 587, 8; 643, 1106, 1128, 1130.

how concluded, 742.

what may be given in evidence on, 651.

need not be signed, in K. B., 671.

C. P., 672.

must be delivered, in K. B., 671, 2.

amendments allowed after, 697.

replication of, to plea of privilege, 71, 685.

judgment, or recognizance, 685, 6.

how concluded, 742, 3.

need not have serjeant's hand, in C. P., 693, 743.

issue of, 717, 742.

by whom made up, 717.

how concluded, 725.

triable, 743, 943, 4.

NUL TIEL RECORD, continued.

issue of, *continued.*

proceedings on ;

in King's Bench ;

when record is of *same* court, 742.

notice or rule to produce record, *id.*

on replication of *nul tiel record* ; concluding with a verification, 748.

when record is of a *different* court, 744, 5.

certiorari and *mittimus*, *id.*

reference to master, to compute principal and interest,
on bill of exchange, 572.

in Common Pleas :

when *plaintiff* avers existence of record, 748, 4.

continuance of notice to produce record, *id.*

defendant avers it, 744.

by original, *id.*

bill against attorney, *id.*

notice of inquiry on, 578.

rule for judgment ;

peremptory, 744, 5.

nisi causa, 744.

on proceedings by original, *id.*

bill, *id.*

final judgment, *id.*

not necessary, on *interlocutory* judgment, 744, 5.

how drawn up, 744.

judgment on. See *tit. Judgments.*

difference on, between discontinuance, and reversal of judgment,
745.

NUNC PRO TUNC. See *tit. Affidavits, Judgments, and Pleas and Pleading.*

NUISANCE,

action for, 4.

of a local nature, 427, 482.

declaration in, 448, 4.

venue in, 482.

justification under right of entry to abate, 646.

O.**OATHS,**

on being called to the bar, 42.

admission of attorneys, 70, 71.

of allegiance, &c. may be taken before a single judge, 70. (*g.*)

OBLIGATIONS,

to king, 1048, 4.

proceedings on, 1045, 6.

from what time lands are bound on, 1051.

OBSTRUCTIONS,

justification under right of entry to remove, 646.

OFFICE COPIES,

of affidavits to hold to bail, 179, 80.

OFFICE COPIES, *continued*.

of records, &c. 800.

depositions in Chancery, when evidence, 801.

OFFICERS,

justifications by, or in aid of, under legal process, 646.

of army, navy, and marines. See *tit.* *Army, Navy, and Marines*.

of King's Bench;

judge's, 39, &c.

on crown side:

clerk of the crown, or coroner, 45.

secondary, and clerk in court, *id.*

clerk of the rules, *id.*

examiner, *id.*

calender keeper, *id.*

clerk of the grand juries, *id.*

on plea side:

prothonotary, or chief clerk, *id.*

master or secondary, and assistant, *id.* 44.

clerk of treasury, 43.

custos brevium, *id.* 53.

filacer, 43.

duty of, in signing writs, *id.* (*f.*)

exigenter, 43.

clerk of outlawries, *id.*

signer of writs, *id.*

bills of *Middlesex*, *id.* 44.

clerk of rules, 43.

papers, *id.*

declarations, *id.*

common bails, *postea*s, and estreats, *id.*

dockets, commitments, and satisfactions, *id.*

inner and upper treasury, *id.*

outer treasury, *id.*

nisi prius in *London*, and other cities, &c. *id.*

for *Middlesex*, *id.* 44.

errors, 43.

chief usher, and crier, 52, 3.

deputy ushers, and oriers, 53.

judges' clerks, 44, 52.

bag bearer, 43.

of King's Bench prison:

marshal, 52, 3.

deputy marshal, 53.

chaplain, *id.*

clerk of papers, 53.

day rules, *id.*

turnkeys, *id.*

tipstaffs, *id.*

of Common Pleas;

judges, 39, &c.

prothonotaries, 44, 729, &c.

office of chief and third, to be vested in same person, 46.

OFFICERS, *continued.*of Common Pleas, *continued.*prothonotaries, *continued.*

duties of, 47, 8.

secondaries, 44.

how formerly appointed, 48.

secondary to chief prothonotary to be appointed by chief-justice, *id.*first appointed, on vacancy of the other, to perform duties, and receive compensation, *id.*duties of, *id.* 49.*custos brevium*, 53.

commissioners of treasury authorized to purchase office of, 54.

filacers, 44, 49, 729.

how formerly appointed, 49.

appointment of, by stat. 6 Geo. IV. c. 88, § 15, *id.*duties of, *id.* 50.clerk of *exigents*, 44, 5; 50.*supersedeases*, *id.*

outlawries, 45, 50.

reversal of outlawries, *id.*juries, *id.*

warrants, enrolments, and estreats, 45, 50, 51, 2; 71, 781, 776.

essoins, 45, 51, 731, 2.

recoveries, 729.

king's silver, 45, 729.

dockets, 45, 51, 898.

judgments, 45, 51, 2; 901, 932.

treasury, 45, 52.

errors, *id.*

chief proclamator, 52, 54.

keeper of *Westminster* hall, 53.

oriers, 54.

court-keeper, *id.*porter, *id.*

of Fleet prison;

warden, 53, 4.

proceedings against, on stat. 59 Geo. III. c. 64, p. 324.

clerk of papers, 53.

rules, *id.*tipstuffs, *id.* 54.

of King's Bench and Common Pleas;

remedy against, in case of misbehaviour, 46.

how, and for what cause, deputy may be appointed, *id.*

sealer of writs, 52, 54, 5.

commissioners of treasury authorized to purchase office of, 54.

duty of, *id.* 55.

of Exchequer of Pleas;

barons, 39, &c.

clerk of the pleas, 53.

deputy, or master, *id.*

OFFICERS, continued.

of Exchequer of Pleas, *continued.*

sworn clerks, or attorneys, 58, 157, 8.

side clerks, *id.*

sealer of writs, 58.

of all the courts:

sheriffs, *id.* 59.

at *nisi prius*:

clerk of *nisi prius*, 59.

associate, and marshal, *id.*

crier, and train-bearer, *id.*

of circuits;

clerk of assize, 59.

associate, *id.*

clerk of arraigns, *id.*

indictments, *id.*

judge's marshal, *id.*

crier, clerk, steward, and tipstaff, *id.*

of court of Great Sessions in *Wales*, removable for misconduct, 282, 3. (*c.*)
fees of. See tit. *Fees*.

lien of, for their costs, 387. (*i.*)

duty of, on trials at bar, 751.

complaint against, examinable by judges, in C. P. 58.

for filing affidavits in Chancery, &c. of execution of articles of clerkship,
64, *id.* (*f.*)

of customs, and excise. See tit. *Customs and Excise*.

OFFICES,

of K. B. formerly saleable, 43, 4.

no longer saleable, and future appointments to, regulated by
stat. 6 Geo. IV. c. 82, p. 44.

of clerk of papers and declarations, to be consolidated, *id.*

of C. P. formerly saleable, 45.

no longer saleable, and future appointments to, regulated by
stat. 6 Geo. IV. c. 83, *id.*

of chief and third prothonotaries, to be vested in same person, 46.

of filacers, to be executed by same person, *id.*

appointments to, *id.*

of K. B. and C. P.

to be executed in person, and not by deputy, unless for reason-
able cause, 44, 5.

appointments to be made by chief justice, *quamdiu se bene
gesserint*, *id.*

attorneys exempt from, 82.

disturbance of, 444. (*b.*)

when saleable, under Lords' act, 381.

corporate, stat. 9 Ann. c. 20, confined to, 656, 7; 951.

for the king;

different kinds of, 1057. (*e.*)

traverse of, 1072, 1075.

proceedings on, 1075, &c.

ORDER of JUDGE; See tit. *Judge's Order*.

for time to plead, must be drawn up and served, 471.

ORDER of NISI PRIUS; See tit. *Arbitration*.

motion to make it a rule of court, in K. B., 485, 490.

rule for, in C. P., 486, 490.

by consent of defendant's counsel and attorney, with
a particular authority, 820.

amendment of, id.

ORDER of PRECEDENCE,

of advocates, or counsel, 42, 3.

ORIGINAL WRIT, 37, 8; 91.

in King's Bench;

jurisdiction of court by, 37.

what, 102.

special, 103.

when it lies, 102.

in what cases necessary, id. 104, 5; 132.

benefit of proceeding by, 102, 1139.

for commencing, or removing actions, 103, 4.

testatum capias good commencement of action by, 27.

de cursu, or *magistralia*, 103.

præcipe, or *si te facerit securum*, 104, 699.

costs on, 103.

in Common Pleas;

jurisdiction of court by, 37, 8.

special, 91, 104, 131, 2.

common:

quare clausum fregit;

history of, 104.

issues out of Chancery, 745.

cannot be connected with another, to avoid statute of limi-
tations, 27.

outlawry on, 131, 2; 142.

chancellor's common law authority in issuing, 104, (a.)

cannot be issued into county palatine, 105, 129.

by whom, and how issued, 104, 5.

form of, 104.

direction, 105.

teste and return, id. 107.

antedating, 107. (d.)

amendment of, 109, 713.

declaration by. See tit. *Declaration*.

in *ejectment*, 1205.

commencement of, id.

venue in, 432.

need not repeat original, 433.

oyer of, cannot be demanded, id. (d.) 588.

against prisoner in Fleet, 92, 358.

should be shown, on tendering declaration, on *habeas corpus*, 409.

issues by. See tit. *Issues*.

award of *venire facias* on, 722, 3.

want of, when not assignable for error, 105.

aided by defendant's undertaking not to assign it, id. 607, 8.

verdict, 103, 923, 1171.

ORIGINAL WRIT, *continued*.

- want of error, after judgment by default, &c., 108, 1169, 70, 71.
 - how assigned, 1170.
 - confession of, 1171.
- suing out, after error brought, *id*.
- certiorari* for, 1170, &c.
- proceedings on, 1170, 71, 1174.

OVERSEERS. See tit. *Churchwardens and Overseers*.

- actions by, on bastardy bonds, 7.
- demand when necessary for supporting action against, 28.
- attorneys not liable to be chosen, 82.
- service of declaration in *ejectment* on, 1212.
- inquiry of damages, in actions against, 575.

OUTLAWRIES,

- clerk of, in K. B., 48.
- C. P., 45, 50.
- reversal of, in C. P., *id*.

OUTLAWRY,

- in civil actions, what, 131.
- in separate, or joint action, *id*. 370, 423.
- on *pone*, or *recordari*, &c. 416, 17.
- forfeiture upon, 131.
- in criminal cases, 144.
- waiver of women, 131, 135.
- persons under, disqualified from serving on juries, 783.
- upon mesne process, 131.
- final process, *id*.
- in C. P. or common or special original, *id*. 132.
- capias*, *alias*, & *pluries* may be sued out together, 129.
- lies not, in Exchequer, 132.
- writ of *exigi facias*, *id*.
- with whom deposited, when returned, in K. B., 133.
- C. P., 133.
- allocatur exigent*, 132.
- must be in sheriff's hands, when defendant is demanded, *id*.
- proclamation, *id*. 133.
- teste* and return of, 133.
- sheriff's return to, *id*.
- irregularity of, *id*. 142.
- with whom filed, in K. B., 133.
- C. P., *id*.
- foreign proclamation, *id*.
- proceedings on *exigent*:
 - arrest, 134.
 - voluntary appearance, *id*.
 - bail, *id*.
 - supersedeas*, *id*.
- judgment of, or waiver, 135.
- charging defendant in execution on, 365.
- capias utlagatum*, 135.
- cannot be sued out after death of parties, in C. P., *id*.
- general, *id*.

OUTLAWRY, *continued.**capias utlagatam, continued.*general, *continued.*

form of, 135.

proceedings on, id. 136.

against bankrupt, 136.

bail, id. 137.

bail-bond, 136.

special, 135.

form of, 137.

proceedings on, id.

inquisition, id.

return, id.

transcript into Exchequer, id.

venditioni exponas, id.*scire facias*, id.*levari facias*, id. 138.

bill of discovery, &c. 138.

poundage on, 1040.

prisoner in custody on, not discharged by bankruptcy, 126.

how to obtain satisfaction on, from outlaw's property, 138.

of reversing it by writ of error, or motion, 139, 40.

on motion, for error in fact, 139.

want of proper addition, 140.

proclamations, 141, 2.

appearance, id.

bail. See tit. *Bail*.

in joint action, 139, 40; 142, 467.

in Common Pleas, 142, 3.

after death, or marriage of plaintiff, id.

entry of reversal, 143.

costs, id.

for not declaring after reversal of, in C. P., 423.

restitution, 144.

limitation of actions, after reversal, 15.

determines by death, 144.

of one defendant, effect of, after death of another, 1117.

how reversed, on death, 144.

pleading death, &c. in Exchequer, id.

judgment thereon, id.

writ of *amoveas manus*, id.

declaration after, 130, 140, (f.) 422, 3.

plea of, in abatement, 634, 641.

bar, 644.

after last continuance, 847, 850.

after judgment, 1028.

in civil suit, considered as an execution, within stat. 8 Ann. c. 14, p. 1015.

landlord's remedy after distress, and outlawry reversed, id.

OXFORD;

claim of conusance, by university of, 631, 2; 638, 4.

OYER,

of deeds, &c. in what case demandable, 443. (*d.*)

OYER, continued.

of deeds, &c. in what cases demandable, *continued.*
by defendant, 586.

plaintiff, id.

by and of whom demanded, id.

cannot be dispensed with by court, 587.

when not grantable, id.

deed is in hands of third person, id.

necessary to be demanded during same term, id.

what must be delivered under it, 586.

of articles, referred to in bond, not demandable, 586.

records, 587, 8; 742.

original writs, 433, 588.

mesne process, 129.

demand of, at what time to be made, 443, (*d.*) 463, 588.

insisting upon, 588.

contesting, id.

no settled time for plaintiff to give it, in K. B., id. 589.

time for giving it, in C. P., 588. (*m.*)

party, of whom demanded, must carry deed, &c. to his adversary, 586.

in what time it must be given by defendant, 588.

judgment for not giving it, id.

setting forth the whole deed, &c. 565, 589.

what use may be made of it in pleading, 443, (*d.*) 588, 9.

time to plead, or reply, after, 468, 9; 588, 9.

inserting deed on, in plea or replication, 589.

consequences of not inserting the whole, or setting it out untruly, id.

OYER and TERMINER;

commission of, 41.

P.**PALACE,**

royal, privilege of, 219.

PALACE COURT;

procedendo awarded, in action on bail bond in, 411.

PANEL,

of jury. See tit. *Jury*.

PANNAGE;

ejectment will not lie for, 1193.

PAPER BOOK; See tit. Issues.

when delivered to judges, in K. B., 504, 738.

C. P., 505.

in error, 1176, 7.

PAPER DAYS, 504.

argument of causes on, id.

PARISH, 434.

when not necessary to be stated in declaration, id.

description of, id.

registers, of christenings, &c., 802.

indentures, books for, id.

PARISH BOOKS,

inspecting, 593, 4.

PARISH BOOKS, *continued*.

rule for, absolute in first instance, 594.

PARISH CLERKS,

exempted from serving on juries, 784.

PARISH OFFICERS;

actions by, 7.

costs in actions against. See tit. *Costs*.

PARK-KEEPER:

justification by, 645.

PARLIAMENT,

writ of error in, 102, 1137, &c.

formerly abated, by prorogation or dissolution of, 1164.

PAROL DEMURRER, 635, 645, 1121, 1175.

PARTICULARS,

of residences and additions of parties, calling for, 534, 636, 1231.

plaintiff's demand, 596.

in what cases demandable, id.

in *assumpsit*, or *debt*, for goods sold, &c. id.

of objections to abstract, 597.

debt on bond, for performance of covenants, id.

when there is a general form of declaring, id.

in *ejectment*, 600, 1231, 2.

in what cases not demandable:

in special *assumpsits*, &c. 597.

actions for wrongs, id.

summons for, 596.

when taken out, 596.

before appearance, id. 597.

after previous order for time to plead, &c. 471, 597.

order on, 596, 7.

how far a stay of proceedings, 597.

defendant must undertake by, to plead issuably, id.

make some admission, in favour of plaintiff, id.

forms of, referred to, id. (a.)

how given, 598, 9.

sufficient, if they convey the requisite information, though inaccurately drawn up, 598.

must not be merely an *echo* of counts in declaration, 599.

erroneous date in, will not vitiate, id.

evidence on, 599, 600.

proof of by defendant, entitles plaintiff's counsel to reply, 858.

time to plead, after delivery of, in K. B., 469, 598.

C. P., id.

in Exchequer, 598.

rule for, in *vacation*, in court of Great Sessions in *Wales*, 486, 7,
(u.) 598. (l.)

non pros cannot be signed for non-delivery of, 598.

of defendant's set-off, id.

summons and order for, id.

form and effect of, 598. (l.)

consequence of not delivering, 598.

PARTICULARS, *continued.*

of defendant's set-off, *continued.*

rule for, in *vacation*, in court of Great Sessions in *Wales*, 486, 7.
(u.) 598. (L)

objecting to, at trial, 598.

summons and order for further particulars, 471, 514, 598, 9.

to amend particulars, 598, 9.

costs on, 599.

effect of, at trial, 600.

no ground for striking out inapplicable counts, 617.

PARTITION,

amendments in, of declaration, and sheriff's return, 699.

PARTNERS,

in *Ireland*, or *Scotland*, how to sue or be sued, 9.

distraining effects of, 112.

actions by or against, 6.

one or more members of a firm, 7. (c.)

pleas in, 636.

set-off in, when allowed, 664, 5.

executions against, 1007, 8.

signing note, on Lords' act, 381, 2.

attorneys, liability of, to penalties, 78.

execution of warrant of attorney, by one of several, 548.

submission to arbitration by one, does not bind the others, 822.

PARTNERSHIPS,

in *Ireland*, or *Scotland*, how to sue or be sued, 9.

PASTURE,

justification under rights of common of, 645, 6.

PATENT,

of precedence, 42.

action for infringing, 604.

venue in, *id.*

evidence in, 612.

scire facias for repealing, 1090, 91; 1098, &c. and see tit. *Scire Facias*.

venue cannot be changed in, 604.

costs in, 1095, 6.

PAUPERS,

what, 97.

when, and how, admitted to sue in *forma pauperis*, *id.* 98.

judge's order for that purpose, *id.* (q.)

discharging, 98.

must first be made a rule of court, *id.*

effect of, as to costs previously incurred, 99.

effect of admission, 98.

opinion of counsel, or certificate, necessary for admitting, 98.

not liable to costs, *id.*

may receive them, *id.*

how answerable for delay, *id.*

staying proceedings, in *ejectment* by, *id.* 99.

not allowed to defend in *forma pauperis*, 97.

entitled to issue money, 726.

may have trials at bar, 749.

PAUPERS, continued.

must pay costs, for not proceeding to trial, in C. P., 759.
aliter, until dispaupered, in K. B., 98, 759.

PAYMENT,

when presumed, in *debt* on bond, or judgment, 18, 19.
 not proved, by indorsement on note or bill, &c. 19.
 to attorney or agent, when payment to principal, 97.
 of debt, after action brought, 626. (*h.*)
 money into court. See tit. *Money*.
 sixpences, on Lords' act, 381, 2.
 plea of, in *debt* on bond, 18, 651.
 by heir, or devisee, 644, 5.
 when pleaded, or given in evidence, 646, 7; 651, 1128, 9.
 without acquittance, how pleaded at common law, 920.

PEACE,

commission of, 41.
 proceedings on recognizance to keep, 1098.

PEERS,

how proceeded against, 27, 37, 91, 102, 104, 112, 115, 116, &c.; 145.
 jointly with others, 118.
 under stat. 6 Geo. IV. c. 16, pp. 116, 17.
 Irish, proceedings against by *bill*, in C. P., 118.
 privilege of from arrest, &c. 192.
 original writ against, 118.
præcipe for, *id.* (*n.*)
 how it differs from that against other persons, 118.
 process against, by original, *id.* 119.
 form of summons on, *id.*
 motion to set aside, when made, 118, 145.
 cannot cast essoin, 109.
 privilege of, from arrest, 192.
 Scotch and Irish Peers, *id.*
 note of appearance for, 121. (*a.*)
 beginning of declaration against, by *original*, 118, 121. (*a.*)
 cannot be bail, 247, 267.
 attached, for non-payment of money, 192.
 non-performance of award, 835.
 taken in execution, 121, 1025, 6.
 exempted from serving on juries, 784.
 liable to attachment, for contempt of process, 192, 807.
 bail of, discharged, 290.

PENAL ACTIONS,

limitation of, 14, 15.
 against attorneys, &c. for practising without certificate, 76, 7.
 when brought in the superior courts, 517, 18.
 at the assizes, &c. *id.*
 process in, need not state in what character plaintiff sues, 147.
 declaring by the bye in, in C. P., 425.
 venue in, 429, 30.
 arrest in, 172.
 may be commenced by *latitat*, 146.
 prosecution of by collusion, consequence of, 556.

PENAL ACTIONS, *continued.*

compounding. See tit. *Compounding Penal Actions.*

staying proceedings in, on payment of penalty, 541.

on stat. 21 *Jac.* I. c. 4, p. 518.

other statutes, 518, &c.

till security be given for costs, 535.

discovery of plaintiff's place of abode in, 534.

entitling plea in, 564.

changing venue in, 604.

double pleas not allowed in, 655.

amendments in, at common law, 698, 711, 12.

by statute, 712, 13; 927, 8.

adding continuances, 679.

of judgments, 942.

not within 16 & 17 *Car.* II. c. 8, p. 1153.

Lords' act, 376.

issue money in, 726.

judgment as in case of nonsuit in, 765, 6, 7.

trial of, when it cannot be put off, 771. (*f.*)

notice to produce deeds, &c. on whom served, 803.

evidence in, after removal on stat. 38 *Geo.* III. c. 52, p. 724.

variance between declaration and evidence in, when not material, 434, 5. (*f.*)

damages in, not recoverable by common informer, 446, 870.

remittitur of, 942.

judgment reversed for, 1179.

postea in, 901.

judgments in, 942, 3.

as in case of nonsuit, 762, 767.

costs in. See tit. *Costs.*

within stat. 32 *Hen.* VIII. c. 30, pp. 927, 8.

error lies in Exchequer Chamber, when part of penalty is given to the king, 1140.

PENALTIES,

for practising as attorneys, without being admitted, 61.

against attorneys, &c. for practising without certificate, 76, 7.

relating to customs and excise, lotteries, and stamp duties, how recovered, 519, 20.

noli prosequi by attorney-general, on informations for, 519. (*g.*)

on game laws, &c. distress for, 528. (*f.*)

for non-residence. See tit. *Non-Residence.*

difference between, and stipulated damages, 173, (*o.*) 876, 7.

arrest not allowed for, 173, 4; 185.

when considered as the debt at law, 173, 4; 541, 876, 7, 8.

staying proceedings, in actions for, 518, &c.

on payment of, 541.

pleas in *debt* for, 650.

cannot be set off, 664.

damages and costs, in actions against justices, for levying, 892, 3.

how applied, in action for money won at play, 985.

execution when not allowed for, 997, 1108.

PENALTIES, continued.

of forfeited recognizances of bail to attachments, not applicable to payment of debt and costs, 1043.

PEREMPTORY DAYS, 505, 6.

PAPER, in K. B., 505.

C. P., 506.

UNDERTAKING. See tit. *Judgments as in case of Nonsuit.*

PERFORMANCE,

plea of, 643.

when pleaded, or given in evidence, 647.

replication to plea of, 686, 7.

PERJURY, 174.

by bail, 274, 5; 277.

in affidavit to hold to bail, 302.

indictment for, on affidavit, with defective *jurat*, 495, 6.

evidence on, 496.

no ground for staying proceedings, 528, 907.

variances in, immaterial, 435, in *notis*. col. 2, 901.

conviction of, ground for new trial, 907.

PER MINAS,

must be pleaded, in *debt* on bond, 650, 51.

plea of, not formerly signed, in C. P., 672.

PERSON,

pleas in abatement to. See tit. *Pleas and Pleading.*

PETITION,

of right, to king, 1072, 1075, 6.

to court;

for day rules, 235, 373, 4; 509.

relief against extortion of gaolers, &c. 232, 509.

for relief on Lords' act, 374, 5; 377, 8; 509.

discharge of insolvent debtors, 389, 90.

judge at chambers;

for paupers, 97, 509.

infants, 99, 100; 509.

court of Great Sessions, in *Wales*, 510.

master of rolls;

for original writ, 108, 9; 509, 1171.

amending original, 109, 509.

lords of treasury;

for money levied on *capias utlagatum*, 138, 509.

attorney-general;

for allowance of writ of error, 509, 1141.

House of Lords;

to return *certiorari* by a short day, 1171.

for day to assign errors, 1168.

to have cause appointed for a short day, 1177.

PETITIONING CREDITOR. See tit. Bankrupt.

costs of, 330, 31.

PETTY BAG OFFICE,

clerks of, excepted out of stat. 22 Geo. II. c. 46, p. 62.

PETTY OFFICERS,

in navy, what, 198. (*f.*)

PEWS. See tit. *Seats in Churches.*

PHYSICIANS,

when exempted from serving on juries, 784.

PILOTS,

when exempted from serving on juries, id.

PLACITA, 775, 1172, 1176.

in K. B., 733, 775, 917, 1172.

C. P., 733, 775, 918.

Exchequer, 723, 733, 777.

Chamber, 1176, 7.

PLAINT,

levied in inferior court, before cause of action, no ground of error, 92.

in trespass, 146.

proceedings on, id. 147.

in replevin, 416.

not removable from county court in *Wales*, into K. B. by *certiorari*, 400, 414.

PLEA ROLL, 47, (*c.*) 729.

various significations of, 728. (*g.*)

entries on. See tit. *Rolls.*

of continuances, 678, 9.

amendment of, 707, 8.

by, 713.

filing, to move for a suggestion, &c. 489.

when brought in, 730, 31, 2.

PLEAS and PLEADING,

general order of;

at law, 680.

in equity. See tit. *Equity.*

time for pleading;

upon attachment of privilege, 321.

bill against attorneys, &c. 322, 3; 464.

prisoners, in custody of marshal, 359, 464.

sheriff, &c. 347.

certiorari, or *habeas corpus*, 418, 464, 467.

pone, or *recordari*, &c. 418.

original writ, or bill of *Middlesex*, &c.:

formerly, 464.

at this day;

when plaintiff declares absolutely, id. 465.

de bene esse, 453, 465.

how reckoned, 465, id. (*e.*)

in Common Pleas, 466, 7.

when declaration is filed on *essoins* day, 466.

after *essoins*, on or before appearance day, id.

appearance day, id.

de bene esse, id.

days are reckoned inclusively, id.

in Exchequer, 454, 5; 467, 8.

after imparlance, 466, 7.

PLEAS AND PLEADING, *continued.*time for pleading, *continued.*upon original writ, &c. *continued.*after four terms. See tit. *Term's Notice.*

changing venue, 468.

demanding oyer, in K. B., id. 588.

C. P., 468, 9.

delivering bill of particulars, in K. B., 469, 598.

C. P., 598.

giving security for costs, in C. P., 469.

amending declaration, in K. B., id. 707.

C. P., 469.

judgment of *respondent ouster*, 642.

to the jurisdiction, 688, 9.

in abatement, id.

pleas in bar cannot be pleaded before bail perfected, 465,

6; 566, 689.

may be delivered at any time before judgment, 566.

cannot be delivered after *ten o'clock* at night, 499,

672.

further time to plead, 469, 70.

summons, and motion for, id. 488.

how reckoned, 470, 71.

month what, 47.

to the jurisdiction, 630.

in local actions, id.

ejectment, id. 631.

transitory actions, 631.

when to be pleaded, 688, 9.

mode of concluding, 637, 8.

must be pleaded in *person*, and with only *half* defence, 637.in courts of equity. See tit. *Equity.*

in abatement;

to the person of plaintiff, 630, 634.

defendant, 463, 600, 630, 635, 6.

count, 630, 636, 7.

writ, 630, 636, 642.

form of, 449, 630, 636, 638.

action of, 630, 637.

for matter apparent, 636, 7.

extrinsic, id.

variance between writ and count, id.

mis-statement in traverse in, cause of special demurrer, 638.

not amendable, id.

may be waived, in order to plead in bar, 673.

in *scire facias*, 1121, 1128, &c.

general requisites of, 637.

may be pleaded by attorney, id.

beginning and conclusion of, id. 638.

cannot be pleaded before, or until defendant has appeared and

perfected bail, 465, 6. 639.

after *full* defence, 637.

PLEAS AND PLEADING, *continued.*in abatement, *continued.*

cannot be pleaded after staying proceedings on bail-bond, 504.
when to be pleaded, 463, 638, 9.

before imparlance, *id.*

must be verified by affidavit, 640.

signed and filed, in K. B., *id.*

filed or delivered, in C. P., *id.*

calling for residences and additions of parties, 534, 636.

replying on demurring to, 641.

withdrawing demurrer to, 638.

judgments on. See *tit. Judgments.*

writ *in debt* may be abated in part, and stand good for remainder, 642.

time to plead, after judgment of *respondet ouster*, 641.

in what cases a second plea in abatement is allowed, *id.*

in courts of equity. See *tit. Equity.*

in bar, what, 643.

in denial;

of the whole cause of action, *id.*

part of it, *id.*

in confession and avoidance,

by matter precedent, 643.

subsequent, *id.*

by way of estoppel, 140, 643.

to extents, 927, 1077, 8.

what is aided, or waived by, 83, 108.

in actions on bail-bonds, 304, 5.

general issue, what, 643.

in *assumpsit*, *id.*

covenant, *id.* 648, 667, 8.

debt on simple contract, 643.

specialty, *id.*

record, *id.*

scire facias, *id.*

case, 645.

detinue, *id.*

replevin, 645.

trespass *vi et armis*, *id.*

reference to forms of, 643. (*f.*)

when proper to be pleaded, 646, &c. 653. (*f.*)

what may be given in evidence on;

in *assumpsit*, 646, 7.

bankruptcy of plaintiff, or his discharge under insolvent act, 647.

covenant, 648.

debt on simple contract, *id.*

bond, or other specialty, *id.* 649, 50, 51.

record, 651.

case, *id.* 652.

detinue, 652.

trespass to persons, *id.* 653.

PLEAS AND PLEADING, *continued.*in bar, what, *continued.*general issue, what, *continued.*

trespass to personal property, 652, 3.

real property, id.

against justices, &c. 653.

officers of army, navy, or marines, id. (b.)

persons acting under bankrupt act, id.

acts relative to lar-
ceny, &c. id.

pleas amounting to, 653, 4.

of colour;

implied, 653.

express, id. 654.

engrossing, 671.

delivering, or entering, in K. B., id. 672.

filing, in C. P., 672.

may be filed with clerk of judgments, in K. B., 566. (l.)

when delivered, must be drawn up at length, in C. P., 672.

need not be signed, 671.

waiving, 673.

withdrawing, to plead it *de novo*, with notice of set off, &c. 488, 622,
668, 669, 673.

and pleading specially, in K. B., 673.

C. P., id. 674.

statute of limitations, in C. P., formerly
refused, 673.

special pleas,

in actions upon *contracts*;

between the parties:

in avoidance, 643.

in performance, 643.

excuse of, id.

discharge, id. 644.

by insolvent debtor, 394.

by executors and administrators, 644.

heirs and devisees, id. 645.

in actions for *wrongs*;

in justification, or excuse, 645.

in case, for libels, or words, id. 651, 2.

trover, 651.

replevin. See tit. *Replevin*.

trespass to persons, 645.

personal property;

for taking cattle, or goods, id.

killing dogs.

cutting ropes, id.

real property, id. 646.

generally;

in justification, or excuse, id.

discharge, 646.

on erroneous, and irregular judgment, 1082.

PLEAS AND PLEADING, *continued.*

in bar, *continued.*

special pleas, *continued.*

when necessary ;

in *assumpsit*, 647.

covenant, 648.

debt on simple contract, *id.*

for rent, 649.

qui tam, *id.*

for a penalty, 650.

on bond, or other specialty, 649, 650, 51.

record, 651.

trover, *id.*

action for words, *id.* 652.

libel, 652.

escape, 649.

detinue, 652.

trespass, *id.* 653.

sham, subtle, and ensnaring pleas discountenanced, 564, 5, 6.

in King's Bench ;

what pleas need not be signed, 671.

must be signed, and filed, 672.

origin and reason of signing them, *id.* (*f.*)

what must be delivered, 671, 2.

waiving general issue or demurrer, and pleading or demurring
specially, 673.

striking out, and giving general issue, *id.* 674.

rule to abide by, 484, 674.

in Common Pleas,

delivering, or filing, 672.

what pleas must be signed, *id.* 673.

signing, *id.*

waiving, or withdrawing, 674, 5.

rule to abide by, not used, 484, (*u.*) 674.

single or double :

at common law, 654.

by stat. 4 Ann. c. 16, *id.* 655.

determinations upon this statute, 655.

in *quo warranto*, 656, 7.

what pleas may or may not be pleaded together, in general, 655.
in C. P., *id.* 656.

motion for leave to plead several matters ;

in King's Bench, 657.

Common Pleas, *id.* 658.

when made, 658.

rule to plead several matters ;

in King's Bench, 657.

Common Pleas, 488, 657.

when drawn up of course, on a serjeant's hand, 657.

not granted without an affidavit, 656. (*a.*)

nisi, 657.

service of, 658.

PLEAS AND PLEADING, *continued.*

in bar, special, single or double, *continued.*

in Common Pleas, *nisi*, *continued.*

making absolute, *id.*

absolute, *id.*

copy of, annexed to plea, *id.*

erroneously entitled, *id.*

judge's order for, in vacation, *id.*

all double pleas must be filed, in K. B., 672.

signed, in C. P., 678.

consequences of pleading double, without leave of court, 658.

its not appearing that leave was obtained, *id.*

costs on double pleading, 658, &c.

in general, their qualities and conditions, 451, 660, 61.

general pleading, in what cases allowed, 660, 61.

mode of pleading seisin of king, 442. (*b.*)

corporation, *id.*

setting out deeds, &c. on *oyer*, 448, (*d.*) 565, 589.

conclusions of, 662.

when defendant must plead issuably, 471, 2, 3; 563, 567, 597.

what are issuable, 470, 71, 2; 563, 4.

when delivered, 504, 5.

to whom, 97. (*b.*)

in what attorney's name, *id.* 566, 672.

searching for, in K. B., 563.

C. P., *id.*

adding, 488, 674.

or withdrawing, rule for, 488.

abiding by, 674.

rule for unnecessary, in C. P., 484. (*u.*)

striking out, 674, 5.

amending. See tit. *Amendments.*

setting aside, 463, 473, 564, 5; 689, 40, 41; 677.

replications,

in denial, 677, 683.

of the whole plea, 683, 4, 5.

of part of it, 683.

with a traverse, *id.*

what and when necessary, 684.

rules respecting it, *id.* 685.

added, after verdict, 924, 5.

in confession and avoidance, 685.

by matter precedent, *id.*

subsequent, *id.*

by way of estoppel, 83, 677, 685.

to plea of discharge under insolvent act, 394.

enrolling deed on *oyer* in, 589.

on extents, 1078, 9.

qualities of, 685, 6.

must not be double, *id.*

may contain several distinct answers, to different parts of plea, *id.*

with a *protestando*. See tit. *Protestando*.

PLEAS AND PLEADING, *continued*.replications, *continued*.

must be consistent with declaration, 688, 9.

departure, what, *id*.

instances of, *id*. 698.

as to time and place, 698.

how taken advantage of, *id*.

by way of new assignment,

general nature of, 690.

as to time, *id*.

on plea of license, *id*.

as to place, 690, 91, 2.

in another part of same close, 691.

extra viam, *id*.

other circumstances, *id*.

when proper, and when not, *id*. 692.

must be certain, 692.

pleas to, *id*.

mode of concluding, *id*. 693.

conclusions of, 686, 692, 3.

demand of, when necessary, 676.

when delivered or filed, in K. B., 693.

C. P., *id*.

signed, *id*.

waiving, on extents, 1079, 80.

rejoinders, sur-rejoinders, rebutters, sur-rebutters, &c. 693.

when signed, in C. P., *id*.

delivering or filing, *id*.

on extents, 1079.

rejoining *gratis*, 472.

demand of sur-rejoinder, &c. 693.

amendment of pleas, replications, &c. 708, 9; 850.

plea or replication bad in part, is bad *in toto*, 694.

of *nul tiel record*, how concluded, 742.

replication to, *id*.

replication of *nul tiel record*, how concluded, *id*. 743.

rejoinder to, 743.

plea *puis darrein continuance*;

what, 847.

when, and in what cases, pleadable, 822, 847, 8, 9; 1131.

in what not, 848.

when pleadable in bank, or at *nisi prius*, *id*. 849.

nunc pro tunc, 848.

in abatement, 849, 50.

peremptory, *id*.

conclusion of, *id*.

after bringing money into court, 625.

in bar, 849, 50.

form of, at the assizes, 850.

conclusion of, *id*.

waiver of former bar, *id*.

must be certain, *id*.

PLEAS AND PLEADING, continued.

pleas *puis darrein continuance, continued.*

how restrained, 850.

proceedings on, 851.

other pleas pleadable at *nisi prius*, 850.

pleadings cannot be objected to, on demurrer to evidence, 865.

what defects in pleadings are aided after verdict, at common law, 919, &c.
are amendable. See tit. *Amendments*.

cured, as matter of form, by statutes of jeofails, 824, 5.

repleader, 904.

when granted, 921.

rules respecting, id.

issues on, by whom made up, 717.

how it differs from judgment *non obstante veredicto*, 922.

costs on, 921.

pleadings in *ejectment*, 630, 81; 1227, 1230, and see tit. *Ejectment*.

scire facias. See tit. *Scire facias*.

error. See tit. *Error*.

of death, &c. for reversing outlawry, 144.

courts of equity. See tit. *Equity*.

PLEDGES,

by original, 110.

bill, 446.

in inferior court, discharged by putting in and perfecting bail above,
404, (b.)

want of, aided, 923.

in *replevin*, liability of, 1038, 9.

PLENE ADMINISTRAVIT,

plea of, general, 644.

special, id.

when it may be pleaded in *scire facias*, 1113, 14; 1130, 31.

need not be signed, in K. B., 671.

must be delivered, id. 672.

affidavit formerly necessary for pleading it, with another plea,
in C. P., 657.

not formerly signed, in C. P., 672.

issue on, by whom made up, 717.

evidence on, 427, 719, 939.

costs on, 976, 980.

on acquittal of one defendant, 986.

confession of, and judgment of assets *quando*, &c. 683.

scire facias on, 1113.

PLURIES,

writs of. See tits. *Capias ad satisfaciendum*, *Fieri Facias*, and *Process*.

POINT RESERVED, 498, 9; 900.

motion for nonsuit after, 904, 910. (*d, e, f*)

POLICY of INSURANCE,

debt proveable by assured on, under commission of bankrupt, 205. (*h*.)

actions on;

arrest not allowed in, without an adjustment, &c. 173.

declaration in, of sums assured, &c. 591.

order in, for plaintiff to produce papers, id.

POLICY OF INSURANCE, *continued.*actions on, *continued.*

changing venue in, 604.

bringing money into court in, 620, 625, 6; 628.

effect of, 626, 7.

costs on, 628.

consolidation rule, what, 614, 15, 16.

history of, 614, 15.

terms imposed on defendant, 615.

staying proceedings on, 539.

setting aside proceedings, on bringing money into court, 615.

opening, *id.*motion for leave to take out execution, after verdict for plaintiff,
487, 996.

in what cases verdict is conclusive, and in what not, 615, 16.

proceedings on, in C. P., *id.*

relates solely to verdict, 615.

effect of, on bringing writs of error, 1134.

evidence of interest in, on execution of inquiry, 581.

interest not recoverable in, 873.

costs in, 616, 628.

of new trial, 916.

setting off losses and returns of *premium*, in actions for *premiums* on, 665.

POLICY BROKERS,

set-off in actions against, *id.*POLLS, challenging. See *tit. Jury.*

PONE,

or *si te fecerit securum*, 104.*loquelam* to remove *replevin* cause;

what, and when it lies, 38, 414, 15.

direction of, 414, 15.

form of, *id.*fee on issuing, 105. (*f.*)

cause for, when shown, 415.

what, *id.*effect of, *id.*receipt and allowance, *id.*

return;

when and how made, *id.* 416.

what is good, and what not, 416.

when plaint is removed under it, *id.*

proceedings on:

filing writ, and return, 415, 16, 17, 18.

effect of, 416.

rule to appear, 416, 17; 483.

process to compel appearance, 416, 17.

appearance of defendant, 417.

rule to declare, *id.* 418, 483.

for time to declare, 417, 423, 4; 484.

demand of declaration, 417.

declaration, *id.**de novo*, *id.*

PONE, continued.*loquellam*, to remove *replevin* cause, *continued*.proceedings on, *continued*.*non pros*, 418.*procedendo*, 414, 416, 418.

rule to avow, or plead in bar, 418, 483.

imparlance, 418.

subsequent proceedings, *id*.*per vadios*, to compel appearance, 417.in *Durham*, 1014.**POORS' RATE,**

distress for, on goods of ambassador's servant, 191.

treble damages in action for levying, 888, 894.

POPE'S BULL, or LICENSE,

on what questions evidence, 801.

POPISH RECUSANCY, 684, 641.**POPULAR ACTIONS. See tit. Penal Actions.****POSSESSION, sufficient against wrong-doer, 444.****POSTEA,**

what, 900.

form of;

on verdict for plaintiff, *id*. (e.)nonsuit, or verdict for defendant, *id*.

when juror is withdrawn, 861, 2. (f.)

in ejectment, 1238, 9.

in King's Bench;

when, and by whom entered, 900.

marking, *id*.

must be brought in, before motion in arrest of judgment, 489, 928.

rule for bringing it in, *id*.

in Common Pleas;

when, and by whom entered, 901.

delivered out, *id*.to prothonotaries, *id*.left with clerk of judgments, *id*. 982.

staying in officer's hands, 898.

new one ordered, 901.

amendment of, 713, 894, 901.

in what cases evidence, and in what not, 902, 943, 4.

variance from, in stating before whom cause was tried, 901.

POST OBIT BOND, 553.

not within statute 8 & 9 W. III. c. 11, § 8, p. 584.

POST OFFICE,

books of, 802.

inspecting, 593.

POST TERMINUM ROLLS, in K. B., 730.

C. P., 728, (g.) 731.'

POUNDAGE, 1039.when sheriff is entitled to, and when not, *id*. 1040.

levying, on statute 43 Geo. III. c. 46, § 5, pp. 997, 8; 1039, 40.

remedy for, 1040.

against sheriff, when excessive, *id*.

POUNDAGE, *continued*.

on extents, 1056, 7; 1070, 71, 2.

levari facias, for crown debt, 1040, 41.

recognizance in nature of statute staple, 1088, 9.

POWER of ATTORNEY,

to execute lease, in *ejectment*, on vacant possession, 1201.

demand money, on award, 836, 7.

PRACTICE,

of inferior court, *certiorari* to return, 715.

of court, when pleadable, 1129.

PRÆCIPE. See *tit. Appearance, Attorneys, Original Writ, and Process*.

for writ of entry, amendable, 702.

PRÆMUNIRE, 634.**PRE-AUDIENCE**,

of attorney and solicitor general, 42.

PREBENDAL STALL;

ejectment lies for, after collation, 1192.

PRECEDENCE;

patent of, 42.

of attorney and solicitor general, *id*.

order of, among advocates or counsel, *id*.

PREROGATIVE. See *tit. King*.**PRESCRIPTION**, 443, 4.

title by, 443. (*c*.)

for sole and several pasture, &c. *id*.

common, &c. by copyholders, *id*.

right of way by, 646.

PRESUMPTION,

of payment, or release, in *debt* on bond, 19.

in *assumpsit*, when statute of limitations is not pleaded, or replied, 1.

PRISON BOOKS,

how far evidence of commitment, 352.

PRISONERS;

jurisdiction over, 87.

cannot commence or prosecute actions, when attorneys, 84, 5.

may put in and justify bail, in vacation, 279.

protection of, against oppression and exaction, 231, &c. 372.

gaol fees, payable by, abolished, except in certain cases, 372.

allowances for subsistence of, *id*.

on insolvent debtors' act, *id*. 373.

must be within the walls, to take benefit of that act, 394.

irregularity in proceedings against, how waived, 514.

warrants of attorney by, 548, &c.

in *France*, not obliged to give security for costs, 535.

on *criminal* account, 341.

cannot be charged with *civil* action, without leave, 345.

brought up by *habeas corpus*, to be charged with *civil* action, in C. P., *id*. 346.

remanding to former custody, 286, 7.

on *civil* account;

commencing actions against:

in King's Bench, 91.

PRISONERS, *continued.*

on *civil* account, *continued.*

commencing actions against, *continued.*

in Common Pleas, 91, 2.

Exchequer, 92.

in custody of sheriff, &c., 341.

when and how bailed, 94, 188, &c.

treatment of, 221, &c. 229, &c.

proceedings against, previous to plea:

by same, or different plaintiff, 342, &c. 345.

bill against, 342, 3.

declaring against, 341, 2, 3, 4, 5.

in *debt*, 342.

time for, 343, 420, 21.

after re-capture, on escape warrant, 346.

further time for, 370, 423, 4.

mode of, in K. B., 342, 3, 4.

C. P., *id.*

Exchequer, 343.

affidavit of delivery, &c. 344, 5.

when and how discharged, for not declaring, in K. B., 342, 3.

C. P., *id.*

Exchequer, 343.

times for appearing and pleading, 346.

demand of plea, &c. 347.

notice of filing plea, when necessary, *id.*

plea pleaded before declaration filed, good in C. P., *id.*

may be brought up by rule, in same court, 348.

removal of, by *habeas corpus cum causa*, &c.

from sheriff's custody, to that of marshal or warden, 347, 8, 9, 50.

marshal's custody, to that of warden, or *vice versa*, *id.*

prison of inferior court, 348, 350.

by *habeas corpus ad testificandum*, 809, 10.

proceedings against;

on removal to or from the Fleet, or King's Bench prison:

before declaration, 349, 356.

after declaration, 350, 356, 365.

in custody of marshal, 341.

bill against. See *tit. Bill.*

proceedings against, previous to plea;

by same plaintiff, for same cause of action, 353, 4, 5.

by bill, 91, 353, 4.

in vacation, 357.

original writ, 353.

on render after declaring, &c. new declaration unnecessary,
354, 456.

time for declaring on removal, commitment, or render in dis-
charge of bail, 353, 4.

further time, 370, 71; 423, 4.

by same plaintiff, for different cause of action, 353, 4; 357.

third person, *id.*

in term, 357.

PRISONERS, *continued.*

in custody of marshal, *continued.*

proceedings against, previous to plea, *continued.*

in vacation, 357.

rule as to detainer, 358.

time for pleading, 359, 464.

demand of plea, 359, 60.

fees payable by, 52, (*d.*) 350, 372.

rules and orders for government of, 52, (*d.*) 372.

supersedeable, list of, 367.

notice of writ of error, &c. for detaining, *id.* 368.

in custody of warden, 341.

actions against, how commenced, 91.

proceedings against, previous to plea;

by same plaintiff, for same cause of action, 353.

beginning of declaration against, 355. (*c.*)

time to declare, in C. P., 354, 5.

Exchequer, 356.

discharge for not declaring on commitment, or render, 354, 5.

mode of declaring;

formerly, 355.

on statute 8 & 9 W. III. c. 27, § 13, *id.*

on removal before declaration, 356.

by same plaintiff, for different cause of action, 357.

third person:

mode of declaring, *id.*

affidavit of cause of action, 358, 9.

delivery of declaration, unnecessary, 359.

time to plead, *id.* 360.

rule to plead, 355, 359.

demand of plea unnecessary, 359.

fees payable by, 53, (*f.*) 372.

in custody of sheriff, &c. marshal, or warden;

note in writing by marshal, &c. 366, 7.

penalty for not giving it, *id.*

effect of, in evidence, 367.

proceedings against subsequent to plea:

times for proceeding to trial, or final judgment, and execution, 360.

in King's Bench, *id.* 361.

on render in discharge of bail, *id.*

Common Pleas, 361, 2.

on render in discharge of bail, *id.*

distinction between rules of K. B. and C. P. 362.

Exchequer, *id.* 363.

mode of proceeding to trial, and final judgment, 362.

plea, *id.*

issue, 363.

notice of trial, *id.*

mode of charging in execution, *id.*

in county gaol, in K. B., *id.*

C. P., 365.

King's Bench prison, 363, 4, 5.

PRISONERS, continued.

in custody of sheriff, &c. *continued.*

mode of charging in execution, *continued.*

in Fleet, 365, 6; 371.

after removal, 350, 365.

when defendant is in prison of inferior court, 365.

consequences of being charged in execution, 366.

superseded, or supersedeable, 367.

supersedeable for *six* months, to be discharged out of prison, 368.

when and how discharged;

for not declaring:

in custody of sheriff, &c. 343, 368.

King's Bench prison, 353, 4; 368, 9.

Fleet, 354, 5, 6; 368, 9.

Exchequer, 356.

for not proceeding to trial, or final judgment, and execution, 360,
368, 9.

rule or order for *supersedeas*, in C. P., 369, 70.

causes to prevent their discharge, 370, 71, 2.

notice of application or petition for relief, under insolvent act,
&c. 371, 2.

in execution;

treatment of, 221, &c. 229, &c. 1029.

fees payable by, 372.

subsistence of, and allowance to, *id.* 373.

by last general insolvent act, *id.*

refusal by marshal, &c. to show them, deemed an escape, 366.

on extents, 1049, 50.

relief of, 375, (*a.*) 1065, 6.

in K. B. may be charged there criminally, by a justice's war-
rant, 347.

cannot be sent by a justice to county gaol, *id.*

removal of, by *habeas corpus*, 1029, 1049.

when entitled to rules of prison, and when not, 373, 4.

day rules, 374.

how relieved by insolvent acts, *id.* 375.

when entitled to benefit of Lords' act, 374, 5; &c.

when and how discharged under it, 377, &c.

notice and affidavit of service, 377.

schedule, and what must be included therein, *id.* 380, 81.

petition, and certificate or copy of causes, &c. 377, 8.

rule of court, in town, 378, 9.

country, 379.

fresh rule, when necessary, 378.

when brought into court, *id.*

on last day of term, *id.* 497.

before justices at sessions, 379.

may be brought before a single judge, in bail court, in K. B. 378.

examination, 379, 80.

interrogatories, *id.*

in C. P., 380.

objections to schedule, *id.*

PRISONERS, continued.

in execution, *continued.*

when and how discharged under it, *continued.*

discharge, 379, 80, 81, 82.

for benefit of what creditors, 379.

assignments of effects, 379, 80, 81; 384, 5.

when not entitled to discharge, 380.

remanding, for further examination, *id.*

false schedule, in C. P., *id.*

on making allowance, *id.* 381.

rule of court on, in Exchequer, 380. (*h.*)

allowance to;

note for, 381, 2.

discharged for non-payment of, 382, 511.

when and how compellable to deliver up their effects, 382, &c.

discharge of, under compulsory clauses in Lords' act, 385, 6.

for small debts, when and how relieved, 386, 7, 8.

discharge of, on stat. 48 Geo. III. c. 123, *id.*

to what prisoners and cases the act extends, and to what not, 387, 8.

rule for, in K. B., 388.

C. P., *id.*

under general insolvent acts, 388, &c. and see tit. *Insolvent Debtors.*

not entitled to set off debt, before judgment obtained for it, 391.

PRIVILEGE, 676, 756.

of parliament, 116, &c. 145, 192, 3.

process in Exchequer, against persons entitled to, 92.

proceedings against persons entitled to, on stat. 6 Geo. IV. c. 16,
p. 116, &c.

from arrest;

personal, 80, 81; 190, &c.

local, 190, 219;

temporary, 190, 218.

how taken advantage of, 194, 5; 207, 216.

of bankrupt. See tit. *Bankrupt.*

insolvent debtors. See tit. *Insolvent Debtors.*

of attorneys, &c., 80, &c. 195, &c.

writ of, 81, 2.

when allowed against privilege, 82, 3.

waiver of, 83.

when and how pleaded, 71, 635, 640.

in what time, 463.

serjeants, and their clerks, in C. P., 89.

clerks of judges, and prothonotaries, *id.*

in Exchequer, 38, 9; 81, 2.

new writ of execution, after discharge by, 1080, 31.

PRIVITY of CONTRACT, 429.

ESTATE, *id.*

PRIVY SEAL, 1067.**PRIZE MONEY;**

staying proceedings in actions for, 529.

PROCEDENDO. See tit. *Habeas Corpus.*

what, and when it lies, and when not, 409, &c. 1187, 82, 408.

PROCEDENDO, continued.

what, and when it lies, and when not, *continued.*

on removal by *certiorari*, or *habeas corpus*, 409, &c.

after return filed, 411, 12.

by *re. fa. lo.* &c. 415, 418.

PROCEEDINGS;

setting aside, and staying. See *tit.* *Setting aside*, and *Staying proceedings.*

PROCESS,

in King's Bench;

by original:

summons, 109, 112, 13; 433.

testatum, 119.

attachment, 110, 112, 13; 433.

how executed, 110.

testatum pone, or attachment, *id.*

distringas, *id.* 111, 12.

testatum, 110, 11; 119.

issues on, 110, 11; 498.

not affected by stat. 12 Geo. I. c. 29, 112.

against corporations, *id.* 121.

hundredors, 112, 122, &c.

peers, and members of the House of Commons, 112, 116, &c.

capias, 128.

alias, *id.* 129, 30.

pluries, *id.*

testatum, *id.*

a good commencement of action, 27.

non amittas, 128, 9.

effect of entering continuance on, in supporting commission of bankrupt, 27. (*i.*)

in counties palatine, 105, 129, 154.

teste and return of, 119, 129.

amendment of, 130.

bailable, 171.

not bailable, 167.

common or serviceable, 166. (*g.*)

notice to appear to, 167.

by attachment in trespass, 146.

bill of *Middlesex*. See *tit.* *Bill of Middlesex*.

alias, *id.* 147.

pluries, 147.

latitat. See *tit.* *Latitat*.

alias capias, 147.

pluries capias, *id.*

non omittas capias, *id.* 217, 309.

may be issued in first instance, 147.

should correspond with previous process, 446, &c.

in *Wales*, and *Counties Palatine*, 151.

in what manner issued, 149.

by whom signed, *id.*

PROCESS, *continued.*

in King's Bench, *continued.*

when sealed, 149.

præcipe, &c. *id.*

common, *id.*

joining several defendants in, 148, 9.

need not be in a plea of *trespass*, 150.

notice to appear to, 161, 167.

special, 149.

ac etiam, *id.* 150.

on lottery act, 150.

against bail, *id.* 151.

against several defendants, 148, 9.

direction of, 151.

teste, 152.

return, *id.* 153.

altering, and re-sealing, 148, 155.

in Common Pleas;

by original *quare clausum fregit*;

similar to that in K. B., 111.

summons, 112, 13.

notice on, 113.

distringas, 112, 13, 14, 15.

notice on, 113.

return of, 111.

alias, or *pluries*, *id.* 498, 9.

issues on, 112.

when defendant is abroad, *id.*

against one of several partners, *id.*

by *capias quare clausum fregit*, 104, 153.

jurisdiction of court by, 38, 91.

a good commencement of action, to avoid statute of limitations,
27, 153.

cannot be connected with subsequent writ, of same nature, 27.
common, 153.

joining several defendants in, 148.

service of, 167, 8.

arrest on, 153.

declaring on, in chief, 450, 51.

by the bye, 425.

in joint action, 456.

special, 153.

against several defendants, 149.

ac etiam, *id.* 150.

need not be inserted in *præcipe*, 149.

teste and return of, 153, 4.

by continuance, 154.

how tested, *id.*

alias, or *pluries*, unnecessary, *id.*

testatum, *id.*

into county palatine, 105, 154.

non omittas, *id.*

PROCESS, *continued.*

in Common Pleas, *continued.*

by *capias quare clausum fregit*, *continued.*

præcipe, &c. 105, 154.

King's Bench, and Common Pleas,

by original:

on statute 7 & 8 Geo. IV. c. 71, § 5, p. 113, &c.

summons, or attachment, 113, 14.

notice on, 113.

service of, *id.* 114.

affidavit of, 114.

distringas, 113, 14.

rule for, 487.

notice on, 113, 14.

service of, *id.*

affidavit of, 114.

forms of returns to, 113. (*e.*)

appearance, 113, 14.

cases not affected by stat. 12 Geo. I. c. 29, p. 112.

51 Geo. III. c. 124, p. 115.

7 & 8 Geo. IV. c. 71, § 5, *id.*

in which plaintiff may still proceed by summons or attachment, and *distringas*, *id.*

Exchequer;

against members of the House of Commons, 120.

in ordinary cases;

venire facias ad respondendum, 92. 155.

practice on, before stat. 51 Geo. III. c. 124, p. 155.

now regulated by stat. 7 & 8 Geo. IV. c. 71, pp. 114, 15; 155.

proceedings thereon, 155.

when defendant is abroad, 156.

distringas ad respondendum, 114, 15; 155, 6.

now regulated by stat. 7 & 8 Geo. IV. c. 71, pp. 114, 15; 155.

practice of issuing, it is said, still continues. *Sed quære?* 114, (*f.*) 155, 6, *id.* (*p.*)

affidavit for obtaining, 156, 7.

rule for, 114. (*a.*)

judge's *fiat* for, in vacation, 114.

issues on, 155.

increasing, *id.* (*n.*)

alias and *pluries*, 155.

subpoena ad respondendum, 92, 155, 6; and see tit. *Subpoena*.

now regulated by stat. 7 & 8 Geo. IV. c. 71, pp. 114, 157.

præcipe for, 157.

issues out of office of pleas, 156.

need not be signed by chief secondary, &c. *id.*

copy or label of, *id.*

service of, *id.*

affidavit of, *id.* 157.

to perform order of court, 138.

PROCESS, *continued.*in Exchequer, *continued.*in ordinary cases, *continued.*

attachment, 156.

præcipe for, 157.

previously to stat. 7 & 8 Geo. IV. c. 71.

alias or *pluries capias*, with clause of proclamation, 156, 7.return to, of *non est inventus*, 157.commission of rebellion, *id.**quo minus capias*, 92, 155, 157.*præcipe* for, 157.

defendant cannot be outlawed on, 132.

clause of *non omittas* in, 157.*teste* and return of, 157.signable, *id.*how subscribed, *id.* 158, 260.signed, *id.*

not signable, 157.

how subscribed, and indorsed, *id.* 158.

variance in copy from, fatal, 168.

bailable against some defendants, and serviceable against others, 149.

not necessary, when there are two writs against more than *four* defendants, to name them all in each writ, 149.

indorsement of date, 158, 9.

sum sworn to, 159, 164, 5.

attorney's name, 159, 319, 20.

and place of abode, 160.

defendant's place of abode, and addition, 159.

issued by plaintiff in person, must be delivered to sheriff by attorney, &c. 160.

misnomer in. See tit. *Initials*, and *Misnomer*.irregularity in. See tit. *Irregularity*.

continuance of, 162.

when to be returned, 161, 2.

motion to quash, 160, 61; 167, 488.

amendment of, 130, 148, 155, 161.

service of copy of, 167, &c.

in what cases, *id.*of what process, *id.* 168.must be of the whole, *id.*

by whom, 168.

on wrong person, 169.

on default, by wrong name, *id.*

when, 168, 500.

where, 168, 9.

how, *id.*

when defendant keeps out of the way, 169.

in joint action, *id.*against husband and wife, *id.*rule to set aside, *id.*irregularity in, when and how taken advantage of, *id.* 513, 14, 15.

mistake in copy of, how taken advantage of, 169.

PROCESS, continued.

- arrest of *feme covert* on, 194, 5.
- bankrupt, on subsequent promise, 211.
- cannot be served, and notice of declaration given, at same time, 455.
- upon bill against members of the House of Commons, 120.
- in what cases void, 216.
- fresh, on escape, 235.
- when, and how, entered on roll, 162.
- in *ejectment*, declaration considered as first, 1204.
- contempt of. See tit. *Attachment*.
- for bringing in jury. See tit. *Jury Process*.
- of execution. See tit. *Execution*.
- original, mesne, or final, justification under, 646.
- in court of Great Sessions in *Wales*. See tit. *Great Sessions*.
- in inferior courts, not within statutes of amendments, 712.
- error in, assignable in same court, 1187.

PROCESS ROLL, 162, 729.**PROCHEIN AMY.** See tit. *Infant*.

- who is usually appointed, 100, 101.
- entry of change of, 100.
- liable for costs, to plaintiff's attorney, id. 101. (o.)

PROCLAMATION, writ of, 132, 3.

- foreign, 133.
- return to, id.
- irregularity of, id. 142.

PROCTORS,

- practising without certificates, 78.
- exempted from serving on juries, 784.

PROFERT in Curia, 443, id. (d.) 1116, 1128.**PROHIBITION,**

- writs of, when moved for, 38.
- to ecclesiastical court, in suit for tithes, 948.
- when grantable on last day of term, 498.
- suggestion for, amended after nonsuit, 697.
- issues in, may be made up by defendant, 734.
- trial by *proviso* in, 760.
- costs in, 946, 948, 9.
- writ of error in, lies not from K. B. to Exchequer Chamber, 1139.
- when allowed after *consultation*, not a *supersedeas*, 1148.

PROMISES,

- to pay, or re-pay money, &c. See tit. *Assumpsit*.
- implied, 2, 3.
- express, id.
- conditional, 25, 6.

PROMISSORY NOTES. See tits. *Bills of Exchange*, and *Promissory Notes*.**PROPERTY;**

- plea of, in *replevin*, 645.
- trespass*, id.

PROTECTION;

- writ of, 190, 91.
- of king's debtor, id.
- plea of, 635.

PROTESTANDO,

what, and its effect, 687, 8.

what may, or may not be taken by, id.

inoperative, in same suit, 688.

when issue is found against party taking it, id.

PROTHONOTARIES; See tit. *Officers.*

office and duties of, 46, 7; 780, &c.

fees anciently payable to, 47. (*a.*)

report of, on interrogatories, 481, 2.

clerks of, 780, 81.

PROVISO;

trial by. See tit. *Trial.*

PUBLIC COMPANIES;

actions by or against, 8.

PUIS DARREIN CONTINUANCE. See tits. *Pleas and Pleading.***PURCHASERS,**

how affected by judgments, 938, &c.

PUTTING off TRIALS. See tit. *Trial.***Q.****QUAKER;**

affirmation by, to be admitted attorney, 70.

when admissible in general, and when not, 88, 9; 838.

to hold to bail, 178.

to ground attachment, for non-performance of award, 838.

QUALIFICATIONS,

of jurors. See tit. *Jury.*

QUANTUM MERUIT, or VALEBANT, 2.**QUARE CLAUSUM FREGIT;**

original writ of. See tit. *Original Writ.*

capias. See tit. *Process.*

QUARE IMPEDIT;

inquiry of damages in, 575.

by the king, double plea not allowed in, 655.

issues in, may be made up by defendant, 734.

trial by *proviso* in, 760.

damages in, 878.

costs in, 946.

QUARTER SESSIONS,

books of;

inspecting, 593.

evidence, of what nature, 801.

QUARTO DIE POST, 107.**QUASHING writs of *capias ad respondendum*, 161, 167, 488.**

certiorari, when allowed or not, 398, 403, 4.

scire facias; See tit. *Scire Facias.*

costs on, 947, 8; 1123.

error. See tit. *Error.*

QUEEN,

precedence of attorney and solicitor general of, 42.

regent, servants in ordinary to, when privileged from arrest, 190.

consort or dowager, servants to, not so privileged, id.

QUI TAM ACTIONS. See tit. *Penal Actions*.

QUO MINUS CAPIAS, 92, 155, 157.

QUO WARRANTO,

information in nature of;

how considered, 595.

filing, 949.

objections to defendant's title must be stated in rule *nisi*, 657.

proceedings in, cannot be stayed, till security be given for costs, 534, 5.

inspection of corporation books in, 595.

disclaimer in, allowed to be entered by defendant, without costs, 949.

consolidating, 614.

pleading statute of limitations, &c. 656, 7; 952.

rule in, when defendant neglects to settle special case, 899.

new trial allowed in, after verdict for defendant, 911.

within statutes of jeofails, 927.

costs in, 758, 9; 946, 949, 951, 2.

amendment of writ of error in, 1162. (*e*.)

R.

RAMSGATE;

court of requests for, 957.

RATE BOOKS, 802.

RAVISHMENT of Ward, 1139.

REAL ACTIONS, 1.

jurisdiction over, in C. P., 38.

amendment of count in, 699.

entries of proceedings in, 728, 9.

damages in, 870.

costs of. See tit. *Costs*.

scire facias in, 1102.

REAL ESTATES,

of traders dying, subject to their debts, 937.

REBELLION,

commission of, in Exchequer, 157.

REBUTTERS. See tit. *Pleas and Pleading*.

RECAPTION,

on fresh pursuit, 201, 218, 233, 377.

after *voluntary* escape, not in general allowed, 218, 233.

by bailiff, before return of writ, 233.

after *negligent* escape, 218, 234.

on *Sunday*, 218.

must be pleaded, 649.

by virtue of escape warrant, 218, 233, 4.

allowed after *voluntary*, as well as *negligent* escape, 235.

time to declare after, 342, 346.

on *alias* attachment, 1080.

RECOGNIZANCES,

what, 1083, 4.

at common law, *id.* 1096.

to the king, 1044, 1050, 1083.

RECOGNIZANCES, *continued.*at common law, *continued.*to the king, *continued.*

proceedings on,

by *levari facias*, 1042, 3.

extent, 1045, 6, 7.

scire facias, 1045, 1091, &c.

from what time lands are bound on, 1050.

to keep the peace, proceedings on, 1093.

to the subject, 1083.

before whom acknowledged, *id.*in *London*, *id.*

must be enrolled, 743, 1083, 4.

time for enrolment of, 1086. (*f.*)

proceedings on,

by *levari facias*, 1043, 1086.*scire facias*, 1096, 7.

of bail,

to the action;

in King's Bench,

by bill, 250, 51; 1097.

original, 251, 1097.

to reverse outlawry, 140, 41, 2.

after judgment, 251.

Common Pleas, *id.* 1097.

on attachment of privilege, 47.

after bail rejected, for rendering defendant, 281.

obligatory by caption, 1122.

Exchequer,

after judgment, 251.

for what sum, *id.* (*b.*) 263.entry of, 236, 278. (*d.*)on *habeas corpus*, 409.in *ejectment*, on stat. 1 Geo. IV. c. 87, pp. 489, 1221, 2;
1244, 5; 1253.

entry of, 236, 277, 8; 729.

by whom, when, and how made, *id.*

amendment of 278.

proceedings on. See tit. *Bail and Scire Facias.*

staying, 582, 3.

striking off the file, 317, 18.

to attachment for contempt, penalty of, not applicable to payment
of debt and costs. 1043.

interest not allowed, on affirmance of judgment on, 1183.

in error, 1097, 1101, 2; 1149, 50; 1155, 6, and see tit. *Bail in error.*in *ejectment*, 1152, 3; 1252, 3.form of, in King's Bench, *id.*

Common Pleas, 1155, 6.

Exchequer, 1156. (*d.*)

amendment of, 1161, 2.

proceedings on. See tit. *Bail, and Scire Facias.*

RECOGNIZANCES, continued.

of bail, *continued.*

in error, *continued.*

bail in error not required on award of execution on, after judgment by default, 1151, 2.

for costs in *quo warranto*, 951.

by statute:

on statutes merchant. See tit. *Statutes Merchant.*

staple. See tit. *Statutes Staple.*

in nature of statute staple, 104, 5, 6; 1084, 5; 1096.

what, *id.*

stamp duty on, 1085.

process on,

against body, lands, and goods, 1087.

liberate, *id.* 1088.

fee to king, on suing out, 1088.

ejectment on, 1190.

on stat. 19 Geo. III. c. 70, § 6, pp. 406, 7.

33 Geo. III. c. 68, § 3, pp. 1187, 8.

34 Geo. III. c. 58, § 2, pp. 406, 7; 1188.

54 Geo. III. c. 23, § 14, p. 396. (*a.*)

1 Geo. IV. c. 87, § 1, pp. 489, 1207, 1209, 1221, 2, 3.

8, pp. 1244, 5; 1253.

4, p. 1222.

stamp duty on, 1085.

from what time they bind the land.

at common law, 1086.

by statute of frauds, *id.*

registering, in *Middlesex* and *Yorkshire*, *id.*

evidence of, 800.

scire facias on. See tit. *Scire facias.*

RECOGNIZANCE ROLL, 729.

entries on, in K. B., 277, 8.

C. P. 278.

amendment of, *id.*

RECORD. See tit. *Nul tiel Record.*

how drawn up, on stat. 3 Geo. IV. c. 10, p. 41.

of commitment, by court in execution, 351, 2.

when removed or not, on *certiorari*, or *habeas corpus*, 407, 412, 745, 6.
in Exchequer, 777.

debts of, to king, 1044, 1050, 51.

RECORD of NISI PRIUS. See tit. *Nisi Prius.***RECORDARI FACIAS LOQUELAM,**

what and when it lies, 38, 414, 15; 1187.

direction of, 414, 15.

form of, *id.*

fee on issuing, 105. (*f.*)

cause for, when shown, 415.

what, *id.*

effect of, *id.*

receipt and allowance, *id.*

RECORDARI FACIAS LOQUELAM, *continued.*

- return ;
 - when and how made, 415, 16.
 - what is good, and what not, 416.
- when plaint is removed under it, *id.*
- proceedings on :
 - filing writ, and return, 415, &c.
 - effect of, 416.
 - rule to appear, *id.* 417, 483.
 - process to compel appearance, 416, 17.
 - appearance of defendant, 417.
 - rule to declare, *id.* 418, 483.
 - for time to declare, 417, 423, 4; 484.
 - demand of declaration, 417.
 - declaration, *id.*
 - de novo*, *id.*
 - when to be delivered, *id.*
 - how entitled, *id.*
 - non pros*, 418.
 - procedendo*, 414, 15, 16; 418.
 - rule to avow, or plead in bar, 418, 483.
 - imparlance, 418.
 - subsequent proceedings, *id.*

RECOVERY. See tit. *Judgment Recoverea.*

- for same cause, plea of, 644, 646, 651.
- when pleaded, or given in evidence, 644, 649, 651.

RECOVERY, Common.

- acknowledgment of persons suffering before commissioners, how taken, 494.

amendment :

- of writ of entry, 699.
- præcipe* for, 702.
- return of, 706.
 - to writ of summons, *id.*
- warrant of attorney, not in general allowed, 702.
- judgment, 706.
- in names of parties, 701, 2, 3; 701. (*p.*)
 - description of premises, 703, 4.
 - by increasing quantity of land, &c. 700, 703.
 - situation of premises, 704, 5, 6.
- by deed, to lead or declare uses, 699, 700.
- enrolment of deed, 707.
 - attested copy of deed, or office copy of enrolment, not allowed, *id.*
- how far back seisin in tail of vouchee must be shown, 706.
- remainder-man in tail may show cause against, 707.
- not allowed, when suffered by insolvent debtor, *id.*
- cannot be made on last day of term, 499, 706.
- affidavit for, must state that possession has gone along with deed, 706.
- material part of deed must be read by serjeant, or officer of court, *id.* 707.
- costs of, when payable by attorney, 707.

RECOVERY, Common, *continued.*

when allowed to pass, with omission or defects in warrant of attorney,
702, 8.

entry of, on plea roll, 728, 9.

scire facias, on error to reverse, 1121, 1173.

RECTOR,

justification by, to fetch away tithes, 646.

RECTORY,

ejectment lies for, 1192.

RE-DISSEISIN,

damages on writ of, 878.

RE-EXCHANGE,

not allowed, on bill drawn in *Scotland* on *England*, 571.

RE-EXTENT, 1080.**REFERENCE. See tit. *Arbitration.***

how far a stay of proceedings, 529, 80; 822.

effect of agreement to refer, 822.

to master, or prothonotaries;

to compute principal and interest, on bills, &c.; 570, &c.

after death of plaintiff, 571.

on copy of stolen bill, *id.*

in action on money bond, 542, 8.

mortgage, 570.

award, 571.

covenant, for payment of money, 570, 71.

when not allowed, 571, 2.

rule or order for;

in King's Bench, 570, 71.

when obtained, 572.

must be served, *id.*

how served, *id.*

service of notice of computing, or copy of master's appointment, unnecessary, *id.*

Common Pleas, 570, 71.

notice must be given of appointment to compute, 572.

Exchequer, 571.

allocatur on, conclusive, 480.

to strike out superfluous counts, or matter, 617, 18.

REGISTERING JUDGMENTS. See tit. *Judgments.***REGISTERS,**

of christenings, &c. 802.

REJOINDERS. See tit. *Pleas and Pleading.***REJOINING *Gratis*, 472.****RELEASE,**

what, 10.

when presumed, in *debt* on bond, 18.

plea of, 644, 646, 651.

may be pleaded with *non assumpsit*, 655.

by nominal plaintiff, set aside, 677, 848.

one of several plaintiffs, *id.*

in *ejectment*;

by nominal plaintiff, 1236.

RELEASE, continued.

plea of, in ejectment, *continued.*

by lessor of plaintiff, 848, 1236.

when pleaded, or given in evidence, 646, 651, 1128, 1130.

after last continuance, 848, 1131.

of actions, a bar to *scire facias*, 1090.

errors, plea of, 1170, 1172, 1174.

by *tertenants*, 1121.

how pleaded, 1174, 5.

how tried, when pleaded in Exchequer Chamber, 1139.

RELICTA VERIFICATIONE. See tit. *Cognovit Actionem.*

REMANETS, 757, 8; 805, 6; 818.

paper of, in C. P., 506.

fresh notice of trial, when not required for trials of, 758.

costs on, *id.* 833.

REMEMBRANCE ROLLS, 49. (*a.*)

REMITTITUR, of Damages, 896.

in penal action, &c. after error, 942, 3.

Record, or transcript in error, when necessary, 1185, 6.

REMOVAL of CAUSES, from Inferior Courts. See tits. *Accedas ad Curiam, Certiorari, Great Sessions, Habeas Corpus, Pone, Recordari, facias loquelam, Wales.*

RENDER. See tit. *Bail.*

RENT;

avowry or cognizance for, 645.

pleas in bar to, *id.*

staying proceeding on payment of, 541, 1234, 5.

payable under execution, 1018, &c.

ejectment will not lie for, 1193.

RENT CHARGE;

action for, not within statute of limitations, 15.

payment of, may be pleaded in bar, in *replevin*, 664.

amendment of recovery, by inserting, 704.

not within stat. 11 Geo. II. c. 19, § 22, p. 977.

within that statute, § 23, p. 977. (*f.*)

extendible on *elegit*, 1034.

RENT SECK,

not extendible on *elegit*, 1035.

REPAIRS;

expenses of allowed, on staying proceedings in *ejectment* by mortgagee, 1235.

REPLEADER; See tit. *Pleas and Pleading.*

costs on, 921.

REPLEVIN,

action of, 5, 10.

when it lies, and when not, 5, (*b.*) 528. (*f.*)

limitation of, 15.

not within stat. 27 Eliz. c. 8, p. 1139.

24 Geo. II. c. 44, § 6, p. 35.

removal of, by *pone* or *recordari*, &c. 414, &c.

plaint in, not removable from county court in *Wales*, to K. B., by *certiorari*, 400, 414.

REPLEVIN, *continued.*action of, *continued.*sheriff not compellable to enter plaint in, for *damage feasant*, on motion, 415.attachment for granting, or obtaining, 528. (*f.*)

rule to appear, 417, 18; 488.

declare, *id.*

for time to declare, 417, 423, 4.

declaration in;

beginning of, 438.

how entitled, in C. P., 426.

must state description, number, and value of goods, with certainty. 444.

rule to avow, or plead in bar, 418, 488.

staying proceedings in, 544.

writ of inquiry in, 418, 575.

notice of executing, 577.

defendant in, when liable to give security for costs, 585.

inspection refused to plaintiff in, of deed to which he was no party, 590.

pleas in ;

general issue, 645.

special pleas, *id.*

avowries and cognizances ;

on distresses,

at common law :

for rents, services, or customs, 645.

damage feasant, *id.*fines, and amerciaments, &c. *id.*

by act of parliament, 645.

pleas in bar to avowries and cognizances ;

for rent, &c. *id.* 656.*damage feasant*, 645.

set-off, when allowed in, and when not, 664.

avowant in, cannot discontinue, 679.

move for judgment as in case of nonsuit, 762.

issues in, may be made up by defendant, 734.

trial by *proviso* in, 760, 61.

verdict in, 869.

judgment in, 931.

of *non pros*, for not pleading in bar, 672.a bar to action of *trespass*, 528.

amendment of, 942.

damages in, for plaintiff, 887.

defendant, 574, 869, 887, 8; 931, 993.

costs in. See tit. *Costs.*

of double pleading, 654, 5; 660.

execution in, 993.

for plaintiff, *id.*

defendant, 993.

at common law, *id.* 994, 1038.*retorno habendo*. See tit. *Retorno habendo*.

REPLEVIN, continued.

action of, *continued.*

execution in, for defendant, *continued.*

on stat. 17 *Car.* II. c. 7, pp. 998, 1038.

consequences of, 1039.

liability of sheriff, for taking insufficient pledges in, 315, (*d.*) 1038, 9.

REPLEVIN BOND,

executed by one surety only, valid, 223. (*i.*)

sureties on, liability of, 1038, 9.

discharge of, by giving time to principal, 296.

assignment of, 1038, 9.

action by assignee of, 7, 1038, 9.

variance between declaration and evidence in, 434, 5. (*f.*)

setting aside proceedings in, 528.

not within stat. 8 & 9 W. III. c. 11, § 8, p. 584.

interest not allowed, on affirmance of judgment in, 1183.

REPLICATIONS. See tit. *Pleas and Pleading.***REPORT.** See tit. *Master's Report.*

of master or prothonotaries, on interrogatories, 481, 2; 486.

of crown office, on contempt, considered as a conviction, 482.

REQUEST,

for completing cause of action, 28.

when necessary to be specially alleged, 439.

time and place of, when merely form, *id.* (*f.*)

REQUESTS, Court of. See tit. *Court of Requests.***RESCOUS,** not within stat. 27 *Eliz.* c. 8, p. 1139.**RESCUE,**

when sheriff may return it, and when not, 236, 7; 308.

what a good return, and what not, 236, 7.

plaintiff's remedy on, *id.* 479, 1030.

fine, &c. for, 237.

RESERVING POINT, at trial, 488, 9; 900, 904.**RESIDENCE,**

of plaintiff, calling for, in K. B., 584.

C. P., *id.*

parties, calling for, *id.* 686.

on court of conscience act for *London*, 955, 6.

lessor of plaintiff, in *ejectment*, 1231.

RESPONDEAT OUSTER. See tit. *Abatement.*

judgment of, in what cases, 641.

error lies not on judgment of, 1141.

RESPONDENTIA BOND,

debt proveable on, under commission of bankrupt, 205. (*h.*)

RESTITUTION,

on outlawry, 144.

reversing, or setting aside judgment, 1038, 1186.

extent, 1081.

RE-SUMMONS, 1173, 4.**RETAINER,**

plea of, by executor or administrator, 644.

heir or devisee, *id.* 645.

RETORNO HABENDO, 418.

form of, 1038.

after verdict, or demurrer, id.

on *non pros*, or nonsuit, id.

and inquiry of damages, id.

feri facias, id.

proceedings on return of *elongata*, id. 1039.

RETRAXIT, 930.

by tenant in *ejectment*, to prejudice of landlord, set aside, 1236.

RETURN DAYS, of Writs.

general, 106, 7.

by original, id.

bill, 152, 3.

altering, 130, 155.

wrong, when not aided, 160.

of execution in court of Great Sessions in *Wales*, 998. (l.)

RETURNS,

to original writs, 106, &c.

recordari facias loquelam, &c. 415, 16.

writs of error, 1159, 60.

certiorari on, 1170, &c. and see tit. *Certiorari*.

false judgment, 1187, 8.

judicial writs,

mesne process,

by original, 110.

writ of proclamation, 132, 3.

exigi facias, 134.

special *capias utlagatam*, 137.

by bill,

attachment, in *trespass*, 146.

in King's Bench, or Common Pleas,

latitat, &c. 161, 2, 3.

capias ad respondendum, 308, 9.

by new or old sheriff, 307.

of lunacy, 216,

mandavi ballivo, &c. 309.

writ of inquiry, 581, 2.

summons for electing grand assize, not traversable, 748.

Exchequer, 155, 6, 7.

final process:

feri facias, 1018, 19.

capias ad satisfaciendum, 1028.

filing, 1098, 9.

elegit, 1036.

extent, 1056; and see tit. *Extent*.

writs of *certiorari*, 407.

habeas corpus, id.

scire facias, 1124; and see tit. *Scire Facias*.

setting aside, 308, 9; 1020.

amending, id.

REVENUE. See tits. Customs & Excise, and Exchequer, revenue side of.

REVERSION;

- action by assignee of, 6.
- pleading assignment of, 442, (*b.*)
- extendible on *elegit*, 184.

REVOCATION,

- of power of arbitrators, 828, 4.

RIDERS,

- to rolls, 730.

RIENS en arriere;

- plea of, in debt for rent, 650.
- in bar of, in *replevin*, 645.
- per discent*, 644, 5; 937.
- affidavit formerly necessary for pleading it, with another plea, in C. P., 657.
- plea of, not formerly signed, in C. P., 672.
- judgment on, altered by stat. 3 W. & M. c. 14, § 6, p. 938.
- per devise*, 645.
- generally, *id.*
- specially, except a reversion, &c. *id.*

RIGHT of ENTRY,

- necessary to maintain *ejectment*, 1194, 5.

RIGHT, Writ of;

- adjournment of *essoin* on, 109. (*o.*)
- proceeding by, 1194.
- discontinuance of, not allowed, 679, 699.
- amendment of count in, not in general allowed, 699.
- judge's order for, discharged, *id.*
- writ of summons for electing grand assize. See tit. *Grand Assize*.
- trial of,
 - at *nisi prius*, 747.
 - bar, when not allowed, *id.* 748.
 - must be by grand assize, 748.
 - attendance of four knights necessary on, *id.*
 - summons for another knight, when one is ill, *id.*
 - challenge of knights, when not allowed, *id.*
 - on tender of *demis* mark, tenant must begin, *id.*
 - judgment as in case of nonsuit in, 762.
 - new trial in, 908.
 - no damages or costs in, 769, 878, 946.

RIOT ACT, 122.

- repealed, by stat. 7 & 8, Geo. IV. c. 27, *id.*
- proceedings, declarations, and cases determined on, *id.* (*b.*)

RIVULET,

- ejectment* will not lie for, 1191.

ROCHESTER, City of;

- court of requests for, 957.

ROLL of Attorneys, 71.

- striking off attorneys from, 89.

ROLLS,

- in general;
- in King's Bench:
 - crown*, or *plea*, 728.

ROLLS, *continued.*in general, *continued.*in King's Bench, *continued.*

delivering out, 728.

post terminum, 730.

docket of numbers for, 728.

numbering, *id.**placita* of, 733, 775, 1172.

entries on;

by whom, and how made, 730.

riders to, *id.*bringing in, *id.*

docketing, 731.

binding up, 732.

where, and from what time preserved, *id.*

Common Pleas:

plea, or *common*, 47, (c.) 728, 9.delivering out, by clerk of essoins, 728, 9.
prothonotaries, 729.receipt for, *id.**post terminum*, *id.* (a.) 731, 2.

numbering, 728, 9.

un-numbered, 729.

not to be carried into country, 731.

placita of, 733, 755.

entries on;

by whom, and how made, 730.

riders to, *id.*

bringing in, to prothonotaries, 731.

docketing, *id.*after judgment, to be examined with paper books, *id.*delivery to clerk of essoins, *id.*

time allowed for, 732.

carets, of, *id.*binding up, *id.*where, and from what time preserved, *id.*alteration and amendment of, *id.*

Exchequer of Pleas:

no *crown* rolls, nor of pleas of *land*, 729.*plea*, or *common*, *id.*by and to whom delivered, *id.*not numbered, *id.* 733.

entries on, by whom made, 730.

placita of, 733.

where, and from what time preserved, 732.

particular:

filacers', 729.

of admission of attorneys, 71.

warrants of attorney, in K. B., 95, 729, 734.
C. P., *id.*

process, 161, 2.

appearance, 239.

ROLLS, continued.particular, *continued.*

of recognizances of bail, 277, 8.

imparlance, 462, 3; 720, 729.

plea, 728, (*g.*) 728, 9.issue. See tit. *Issue Roll*.

judgment, 729, 981, &c. 942, 3.

docket, 731, (*h.*) 989.of proceedings in *scire facias*, 729, 30; 1126, &c.

error and false judgment, 730, 1175.

deeds, and awards, &c. 730.

ROLLS of COURTS BARON, 802.**ROMAN CATHOLICS,**

oaths by, on being called to the bar, 42.

admitted attorneys, 71.

rule of court on their admission, *id.* (*a.*)disabilities of, *id.*

exemption of priests, from serving on juries, 784.

BOOM,*ejectment* lies for, 1191.**ROPES,**

justification in action for cutting, 645.

RULES,

of King's Bench Prison, 373, 4.

limits of, *id.* (*b.*)

when grantable, 373, 4.

when not, *id.*effect of granting, *id.*prisoners escaping, lose benefit of, *id.*

fees not to be taken by inferior officers, for granting, 374.

Fleet Prison, 373, 4.**RULES and ORDERS,**

general;

in King's Bench.

Common Pleas.

Exchequer.

} See Table of these Rules, *in principio*.

in particular cases;

what, 478, 490.

on parties, without their consent, 487, 589, 90; 592, 3.

moved for in court, 478.

granted or refused, *id.*absolute, or to show cause, *id.*

made out by officers, 478.

King's Bench;

on *crown* side, 478.

for attachments;

in what cases, and against whom, *id.* 479.

absolute in first instance, 480.

to show cause, and rules absolute thereon, *id.*motions and affidavits for, how entitled, *id.*

481, 493.

cannot be moved on last day of term, 481, 498.

RULES AND ORDERS, *continued*.in King's Bench, on *crown* side, *continued*.for attachments, *continued*.cannot be served on *Sunday*, 218, 481.on *plea* side:

common ;

given by master :

to declare, or plead in bar, in *replevin*, 417, 18; 488.

reply, 483, 676.

in *ejectment*, 1231.

rejoin, sur-rejoin, &c. 483, 693, 718, 19.

join in demurrer, 483, 696.

enter issue, 483, 727, 734, 761.

for defendant to produce record, 483, 743.

trial by *proviso*, 483, 761.to return writ of *certiorari*, in error, 483, 1170.

are entered with clerk of the rules, 483.

must be served, *id*.expire in *four* days after service, *id*.

given by filacer :

to appear to *pone*, or *recordari*, &c. *id*.

given by clerk of the papers :

to return paper-book, *id*. 725, 6.

given by clerk of the errors :

for better bail in error, 483, 1157.

to certify record, 483, 1158.

assign errors, *id*. 1168.entered on *præcipe*, with clerk of the rules :to declare, not necessary by *original*, 458.

plead, 473, &c.

what, 474.

history of, *id*.in what cases necessary, *id*.after judge's order for time to plead, *id*.when and how given, *id*.rule expires, *id*.judgment may be signed on, *id*. 475.

new rule when necessary, 475.

to new assignment, 693.

unnecessary in *ejectment*, 1234.in *scire facias*, 1127.avow in *replevin*, 418.

for judgment, 483.

when necessary to be given :

on inquisition, *id*.

demurrer, 740.

nul tiel record, 744, 5, 6.*postea*, 483, 903.

subject to award, 903.

time of entering, and when it expires, *id*.*scire facias*, 483, 1126, 1166, 7.

RULES AND ORDERS, *continued.*in King's Bench, on *plea* side, *continued.*common, for judgment, *continued.*

when not necessary:

on final judgment, by default, 568.

consequence of not giving it, 1129.

not served, 483.

anciently moved at *side-bar*.*For these rules, which are the same in K. B. and C. P.,*
vide post, p. 1460.

cannot be dated the last day of term, 484, 498.

must be served, 485.

drawn up by clerk of the rules;

on judge's *fiat*, &c.:for admission of *prochein amy*, to prosecute, 100.guardian, to defend, *id.*

day rule, 374.

signature of counsel:

to declare peremptorily, 424, 484.

have good jury, on execution of inquiry, 484,
486, 576, 787.make submission to arbitration a rule of court,
in vacation, 486.for computing principal and interest on bills,
&c. in *vacation*, 484.to change venue, *id.* 486, 608, 9; 10.bring it back, on common undertaking, 484,
610, 11, 12.

money into court, 484, 486, 621, 2.

plead several matters, 484, 486, 697, 8.

make several avowries, or cognizances, 484,
654, 5.

for defendant to abide by his plea, 484, 672.

unnecessary, in C. P. 484. (*a.*)*concilium* on demurrer, special verdict, or writ
of error, 484, 5; 737, 8; 898, 1176.costs for not proceeding to trial or inquiry, pur-
suant to notice, 485, 490, 580, 758, 9; 1236.

special jury, 485, 6; 792, 3.

service of, 793, 817.

view, 485, 6; 798.

making submission to arbitration a rule of
court, 836.

by consent:

common rule in *ejectment*, 490, 1225, &c.to examine witnesses upon interrogatories,
485, *id.* (*g.*) 810.

refer causes to arbitration, 485, 819, &c.

enlarge time for making award, 485,
826, 7.make judge's order, or order of *nisi prius*,
a rule of court, 485, 511, 819, 20; 826, 7;
836.

RULES AND ORDERS, in particular cases, *continued*.

in King's Bench, on *plea* side, *continued*.

common, *continued*.

drawn up by clerk of the rules, *continued*.

on signature of counsel, *continued*.

for *scire facias* to revive judgment, above *ten*, and
under *fifteen* years old, 485, id. (*m.*) 1105.

in *ejectment*:

for judgment against real ejector, on vacant
possession, 489, 1219.

against casual ejector, id. 1220, 21.

when drawn up,

1220, 21.

after verdict, in K. B., 1239, 40.

landlord to defend, instead of tenant, 490,
1229.

must be served, 485.

special, peculiar to this court:

absolute in first instance;

for discharge of prisoner, on stat. 48 Geo. III. c. 123,
p. 388, 489.

certiorari, to remove record of judgment from in-
ferior court, 400, 401; 485.

transcript of record from
Wales, or county *palatine*,
401, 2; 485.

entering up judgment in *term* time, on warrant of
attorney, above *ten*, and under *twenty*
years old, 485, 553.

copyhold tenants to inspect and take copies of court
rolls, 485, 6; 594, 5.

inspecting, and taking copies of, corporation books,
pending information, or action, 596.

mandamus, to examine witnesses in *India*, on stat.
13 Geo. III. c. 63, § 44, p. 486.

computing interest, on affirmance of judgment,
1184.

For special rules, absolute in first instance, in K. B.
& C. P. vide post, p. 1460.

to show cause, and rules absolute thereon;

on behalf of plaintiff:

to discharge rule for special jury, 487, 794, 5.

for leave to take out execution against casual ejector,
when landlord has been made defendant, and
failed at trial, 489, 1245.

scire facias to revive judgment, above *fifteen* years
old, 487, 1105.

For special rules to show cause, &c. in K. B. & C. P.
on behalf of plaintiff, vide post, pp. 1460, 61.

enlarged, may come on at sitting of judges, in *vacation*, 40.

on behalf of defendant:

to consolidate actions, 487, 490, 614, 15; 1232.

RULES AND ORDERS, in particular cases, *continued*.

in King's Bench, on *plea side*, *continued*.

to show cause, and rules absolute thereon, *continued*.

on behalf of plaintiff in error:

to reverse judgment for plaintiff in inferior court, and

tax plaintiff in error's costs, 1180.

For special rules to show cause, &c. in K. B. & C. P.

on behalf of defendant, and those for either party,

which are the same in both courts, vide post, pp.
1461, 62.

pronounced by judges in vacation, how drawn up, 40.

in Common Pleas,

common;

given by prothonotaries:

to appear in *scire facias*, 483, 1125.

given by filacers:

to appear to *pone*, or *recordari*, &c. 416, 17.

declare in *replevin*, 417, 18; 483.

bring in body, 50, 310, 483.

given by clerk of the errors:

for better bail in error, 483, 1157.

to certify record, 483, 1158.

drawn up by secondaries;

on *præcipe*:

to declare, (except in *replevin*,) 421, 2, &c. 458, 483.

plead, 474, &c. 483.

what, 474.

in what cases necessary, 305, 474.

when, and how given, 474.

not waived by summons unattended, for time to
plead, id.

time allowed by, id. 475.

when it expires, id.

judgment may be signed on, 475.

new rule necessary, on amending declaration, 469,
475, 708.

unnecessary, after time to plead, in another
term, 475.

in actions against warden of *Fleet*, on stat. 59 Geo.
III. c. 64, p. 324.

against prisoners, 355, 359.

to new assignment, 693.

unnecessary in *ejectment*, 1224.

in *scire facias*, 1126.

avow, or plead in bar, in *replevin*, 418, 483.

reply, 483, 676.

in *ejectment*, 1231.

rejoin, sur-rejoin, &c. 483, 693, 718, 19.

join in demurrer, 483, 696.

for attorneys, &c. to appear and plead, 323, 483.

not served, 483.

demand in writing must be made on, id. 484.

RULES AND ORDERS, in particular cases, *continued*.in Common Pleas, common, *continued*.drawn up by secondaries, *continued*.*side-bar* or *treasury* rules, peculiar to this court, 484.

to take bill against attorney off the file, id.

enter up judgment on warrant of attorney, above
one, and under *ten* years old, id. 553.bring money into court, under *five* pounds, 484, 622.

enter issue, 484, 727, 8.

for costs, for not proceeding to trial or inquiry, pur-
suant to notice, 484, 490, 759, 60; 1236.

to return writ of false judgment, 484.

assign errors thereon, id.

consent rule in *ejectment*, id. 490, 1208, 4; 1225, &c.
1280.

must be served, 485.

*For such other side-bar or treasury rules, as are the
same in K. B. & C. P. vide post*, p. 1460.

on signature of serjeant:

to bring money into court, if it exceed *five* pounds,
485, 622.

plead several matters, in certain cases, 485, 657, 8.

in *ejectment*:for judgment against casual ejector, 489, 1219,
20, 21.

when drawn up, 1221.

landlord to defend, instead of tenant, 490,
1229.

how entitled, 1226.

for prothonotaries, in *vacation*, to compute principal
and interest on bills or notes, &c. 570, 71, 2, 3.*concilium* on demurrer, special verdict, or writ
of error, 485, 737, 8; 898, 1176.

special jury, 485, 792.

must be served, 485.

special, peculiar to this court:

absolute in first instance;

for allowance to bail, and *supersedeas*, 869, 70.

attachments, 480.

leave to enter up judgment on warrant of attorney,
above *ten*, and under *twenty* years old, 486, 553.

good jury, on execution of inquiry, 486, 576.

judgment for plaintiff, on *nul tiel record*, 486, 744, 746.not required on verdict, or inquiry, 486, 581, 2;
903, 4.view, 485, (*f.*) 798.making judge's order, or order of *nisi prius*, a rule of
court, 486, 511, 819, 20; 836.for leave to take out execution against casual ejector,
when landlord has been made defendant, and failed
at trial, 489, 1245.

RULES AND ORDERS, in particular cases, *continued*.in Common Pleas, special, *continued*.absolute in first instance, *continued*.*scire facias*, to revive judgment above *ten*, and under *twenty* years old, 486, 1105.*For special rules, absolute in first instance, in K. B. & C. P. vide post*, p. 1460.

to show cause, and rules absolute thereon ;

on behalf of plaintiff :

for discharge of prisoners, on stat. 48 Geo. III. c. 123, pp. 388, 489.

attachments, 478, 9, 80, 81.

not usually granted, for disobedience to *sub-pœna*, 479, 808.*scire facias*, to revive judgment above *twenty* years old, 487, 1105.*For special rules to show cause, &c. in K. B. & C. P., on behalf of plaintiff, vide post*, pp. 1460, 61.

on behalf of defendant :

to declare peremptorily, when defendant is in custody, 424, 487, 8.

change venue, 488, 608, 9; 611, 12.

plead several matters, except in certain cases, 488, 657, 8.

for copyhold tenants to inspect, and take copies of court rolls, 486, (a.) 488, 594, 5.

For special rules to show cause, &c. in K. B. & C. P., on behalf of defendant, vide post, pp. 1461, 2.

for either party :

to inspect court rolls, 594, 5.

when moved for on last day of term, 498, 9.

party obtaining, not compelled to proceed on, 1235.

called upon, may oppose in person ; after order for changing attorney, 94, 5.

For special rules to show cause, &c. in K. B. & C. P., for either party, vide post, p. 1462.

sheriff to return writ, 306, 7, 8; 484, 497, 1017.

rule to set aside, 306.

bring in body, 309, &c. 484.

affidavit of service of, 311.

marshal to acknowledge defendant in custody, 363, 4; 484.

time or further time to declare, 418, 423, 4; 484.

to discontinue, 484, 679, 80, 81.

be present at taxing costs, 484, 989, 90.

for *scire facias* to revive judgment, above *seven*, and under *ten* years old, 484, 485, (m.) 1105.

special :

absolute in first instance ;

to increase issues, on writs of *distringas*, 110, 11; 486.for *distringas*, on stat. 7 & 8 Geo. IV. c. 71, p. 113, &c. 486.

allowance of bail, 276, 486.

RULES AND ORDERS, in particular cases, *continued.*in King's Bench, and Common Pleas, *continued.*special, absolute in first instance, *continued.*for allowance of writ of error *coram nobis*, 486.

bringing up prisoner, in same court, 348.

on Lords' act, 378.

leave to compound penal action, 486, 556, 7, 8.

inhabitant to inspect parish books, 593, 4.

judgment on demurrer, or writ of error, 486, 740.

entering verdict for, on delivery of *postea* to, prevailing

party, on special verdict, or special case, 486, 898, 9.

suggestion, on *Welch* judicature act, to entitle defendant
to judgment of nonsuit, 486, 969, 70.

to show cause, and rules absolute thereon;

on behalf of plaintiff:

for sale of issues, on writs of *distringas*, 111, 487.

amending writ, or return, 130, 161, 487.

money deposited with sheriff, and paid into court,

on stat. 43 Geo. III. c. 46, § 2, to be paid over
to plaintiff, 228, 487.attachment against under-sheriff, on death of sheriff
during his office, 314.setting aside judgment of *non pros*, for irregularity,
460, 487.leave to enter up judgment on warrant of attorney,
above *twenty* years old, 487, 553.compelling witness to swear to execution of warrant
of attorney, 554.reference to master or prothonotaries, in *term* time,
to compute principal and interest on bills or
notes, &c., 487, 570, &c.must be served on defendant before final judg-
ment, in K. B., 572.how served, *id.*when there are two defendants, *id.*for execution of inquiry before chief justice, or judge
at *nisi prius*, 487, 576.defendant to produce and give copy of deed, for plain-
tiff to declare on, 487, 589.produce same before commissioners of
stamp office, to be stamped, 487, 590.produce same to plaintiff's attorney, for
subpoenaing witnesses to prove it, *id.*to discharge rule for changing venue, for irregularity,
487, 610, 11.

amend declaration, or replication, &c. 697, &c. 708, &c.

set aside nonsuit, verdict or inquisition, and have a
new trial, or inquiry, 487, 581, 2; 904.enter judgment for plaintiff, *non obstante veredicto.*
487, 904, 920, 21.

allow plaintiff costs, in action on judgment, 487, 969.

RULES AND ORDERS, in particular cases, *continued*.in King's Bench and Common Pleas, *continued*.special, on behalf of plaintiff, *continued*.

enter up judgment, and take out execution, after verdict against one of several defendants, &c. 487, 996.

take out execution, pending error, 487, 994, 1147.

in *ejectment*:

that service of declaration, on tenant's son or daughter, &c. may be deemed good service, 489, 1213, 1214, 1219, 20.

for consolidating actions in, 1232.

amending declaration in, 1206, 7.

tenant to give undertaking, and find bail, as required by stat. 1 Geo. IV. c. 87, § 1, pp. 489, 1221, 2, 3.

staying proceedings, pending error, 490, 1234.

attachment against defendant, in K. B. or C. P.

for costs, on consent rule, 489, 1241, 2.

subpoena for same, in Exchequer, 489, 991.

attachment, for opposing execution of writ of possession, 489, 1247.

on behalf of defendant:

to reverse outlawry, 189, &c. 488.

quash writ, 161, 167, 488.

set aside service of process, 169.

for money deposited with sheriff, and paid into court, on stat. 43 Geo. III. c. 46, § 2, to be repaid to defendant, or his bail, &c. 228, 488.

time to plead, under certain circumstances, 469, 70; 488.

to set aside proceedings for irregularity;

in process, or notice subscribed thereto, and discharge defendant on filing common bail, &c. 160, 61; 167, 488, 512, 13.

delivery, filing, or notice of declaration, 447, 457, 8; 488, 512, 13, 14.

notice of trial, 488, 512, 13, 14.

inquiry, *id*.

on bail bond, 300, &c. 488.

against sheriff, 316, &c. 488.

to set aside interlocutory judgment, &c. for irregularity, 488, 512, (c.) 567, 8.

on affidavit of merits, 488.

verdict or inquisition, and have a new trial or inquiry, *id*. 582, 904.

execution for irregularity, and discharge defendant out of custody, or restore to him money levied, 488, 1032.

to stay proceedings, in action on bail bond, 300, &c. 488, 541, 2.

against sheriff, 316, &c. 488.

RULES AND ORDERS, in particular cases, *continued.*in King's Bench and Common Pleas, *continued.*special, on behalf of defendant, *continued.*

- to stay proceedings, where debt sued for appears to be under 40s. 487, 516.
- where action is brought on bad or defective grounds, 488, 516, &c.
- contrary to good faith, 488, 515, 16; 529.
- without proper authority, 516, 529.
- pending error, 488, 530, &c.
- until security be given for costs, 488, 533, 4.
- costs are paid, of former action for same cause, 488, 538, 9.
- to compound penal action, 566, *id.* (i.)
- strike out superfluous or unnecessary counts, 488, 616, 17.
- withdraw general issue, and plead it *de novo*, with notice of set-off, or upon bringing money into court, 488, 678.
- add or withdraw special pleas, 488, 671, 2.
- amend pleadings, 488, 697, &c. 708, &c.
- for judgment as in case of nonsuit, 488, 764, &c.
- putting off trial, for absence of material witness, 488, 770, &c.
- till plaintiff consent to witnesses being examined on interrogatories, 488, 810, 11.
- nonsuit, after point reserved, 488, 9; 904.
- in arrest of judgment, 489, 928.
- for plaintiff to bring *postea* into court, and file plea roll, so that defendant may enter suggestion thereon, to entitle him to costs, on court of conscience acts, 489, 960, 61.
- for suggestion, after nonsuit or verdict, to entitle him to double or treble costs, &c. 489, 989.
- allowing defendant costs, where plaintiff does not recover the sum for which he was arrested, &c. 489.
- discharging insolvent debtor, on stat. 48 Geo. III. c. 123, pp. 388, 489.
- in *ejectment*:
 - to permit coparcener, joint-tenant, or tenant in common, to confess lease and entry only, 490, 1227.
 - set aside proceedings, for irregularity, 489, 1224.
 - when regular, upon affidavit of merits, &c. 489, 90, 1224, 5.
 - stay proceedings, when two actions are pending, for same premises, in different courts, 1232.
 - pending error, 490, 1232.

RULES AND ORDERS, in particular cases, *continued*.in King's Bench, and Common Pleas, *continued*.special, on behalf of defendant, in *ejectment*, *continued*.

until security be given for

costs, 490, 1231, 2.

costs are paid of former

ejectment, 490, 1233.

on payment of rent, &c. 490,

1234, 5.

mortgage money,

&c. 490, 1235, 6.

for attachment, against lessor of plaintiff, in K. B.

or C. P. for costs on consent rule, 490,

1242, 3.

subpoena for same, in Exchequer, 490, 991,

1243.

restoring possession of premises, improperly

delivered under writ of possession, 490, 1246.

for either party:

for leave to inspect and take copies of books, &c. or court

rolls, and have them produced at trial, 489, 592, &c.

trial at bar, 489, 749, 50.

in adjoining county, 489, 723, 4, 5; 751.

to set aside judge's order, 489, 511.

award, 489, 844, 5.

for replader, 489, 904, 921.

venire facias de novo, 489, 904, 922, 3.

master or prothonotaries to review taxation, 489, 990.

judgment *nunc pro tunc*, 489, 532, 932, 3; 939.

when no action is depending:

for admission of attorney, on stat. 31 Geo. III. c. 32, p.

71, (a.)

to strike attorney off roll, for misconduct, 89, 490.

at his own instance, 89, 485, 490.

re-admit attorney, 78, 9; 89, 90, 490.

make submission to arbitration a rule of court, 490.

set aside annuity, 490, &c. 520, &c.

at judge's chambers, 502.

drawing up, 499, 503.

service of, 72, 229, 483, 4; 485, 500.

affidavit of, 501.

how far a stay of proceedings, 301, 493, 500, 501.

showing cause against, 499, 500, 501.

in first instance, 499, 503.

at judge's chambers, 502, 3.

making absolute, in K. B., 501.

C. P., *id*.Exchequer, *id*. 502.

standing over, 502.

rehearing, *id*.enlarging, *id*. 505, 6.

service of, 500.

RULES AND ORDERS, in particular cases, *continued*.in King's Bench, and Common Pleas, *continued*.special, enlarging, *continued*.

making absolute, 502, 3.

entering on peremptory paper, 505, 6.

reviving, 502.

amending and opening, in K. B., 506, 615.

C. P., *id*.

Exchequer, 506, 508.

not to be moved for, contrary to former rule, 506.

when appointed for particular days, 504.

brought on peremptorily, 482, 505, 6.

costs of application for, 503, 4.

on refusal of, 503.

making absolute, *id*.discharging, *id*. 504.**Exchequer of Pleas**;

common :

to appear and claim on extents, 1068.

scire facias, for king, 1092.

plead, 474, 5.

to extent, 1124.

scire facias, for king, 1092.

reply, 676.

enter issue, 727.

rejoin, or join in demurrer, on extents, 1079.

for judgment on same, 1081.

special :

for *distringas*, on stat. 7 & 8 Geo. IV. c. 71, pp. 114, 15; 155, 6.

to show cause, and rules absolute thereon ;

for attachments, 478.

absolute, or *nisi*, 480.

changing venue, 612, 13.

judgment as in case of nonsuit, after peremptory under-
taking, absolute in first instance, 769. (*c*.)special jury, 793. (*b*.)execution, after nonprossing writ of error, 1185. (*k*.)

motion for, on last day of term, 497, 8.

service of, 500.

showing cause against, 501, 2.

Exchequer Chamber;

common :

to allege diminution, 1165, 1167.

assign errors, 1168.

plaintiff in error not confined to one rule in each term, *id*.

special :

when made absolute, 501.

for computing interest, on affirmance of judgment, 1184.

in court of Great Sessions in *Wales*. See tit. *Great Sessions*.

not records, 490.

evidence of, *id*.

S.

SAILORS. See tit. *Seamen*.

SALARIES,
of judges, &c. 39. (*g.*)

SANDWICH,
court of requests for, 957.

SATISFACTION. See tit. *Accord & Satisfaction*.

by levy on *feri facias*, 1019.

taking body on *ca. sa.* 1029, 80.

entry of, 555, 6; 729, 1041.

on warrants of attorney, and *cognovits*, 555, 6; 1041. (*d.*)
judgments;

against insolvent debtors, 395, 6.

in K. B., 1041.

C. P. *id.*

in term, *id.*

vacation, *id.*

payment on, 508, 1041.

SATISFACTION PIECE, 1041.

SAVINGS BANKS,

actions by or against trustees of, 8. (*b.*)

SCANDALUM MAGNATUM, 604, 1139.

SCHEDULE,

of debts, &c. on insolvent act, 390, 91.

effect of error in, without fraud, 395.

SCIENDUM, 775.

SCIRE FACIAS,

what, 1090.

in general, *id.*

to have execution :

generally, 1090, &c.

of other lands, after eviction on extent, 1087, 8.

for other purposes :

to prosecute, &c. after pardon of outlaw, 144.

ad rehabendum terram, 1097. (*a.*)

audiendum errores; 1172, 8.

to compel joinder in error, 1164, 5; 1169.

false judgment, 1188.

costs on, 947, 8.

processum et recordum, 1121, 1173.

to obtain restitution, after reversal of judgment on error, 1083,
1186, 7.

disprove debt, in mayor's court of *London*, 1107. (*c.*)

cannot be sued out, without a new warrant of attorney, 93, 4; 1090.

for the king;

to have execution :

on recognizance, 1046, 1091.

to keep the peace, 1093.

judgment, 1091.

not necessary, after a year, 1045, 1091.

death of king's debtor, 1091.

SCIRE FACIAS, continued.for the king, *continued.*to have execution, *continued.*

of bond debt, 1005, 1091.

against principal, 1046, 1091.

sureties, *id.*

simple contract debt, when recorded, 1046, 7.

debts found to be due to king's debtor;

on extent, 1068, 1091.

diem clausit extremum, *id.*special *capias utlagatum*, *id.*

a judicial writ, 1091.

out of what court it issues, *id.**fiat* of baron not necessary for issuing it, *id.*against devisees, for writ of *diem clausit extremum*, unnecessary, 1058.

form of, 1091, 2.

into what county, 1091.

signing, *id.**teste* and return of, *id.* 1092.

cannot be sued out in vacation, on inquisition after preceding term, 1092.

amendment of, *id.*

return of;

scire feci, *id.**nihil*, *id.*second writ of, *id.*rule to appear, *id.*on writ returnable last day of term, *id.*plead, *id.*obtaining further time to plead, *id.*

consequences of not appearing or pleading, 1092.

extent, *id.*entry of judgment unnecessary, *id.*

proceedings on appearance, 1092, 3.

plea of statute of limitations, *id.*grounds of putting off trial, 1092. (*m.*)

to repeal letters patent, 1090, 91.

when granted of a thing not grantable, 1093.

on a fraud, or false suggestion, *id.*if failure in part, vitiates the whole? *id.*on forfeiture of office, *id.* 1094.

when two patents are granted of same thing, 1094.

when granted to the prejudice of another, *id.*

an original writ, 1090, 1094.

direction of, 1094.

when returnable;

in petty bag office, *id.*King's Bench, *id.*motion to set aside, *id.*founded on matter of record, *id.*mode of obtaining, *id.*

SCIRE FACIAS, continued.for the king, *continued.*to repeal letters patent, *continued.**fiat*, &c. 1094.form of, *id.* 1095.return of, *id.*judgment by confession or default, *id.*

venue cannot be changed in, 604.

plea or demurrer, 1095.

trial, *id.*judgment, *id.* 1096.costs, *id.*

for the subject;

on a recognizance, 1000, 91.

at common law, 1091.

against bail to the action, 530, 1097.

when it lies, and when not, 1097.

a personal action, within stat. 16 & 17 *Car.* II. c. 8, p. 1153.

out of what court it issues, 1100.

when it may be commenced, 1099.

præcipe for, 1100.form of, in K. B., *id.* 1101.C. P., *id.*not within stat. 27 *Eliz.* c. 8, p. 1139.need not be entered in sheriff's book, if filed in time,
1125, 6.

award of execution in, 1126, 7.

execution in, 1133.

against bail in error, 1097.

out of what court it issues, 1101.

by whom made out, *id.* 1102.form of, *id.*

by statute:

on stat. 19 Geo. III. c. 70, § 6, p. 406. (*f.*)

after a year, 1096.

death of conusee, *id.*

eviction, 1037, 1087, 8.

on a judgment, 1090, 1096.

by or against the *same* parties.

after a year and a day, 1102.

history of, and when necessary;

in real actions, *id.*personal actions, *id.* 1103.*ejectment*, 1248, 9.

after interlocutory judgment, 1103.

former *scire facias*, *id.* 1106.

error. Append. Chap. XLIII. § 79, &c.

year, how computed, 1103.

when not necessary;

in case of the king, 1045, 1091.

upon outlawry after judgment, 135.

SCIRE FACIAS, continued.for the subject, *continued.*on a judgment, when not necessary, *continued.*

judgment against insolvent debtor, on stat. 1 Geo,

IV. c. 119, § 25, pp. 395, 6.

after execution taken out within the year, 1104.

defendant is charged in execution, 366.

stay of execution by agreement, 560, 1104.

agreement that it shall not be necessary, 1104.

error, *id.* 1105.

injunction, 1105.

out of what court it issues, *id.*rule or motion for, in K. B. 484, 5; 485, (*m.*) 1105.C. P. 484, 5; *id.* (*m.*) 1105, 6.

form of, 1106.

upon judgment of inferior court:

after removal by *certiorari*, or *habeas corpus*,
400, 401, 1106.in error. See tit. *Error.**quare executionem non*, 1107, 1163, &c.

costs on, 947, 8; 1167.

ad audiendum errores. Ante, p. 1464.

costs on, 947.

processum et recordum, 1121, 1178.after *non pros*, on writ of false judgment, 994, 5.

for demands arising after judgment;

in covenant, 1107.

annuity, *id.**debt* on bond, for payment of annuity, *id.* 1108.money by instalments,
1108.performance of covenants, *id.*

to have execution of future effects, 1102.

of bankrupts, by stat. 5 Geo. II. c. 30, § 9, p. 1109.

decisions thereon, *id.*

by stat. 6 Geo. IV. c. 16, p. 1111.

insolvent debtors, *id.* 1112.against insolvent debtors, *id.*

executors of administrators;

on judgment of assets *quando acciderint*, 1112, &c.*de bonis propriis*, 1102, 1112, &c.*scire fieri* inquiry, 1025, 1114.upon a *change* of parties, 1114, 15.by marriage, *id.*

bankruptcy, 934, 1115, 16.

death, 1116, 17.

of sole plaintiff, or defendant;

before final judgment:

between verdict and judgment, 933, 4.

after interlocutory, and before final judgment, 934, 1117, 18.

costs on. See tit. *Costs.*

SCIRE FACIAS, *continued.*for the subject, *continued.*on a judgment, upon a *change* of parties, *continued.*

after final judgment;

in *ejectment*. See tit. *Ejectment*.by or against personal representatives,
1118, &c.

form of, 1120.

award of execution on, 1126, 7.

by administrators *de bonis non*, 1119.

against heirs and tertenants, 1120, 21.

on death of one of several defend-
ants, 1121.form of, *id.*against tertenants, *id.*in error, to reverse fine or reco-
very, *id.*

of one of several plaintiffs, or defendants;

pending suit, 1119, 20.

after judgment, and before execution, 1120.

in *replevin*;

against pledges for a return, 1088.

sheriff, 1089.

generally, 1122.

in King's Bench;

where brought, *id.*by whom made out, and signed, *id.**teste* and return of, *id.* 1123.

when amendable, 1123.

Common Pleas;

where brought, 1122.

by whom made out, and signed, 1122.

where one *scire facias* is sufficient, 1125.*teste* and return of, 1122, 3.

when amendable, 1123.

quashing, without costs, *id.*summons, *id.* 1124.

calling for return, 1124.

sheriff's return;

scire feci: *id.*

on old judgment, in C. P. 1105, 6.

nihil habet, 1124.*scire feci* to one, and *nihil habet* to another, *id.*against heirs and tertenants, *id.**alias*; *id.**teste* and return of, 1125.

leaving in sheriff's office, 1098, 1125, 6.

how long to remain there, *id.*

sheriff's indorsement on, 1125.

entering *ca. sa.* in sheriff's book, in K. B., 1098, 9; 1125, 6.Exchequer, 1098, 99;
1126.

SCIRE FACIAS, continued.

for the subject, generally, *continued.*

in sheriff's return, *continued.*

rule to appear in K. B., 483, 1126.

C. P., *id.*

judgment by default, 1126.

entry of proceedings, in K. B., *id.*

C. P., *id.* 1127.

appearance, in K. B., 1127.

C. P., *id.*

præcipe for, *id.*

when compulsive, no waiver of irregularity, 514.

imparlance, in C. P., 1127.

declaration ;

in King's Bench, *id.*

on recognizance, *id.*

judgment, *id.* 1128.

Common Pleas, 1128.

title of, *id.*

good in part, and bad in part, 694.

staying proceedings in, pending error ;

against principal, 530.

bail, 532, 3.

pleas ;

in abatement, 1121, 1128.

bar :

nul tiel record, 643.

several matters, when not allowed, 656.

by bail, 689, 1128, &c.

on judgment, 1130, 31.

by heirs and tertenants, 640, 1121, 1128.

must be delivered, in K. B., 672.

or filed, in C. P., 1131.

pleading to, waiver of irregularity, 514.

replication on, against bail, conclusion of, 1130.

demurrers, 672, 717, 1131.

must be delivered, in K. B., *id.*

or filed, in C. P., 1131.

issues, 1131.

by whom made up, in K. B., 717, 1131.

and to whom delivered, in C. P., 1131.

form of, on extent in aid, &c. 1092. (*m.*)

nonsuit in, 868.

relief on, by *audita querela*, &c. 1131.

after *scire feci*, *id.*

two *nihils*, *id.*

damages, 870, 1132.

on stat. 8 & 9 W. III. c. 11, § 8, pp. 881, 947, 1132.

judgment reversed for, 1179.

costs. See *tit. Costs.*

payable by plaintiff on quashing, in K. B., 947, 1123.

aliter, in C. P., before plea, 947, 8; 1123.

SCIRE FACIAS, *continued.*

for the subject, generally, *continued.*

award of execution, 1126, 7.

execution, 1045, 1132, 3.

not within statutes of limitations, 16.

SCIRE FACIAS Book, what, 1098, 9; 1125, 6.

entry of *capias ad satisfaciendum* in, id.

SCIRE FACIAS Roll, 729, 80.

SCIRE FIERI Inquiry, 1025, 1114.

return to, 1114. (c.)

SCOTLAND;

societies or partnerships in, how to sue or be sued, 9.

within statute of limitations, 16.

affidavits sworn in, 166, 181, 553.

privilege of peers of, from arrest, 192.

sequestration in, no bar to arrest, 202.

effect of bankrupt's certificate, when cause of action arises in, 211.

plaintiff residing in, must give security for costs, 534.

commission for examining witnesses in, 771.

error from, 1140.

appeals from, to House of Lords, id. (g.)

SEAL,

necessary for authenticating foreign judgment, 944.

SEAL DAY,

writ of error need not be tested on, 1143.

SEAL OFFICE,

when open, 54, 5.

holidays at, 55, and see tit. *Holidays.*

SEALER OF WRITS,

office and duty of, 54, 5.

commissioners of treasury authorized to purchase office of, 54.

in exchequer, 58.

duty of, on sealing writs of execution, in K. B., 999.

SEAMEN,

limitation of actions for wages of, 16.

arrest of, 198, &c.

bail of, how discharged, 292, 3.

foreign, when not required to give security for costs, 535.

SEARCHING for PLEAS, 563.

Consent rule, in *ejectment*, 1230.

SEATS in Churches;

actions for disturbance of, 444.

evidence in, id.

SECONDARY of King's Bench, 43.

when clerks anciently accounted with him, 730. (d.)

to chief prothonotary, in C. P., how appointed, 48.

SECONDARIES of Common Pleas. See tit. *Officers.*

office and duties of, 44, 5; 48, 9.

on trials at bar, 751.

SECURITY for Costs, 533, &c.

when required, 534, 5.

SECURITY for Costs, *continued.*

- when not required, 535, 6.
- in Exchequer, 534, (g.) 535.
- in error, 535.
- application for, when and how made, 537, 8.
- signing judgment after giving, in C. P., 469.
- in *ejectment*, 1231, 2.
- for prisoner's allowance, 881, 2.

SEISIN, how stated in pleading;

- of king, 442. (b.)
- corporation, id.
- husband, *jure uxoris*, id.

SEQUESTRARI FACIAS, 1023. (h.)**SEQUESTRATION,**

- in *Scotland*, no bar to arrest in *England*, 202.
- process of, 1023, &c.
- what, 1023.
- proceedings on, id. 1024.
- returns to, id.
- out of *Chancery*, fraud in executing, 1005.
- landlord entitled to year's rent on, 1014.
- on insolvent act, 1 Geo. IV. c. 119, p. 1024.

SERJEANTS AT LAW, 42.

- may be called in vacation, id.
- precedence of, id.
- privileges of, 80, 606, 7.
- exempted from serving on juries, '784.

SERJEANTS INN HALL,

- sittings of judges at, out of term, 39, 40.
- business formerly done at, 262, 3.
- special arguments in, 39, 40.

SERVICE,

- under articles of clerkship. See tit. *Attorneys.*
- of process. See tit. *Process.*
- notices, &c. 71, 2; 454, 499, 500, 670.
- rules, 71, 2; 229, 483, 4, 5; 500.
- declaration in ejectment, 1197, 1204, 1209, &c., and see tit. *Ejectment.*
- perfect or imperfect, 1211, 1219.
- pleas, 499, 500, 672.
- allowance of writ of error, 1144.

SERVICES,

- avowry or cognizance for, 645.

SESSIONS, 61.

- books of, 593, 801, and see tit. *Inspection.*
- attorney's bill taxable, for business done at, 829.

SET-OFF,

- at common law, 662, 3.
- by statutes, id. 664.
- in what actions allowed, 663, 4.
- in what not, id.
- in *replevin*, 664.
- cannot be of penalty, id.

SET-OFF, *continued*.

- cannot be of general damages, 664.
 - debt barred by statute of limitations, id.
- debts must have existed at time of commencing action, id.
 - be mutual, and due in same right, id. 665, 6.
- cases of goods sold for ready money, 664.
 - partners, id. 665, 6.
 - on policies of insurance, 665, 6.
 - of husband and wife, 666.
 - executors and administrators, 665, 6.
 - trustees, 666.
 - assignees of bonds, id.
 - bankrupts, 665, 6, 7.
- plea of, 564, 644, 662, 3, &c. 667, 8.
- when it must, or may be pleaded, 650, 51; 667.
- mode of replying to plea of, 667, 685, 6.
- notice of, when and how given, 488, 662, &c. 668, 673.
 - form of, 668.
 - can only be given with general issue, 667.
 - cannot be given with plea of *non est factum*, in *covenant*, 667.
 - proceedings on, 668.
- particulars of, 598, 9.
- of costs, or debt and costs, in one action, against those in another, 839, 40; 991, 2.
 - on award, 881, 885, 888.
- debt, not allowed in cross action, when defendant is in execution, 1029.

SETTING aside Awards. See tit. *Arbitration*.

- Executions, 1082.
- Inquisitions, 582, 3; 904.
- Judgments by default. See tit. *Judgments*.
- Pleas, 463, 473, 564, 5; 639, 40, 41; 677, 8.
- Proceedings,
 - want of attorney's certificate, no ground for, 77.
 - on bail bond, 300, 301, 304.
 - against sheriff, 316, 17.
 - for irregularity. See tit. *Irregularity*.
 - costs on, 515.
 - difference between, and staying proceedings, id.

SEVERAL FISHERY,

- justification under right of, 646.

SEVERAL PLAINTIFFS,

- signing note on Lords' act, 381.
- security for costs, when not required in action by, 535.
- judgment on warrant of attorney, 551.
 - affidavit for, 553, 4.

SEVERAL DEFENDANTS,

- process against, 148, 9.
- declaring against, id. 420, 446, 7; 467.
- one of, cannot bring money into court, 621.
- making up issues against, 721, 2.
- notice of trial to, 756.
- judgment against, on warrant of attorney, 552.

SEVERAL DEFENDANTS, *continued*.

execution against one of, 1030.

costs in actions against, 985, &c. 991.

SEVERAL COUNTS, or Pleas, costs of, 917, 971, &c.

ISSUES, how made up, 717, 721, 2.

costs of, on inclosure act, 975.

SEWERS. See tit. *Commissioners of Sewers*.**SHAM PLEAS**, discountenanced, 564, 5; 675, 710. (*k.*)**SHEFFIELD**,

court of requests for, 957.

SHERIFF,

an officer of the court, 58, 9.

duty of, *id.*

punishable for misbehaviour, *id.*

attorneys not liable to serve the office of, 82.

his authority under writ, 216.

officers, *id.* 217.

warrant, 217.

mandate to bailiff of liberty, 216.

not bound to take notice of defendant's privilege, 192, 196, 215, 219. (*m.*)

entering liberty, without a *non omittas*, 217, 1049.

his duty upon an arrest, 221, &c.

by special bailiff, 306.

under stat. 43 Geo. III. c. 46, § 2, pp. 227, &c.

7 & 8 Geo. IV. c. 71, § 8, p. 160.

treatment of prisoners, arrested on mesne process, 229, &c.

when to carry them to county gaol, 230.

penalty on, for misbehaviour, 232.

duty, upon a special *capias utlagatum*, 187.

how discharged, on reversal of outlawry, 144.

his power and duty, in taking bail on an attachment, 222, 3; 481.

has no right to take fees at common law, for execution of process, 233.

what fees he, or his officer, may take, by stat. 23 Hen. VI. c. 9, *id.*

in what cases liable for escape, and in what not, 224, 230, 31; 235, 6;
282, 3; 309, 10; 1029, 1031.

when he may return a rescue, 236.

rule for, to return writ, 297, 306, &c.

in what cases it cannot be had, 306.

at what time it may be taken out, *id.* 307.

by stat. 20 Geo. II. c. 37, *id.*

in Great Sessions of *Wales*, 307.

from whom obtained, in K. B., 306.

C. P., *id.*

service of, 307.

when it expires, in K. B., *id.*

C. P., *id.*

Exchequer, *id.*

motion to set aside, 306.

when to make his return, 107, 307.

liable to attachment, for not making it, 307.

his return, and when liable to action or attachment thereon, and when
not, 110, 307, 8; 309, &c. 1029.

SHERIFF, *continued.*

his return, &c., *continued.*

to process by *original*, 110.

when rule expires in vacation, in K. B., 307.

C. P., *id.*

as between new and old sheriff, *id.* 1030.

rule for, to bring in body, 297, 309.

when it cannot be had, 306.

at what time it may be taken out, 310.

cannot be taken out, till time for putting in bail has expired, *id.*

should be given without delay, *id.*

from whom obtained, in K. B., *id.*

C. P., 50, 310, 483. (*n.*)

form of, in Exchequer, 310. (*f.*)

affidavit of service of, 311.

of county palatine, answerable for contempts, 312.

liable to attachment, for not bringing in body, 311, 12, 13.

origin of this practice, 309.

how far liable thereon, 315.

liability of, on attachment, for costs in actions on bill, *id.*

for taking insufficient pledges in *replevin*, *id.* (*d.*)

not liable to action, for refusing bail, on attachment out of Chancery,
222, 3.

for costs, on discharging defendant after notice, 338.

how proceeded against, if he take bail thereon, 223.

proceedings on death of, during his office, 313, 14.

when discharged;

by taking assignment of bail bond, 306.

appointing special bailiff, at plaintiff's request, *id.*

render, 282, 3; 312.

lashes, 310, 315, 16.

cognovit, 315.

putting in bail, &c. 316, 17.

when not discharged;

by render, 282, 311.

payment of sum sworn to, on stat. 43 Geo. III. c. 46, § 2,
p. 315.

death of defendant, after contempt incurred, *id.*

or his bail, may be put in and justify bail above, by their own attorney,
94, 246.

need not justify bail, to set aside irregular attachment, in C. P., 257.

allowance to, for bringing up defendant, on *habeas corpus*, 349.

his power and duty, under writ of *feri facias*, 1011, &c.

property in goods taken in execution, 1013.

duty in selling them, *id.* 1020.

must satisfy arrears of rent, and king's taxes, 1013, &c. 1016, 17.

notice to, of rent in arrear, on stat. 8 Anne, c. 14, § 1, pp. 1015, 16.

his return to *feri facias*, 1018, &c.

time enlarged for making it, 1017, 18.

not allowed to receive money of defendant, 1029.

his duty upon *ca. sa.* when he receives debt and costs, *id.*

return to *ca. sa.* 1028, 1098.

SHERIFF, continued.

his duty on *elegit*, 1034, 5.

extent, 1049, 50; 1056, 7.

when and how discharged, by appointing special bailiff, 1029.

in what cases entitled to poundage, and in what not, 1039, 40; 1070, 1, 2.

penalty on, for extortion, in levying crown debt, 1071, 2.

not bound to execute writ of false judgment, without being paid his fees.
1187.

actions by. See tit. *Actions*.

against; Same title.

declaration in, 236, 434, 5. (*f*.)

evidence in, 223, 236, id. (*f*.) 1016.

damages in, 886.

staying proceedings in, 1018.

SHERIFF'S COURT of LONDON;

return that defendant was taken, &c. on plaint levied in, 407. (*d*.)

SHERIFF'S OFFICERS, &c. 216, 229, &c.

agreements with, to put in bail, &c. 224.

cannot be bail, 247.

actions by, 224, 317.

against, on stat. 32 Geo. II. c. 28, § 12, pp. 233, 528.

for money levied by distress, after reversal of outlawry,
1015.

exempted from serving on juries, 784.

SHOWERS,

on view, 798.

SHIP'S ARTICLES;

delivering copy of, 592.

SHORT NOTICE of Trial. See tit. *Trial*.

Inquiry. See tit. Inquiry.

SHROPSHIRE,

next *English* county to *North Wales*, 751.

SI TE FECERIT SECURUM. See tit. *Pone*.**SIDE BAR Rules. See tit. *Rules and Orders*.****SIDE CLERKS, in Exchequer, 58, 321, 325.****SIGNING PLEAS. See tit. *Pleas and Pleading*.****SIMILITER,**

adding, in C. P., 472, 718.

to general issue, must be delivered, in K. B., 698.

striking out, and demurring, 726.

want, or improper addition of, amendable, in K. B., 925.

aliter, in C. P., id.

SIMPLE CONTRACT DEBTS,

to king, 1044.

mode of recovering. 1046, 7.

from what time lands are bound by, 1051.

extent in aid for, 1059, 60, 61.

written *memorandum* when necessary to take case out of statute of limitations, in action for, 27.

SINGLE BILL,

interest, when recoverable in action on, 874.

SINGLE DAMAGES. See tit. *Damages*.

SITTINGS,

of judges in Bank, out of term, 89, 40.

SLANDER. See tit. *Words*.

SLANDER of TITLE,

truth of words may be given in evidence in action for, 652.

SMALL DEBTS,

discharge of prisoners in execution for, 386, 7, 8; 1112.

SOCIETIES,

or partnerships, in *Ireland* or *Scotland*, how to sue or be sued, 9.

SOLDIERS,

arrest of, 199.

appearance in actions against, 243.

proceedings on bail bond given by, 301.

place of life guardsman saleable, under Lords' act, 381.

aliter, of officer's full or half pay, *id*.

SOLICITOR,

in *Chancery*, may practice on equity side of Exchequer, 73.

on equity side of Exchequer, cannot practice as such in *Chancery*, *id*.

in equity, lien of, on papers in his possession, 337. (*h*.)

when not allowed, 337.

SOLICITOR GENERAL,

pre-audience of, 42.

SOLVIT AD DIEM,

plea of, 651.

must be delivered, 566, 671, 2.

need not be signed, in K. B., 671.

not formerly signed, in C. P., 672.

evidence on, 18, 19.

SOLVIT POST DIEM,

plea of, 651.

when it must be pleaded, 18.

SON ASSAULT DÉMESNE,

must be pleaded, 652.

plea of, generally, in defence of self, 645.

third persons, *id*.

specially, with an *irâ motus*, *id*.

need not be signed, in K. B., 671, 2.

must be delivered, *id*.

not formerly signed, in C. P., 672.

new assignment on, 690.

issue on, by whom made up, 717.

SOUTH SEA HOUSE,

books, of, 802.

inspecting, 593, 5.

SOUTHWARK,

direction of process, when defendant resides in, 152.

court of requests for, 957, &c.

SPECIAL ARGUMENTS, 504, 5.

days appointed for, in C. P., 504, 5, 6; 738, 9.

in Serjeants Inn Hall, 39, 40.

SPECIAL ASSUMPSITS, 3.

SPECIAL BAILIFF,

appointment of, discharges sheriff, 806, 1019, 1029.

SPECIAL CASES,

origin of, 898.

what and how drawn, id. 899.

turning into special verdict, 898.

not allowed, on trial of indictment at sessions, id. 899.

after decision of court, on rule *nisi* for *mandamus*, 502.

on appeals at Quarter Sessions. 507, 8; 898, 9.

in cases of settlement, 899.

upon convictions for penalties, id.

how drawn, id.

attorney fined for false statement in, id.

when not drawn up, settled or signed, how to proceed, id.

setting down for argument, in K. B., 504.

C. P., id. 505.

arguing, in Exchequer, 508.

amending, 899.

evidence of facts stated in, id.

costs on, 900.

SPECIAL CAUSES,

when set down for argument, in K. B., 504.

in what order argued, id.

SPECIAL DEMURRERS. See tit. *Demurrer*.**SPECIAL JURY.** See tit. *Jury*.

costs of, 792.

SPECIAL PLEADERS,

admission of attorney's clerks, after being pupils of, 69.

stamp duty on certificates of, 77.

SPECIAL PLEAS. See tit. *Pleas and Pleading*.**SPECIAL VERDICT.** See tit. *Verdict*.**SPECIAL WRITS,**

when not to be sued out, 103.

SPECIALTIES,

to king, 1044.

proceedings on, 1045, 6.

from what time lands are bound by, 1051.

STAMP OFFICE, commissioners of, 80, 487, 590.

books of, 802.

STAMPS,

on articles of clerkship, 65, 70.

assignment of, 68.

admission of attorneys, 71, 80.

certificates of attorneys, 75, 7; 79.

special pleaders, draftsmen in equity, and conveyancers, 77.

memorandum of warrant, 96.

commission to take affidavits, 179. (*o.*)

special bail, 249. (*f.*)

formerly required on affidavits, and copies thereof, 496.

when one stamp was sufficient for, or several were required, id.

when necessary to be re-stamped, id.

STAMPS, *continued*.

on law proceedings, repealed by stat. 5 Geo. IV. c. 41, pp. 96, 322, (*m.*) 454, (*e.*) 496.

warrants of attorney, and defeazances, 546, 7.

may be affixed at any time, on payment of penalty, 547.

arbitration bond, 821, 2.

appointment of umpire, not required, 825.

awards, 828, 844.

bond, to secure sum recovered, on granting new trial, 910.

recognizance, statute merchant, or statute staple, 1085.

rule to produce deed to be stamped, 487, 590.

evidence in action on note, improperly stamped, &c. 599.

in what cases court will not set aside award, for improper stamp, 844.

penalties relating to, how recovered, 77, 8; 519, 20.

STANNARIES,

error from court of, in *Cornwall*, 1138.

STATUTE of EQUITY, 1077.

LIMITATIONS. See tit. *Limitation of Actions*.

STATUTES. See Table of *Statutes*, prefixed to this work.

STATUTES MERCHANT, 1083, 4; 1096.

what, *id.*

stamp duty on, 1085.

process on :

capias si laicus, 1086.

writ to extend lands, &c. *id.* 1087.

against clerk, 1043, 1087.

ejectment by conusees of, 1190.

STATUTES STAPLE, 1045, 6; 1084, 1096.

what, *id.*

stamp duty on, 1085:

process on :

against body, lands, and goods, 1087.

liberate, *id.* 1088, 9.

from what time they bind the lands ;

at common law, 1086.

by statute of frauds, *id.*

registering, in *Middlesex* and *Yorkshire*, *id.*

scire facias on, unnecessary, 1096, 7.

ejectment by conusees of, 1190.

STAYING PROCEEDINGS,

generally ;

motion and rule for, when and how made, 488, 515, &c.

on last day of term, 498.

difference between, and setting aside proceedings, 515.

when action is brought without proper authority, 529, 30.

pending another action for same cause, 528.

bill in Chancery, &c. *id.*

reference, 529.

error, 530, &c.

in *debt*, or *scire facias*, on judgment, 531, 2; 1144, 5; 1157, 8.

STAYING PROCEEDINGS, continued.generally, *continued.*pending error, *continued.*in debt or *scire facias* on recognizance of bail, in K. B., 532, 3.C. P., *id.*

Exchequer, 533.

ejectment, 1234.

till security be given for costs, in K. B., 533, 4; &c.

C. P., 534, 5; &c.

security be given for costs, in Exchequer, 535, 537.

payment of costs in former action, 538, 9.

on verdict, after bill found against witnesses for perjury, 907.

execution, in vacation, 511.

in actions upon contracts;

on attorneys' bills, in C. P., 386.

against attorney, neglecting to plead his privilege, 81.

for debt under 5*l.* p. 960. (*g.*)

on bail bond, 300 to 305, 488, 541, 2.

rule for, 302.

affidavit in support of, *id.*

time allowed on, for next proceeding, 301, 500.

on replevin bond, 529.

when debt sued for appears to be under 40*s.* pp. 488, 516, 961.for penalties, by stat. 21 *Jac.* I. c. 4, pp. 517, 18.

for want of affidavit, that offence was committed in proper county, 518.

bribery, *id.*

non-residence, 519.

on stat. 18 *Geo.* II. c. 34, pp. 518, 19.32 *Geo.* II. c. 28, p. 526.

turnpike act, 519.

lottery act, 526.

revenue laws, 519.

relating to customs or excise, *id.*lotteries, *id.* 520.

stamp duties, 520.

by bank acts, 520.

annuity act, 17 *Geo.* III. c. 26, *id.* 521, 2.53 *Geo.* III. c. 141, p. 522, &c.3 *Geo.* IV. c. 92, pp. 525, 6.7 *Geo.* IV. c. 75, p. 526.

against sheriff, for money levied, 529.

after deposit of negotiable instrument, *id.*by provisional assignee of insolvent debtors' court, *id.*

on the merits, 530.

payment of debt and costs, 540, &c.

in *assumpsit*, on bill of exchange or promissory note, &c. 530, 541.

debt, for penalty on game laws, 541.

on single bill, *id.*

bond;

for performance of covenants, *id.*

payment of money, 542, 3.

STAYING PROCEEDINGS, *continued.*

in actions upon contracts, *continued.*

in *debt* on bond, *continued.*

for payment of annuity, interest, or money by instalments, 543, 4.

recognizance, 542, 1099, 1100.

actions for wrongs;

against sheriff for escape, 817.

for libels, 528.

general damages, 544, 5.

in trover, 545.

replevin, 544.

on highway act, 528.

trespass, after recovery in replevin, *id.*

by feme covert, in her husband's name, 529, 30.

against sheriff, 1018.

ejectment; See *tit. Ejectment.*

for non-payment of rent, 1234, 5.

by mortgagee, 1235, 6.

on stat. 1 Geo. IV. c. 87, § 3, pp. 1244, 5; 1253.

on attachment, against sheriff, 316, 17; 529, 1018, 19; 1132, 8.

practice on, 316, 17.

indictment for perjury, 528, 9.

STEAM ENGINE;

action against hundred, for destroying, 122.

STET PROCESSUS, 677, 682, 3; 767, 8; 829, 930.

STIPULATED DAMAGES;

arrest for, 185, 6.

difference between, and penalties, 173, (*o.*) 876, 7, 8.

STOCK;

damages in action for not replacing, 879, 80.

STOCK JOBBING ACT,

cannot be pleaded with *non assumpsit*, 655.

STRIKING out COUNTS; See *tit. Superfluous Counts.*

superfluous, indecent, scandalous, or impertinent matter, 616, 17.

pleas, pleaded without leave of court, in C. P., 658.

special pleadings, and giving general issue. See *tit.*

Issues and Trial.

similiter, and demurring. See same titles.

STRIKING special JURY. See *tit. Jury.*SUBMISSION to Arbitration. See *tit. Arbitration.*SUBPENA; See *tit. Witnesses.*

in Exchequer, 92, 113, 4; 138, 155, 6, 7.

for non-payment of costs in *ejectment*, 489, 90; 991.

on writ of inquiry, 580.

attachment for disobeying, 479, 80; 806, &c.

should be moved for as soon as possible, 807, 8.

calling witness on, at trial, 808, 9.

in *ejectment*, 1238.

SUBSEQUENT DEMAND and REFUSAL;

replication of, to plea of tender, 622.

effect of finding on, for plaintiff, *id.*

SUBSEQUENT PROMISE;

arrest of bankrupt, in insolvent debtor, on, 211, 213.

SUGGESTIONS,

of creditor's electing to proceed under commission of bankrupt, 204.

breaches, on stat. 8 & 9 W. III. c. 11, § 8; pp. 583, &c. 686, &c. 1108.

when necessary, and when not, 585.

form of, id. 686, 7.

practice on, 585.

deaths, &c. 725, 942, 1119, 20.

for awarding *venire* out of common course, 605, 608, 722, &c.

costs, on court of conscience acts, 489, 516, 960, 61, 2.

stat. 43 Geo. III. c. 46, § 3, pp. 982, 3, 4.

double or treble costs, 489, 988.

nonsuit, on *Welch* judicature act, 320, 486, 969, 70.

prohibition amended, after nonsuit, 697.

not verifying in six months, 948.

SUMMONS,

by original; See tit. *Process*.

against members of parliament, 118, 119.

on process in Exchequer, 138.

against members of the House of Commons, 120, 21.

pone or *recordari*, &c. 416, 17.

scire facias, 1123.

of jury. See tit. *Jury*.

writ of, for electing grand assize. See tit. *Grand Assize*.

suffering recovery, 706.

SUMMONS and ORDER,

practice by, 509, 10, 11.

in vacation, id.

when order made on first summons, 511.

three summonses, id.

by judges, on their circuits, 509, 10.

for staying proceedings, on bail-bond, 302, &c. 541, 2.

payment of debt and costs, 540.

taxing bill of costs, in K. B., 335, 6.

C. P., id.

obtaining prisoner's discharge, 368, 9.

time to plead;

unattended, must be discharged before signing judgment,
in C. B. 471.

aliter, in K. B., id.

no waiver of rule to plead, in C. P., 474.

further time, not grantable till previous order drawn up, 471, 599.

for setting aside execution, &c. 511.

in *ejectment*;

to amend declaration, 1206, 7.

notice to appear, 1208.

for particulars of premises, 1331.

breaches of covenant, 600, 1231, 2.

staying execution, on stat. 1 Geo. IV. c. 87, § 3, pp. 1244, 5.

amendments commonly made by, 697.

service of, 72, 470, 500.

SUMMONS AND ORDER, *continued.*

attendance on, 86.

affidavit of, 335, 369, 470.

how far a stay of proceedings, 470, 71.

SUMMONS and SEVERANCE, 129, 1136, 1169.

SUNDAY,

how it affects the beginning or ending of terms, 106.

return days on, *id.*

executing process on, 218, 234, 480, 81; 499.

contracts entered into on, 218. (*c.*)service of declaration in *ejectment* on, 1210.

when accounted a day in legal proceedings, 284, 474, 577, 676.

when not, 477, 676, 903, 1098, 1125.

rule *nisi* for attachment cannot be served on, 218, 481, 499.

inquiry cannot be executed on, 579.

not a day for giving or countermanding notice of trial, in C. P., 757.

scire facias lying in sheriff's office, 1098, 1125.in rule to appear to *scire facias*, in error, 1166.

SUPERFLUOUS COUNTS,

or matter striking out, 488, 616, 17: 1182, 3.

motion for, when made, in C. P., 618.

costs on, 616, 17.

SUPERSEDEAS,

when granted to *certiorari*, 403.

arrest after, 176.

upon outlawry, 134, 139, 144.

to sheriff, &c. or warden;

on bailing prisoner, in vacation, 279.

for not declaring, 343, *id.* (*d.*) 367, 8, 9.

proceeding to judgment, or execution, 361, 2, 3; 367, 8, 9.

rule or order for, in C. P., 369, 70.

cannot be pleaded to action on judgment, 367.

of execution. See tit. *Error*.

SURETIES,

debts proveable by, under commission of bankrupt, 209.

when and how discharged, on bankruptcy of principal, and when not, 206, &c.

remedy for, against principal, *id.*each other, 208, 317. (*h.*)

in equity, 295, 6.

on bond, not discharged by parol agreement to give time to principal, 296.

replevin bond, executed by one only, 223. (*i.*)

discharge of, by giving time to principal, 296.

extent in aid for, 1059, 60.

SURGEONS,

when exempted from serving on juries, 784.

SURPLUSAGE, 451, 661, 920.

SUR-REBUTTERS. See tit. *Pleas and Pleading*.

SUR-REJOINDERS. Same title.

SURRENDER,

in discharge of bail. See tit. *Bail*, and *Prisoners*.

SURVEYS,

of ecclesiastical benefices, &c. 801.
parishes, or manors, 802.

SURVIVORSHIP,

scire facias when necessary on, 1117, &c.

SUSPICION of FELONY,

justification on, 646, 653.

SWEARING JURY. See tit. *Jury*.**T.****TALES.** See tit. *Jury*.**TALESMEN.** Same title.**TAVERN,**

justification under right to enter, 646.

TAXATION,

of costs. See tit. *Attorneys*, and *Costs*.
rule to be present at. See tit. *Costs*.
costs of, 327, 336, 7.

TAXES,

actions relating to:
limitation of, 21.
notice of, 32.
costs in, 988.
notice of action to collectors of, 33.
bail rejected, for not paying arrears of, 268.
must be paid to collector, under execution, &c. 1013, 14; 1016, 17.
levari facias, for arrears of, 1042.

TENANCY in COMMON,

plea of, in trespass to *personal* property, 645.
real property, 646.

TENANTS,

in common, 1, 635, 645, 6.
actual entry, when necessary to be made by, 1198.
ejectment by, 1190.
demise in, how laid, 1205.
confession in, of lease and entry only, 490, 1227.
in tail, or for life, averment of life of, 437, (a.) 442, 3.
discontinuance by, 1194.

TENDER,

of debt, must be made before action brought, 35.
amends, in action for involuntary trespass, 36.
in bank notes, or drafts on bankers, when legal, and when not, 187,
id. (m.)
negating, in affidavit to hold to bail, 187.
no longer necessary, 188.
gold coin, declared to be the only legal tender, 187. (l.)
when it may be made, 146.
plea of, in *assumpsit*, 647.
covenant, 648.
trespass, 36, 646.
against justices, 646. (a.)
officers of excise, or customs, id.

TENDER, continued.

plea of, in trespass, *continued.*

against officers of army, navy, or marines, 646. (*a.*)
commissioners of bankrupt, *id.*

persons acting under 43 Geo. III. c. 99, § 70, *id.*
7 & 8 Geo. IV. c. 29, 80, *id.*

effect of, in *London*, when debt was originally under 5*l.* p. 959.

replication to, of subsequent demand and refusal, 622.

effect of finding on, for plaintiff, *id.*

mode of entitling declaration on, 427.

evidence on, 719.

must be pleaded, in *assumpsit*, 647.

debt on simple contract, 649.

bond, 651.

in what time it must be pleaded, 463.

may be pleaded after imparlance, *id.*

cannot be pleaded with *non assumpsit*, or *non est factum*, &c. 655.

mode of concluding plea of, 662.

paying money into court on, 622.

judgment may be signed for want of 565, 622.

taking money out of court on, 622.

effect of, in action for double value, 627. (*k.*)

nonsuit, after plea of, 868.

admits contract, and facts stated in declaration, 625, 6.

costs on plea of, 971, 2.

TENEMENT,

ejectment lies not for, without other description, 1191.

amendment, by striking out, after verdict, and writ of error, 1239.

TENOR of Record, certifying, 743, &c.

TERM,

what may be moved on last day of, 497, 8, 9; 706.

TERMS, and RETURNS, 105, &c.

issuable, 106.

TERMS for YEARS. See tit. *Leases.*

enlarging, in *ejectment*, 1207.

may be extended or sold, on *elegit*, 1035.

extent, 1052.

TERM'S NOTICE,

to plead, 468.

when necessary, and when not, *id.*

reply, 676.

of trial;

when necessary, and when not, 756.

inquiry, in K. B., 577, 8; 1103. (*c.*)

C. P., *id.*

Exchequer, 577.

may be given in K. B. without previous notice of intention
to proceed, *id.* 578.

rule for judgment, not necessary, after four terms, 903.

must be given before essoin day, 468, 676.

does not extend beyond the term, *id.*

TERRIERS,

ancient, or surveys of parishes or manors, 802.
ecclesiastical or temporal, *id.*

TERTENANTS,

what, 1120.

scire facias against, *id.* 1121.

in ejectment, 1249.

error, to reverse fine or recovery, 1121.

pleas in, 640, 1121, 1128.

TESTATUM WRITS. See tit. *Capias ad satisfaciendum, Fieri facias,*
and *Process.*

TESTE and RETURN,

of attachment of privilege, 820.

original writ, 107, 8.

process by original, 107, 129, 80.

distringas, in C. P., 111, 12.

against peers, &c. 118.

to proceed to outlawry, 129.

writ of *exigi facias*, 132.

proclamation, 133.

by bill, against members, &c. 120, 21.

bill of *Middlesex*, or *latitat*, &c. 151, &c.

capias quare clausum fregit, 153.

process in Exchequer, 157.

writ of covenant, for levying fine, 699.

entry, for suffering recovery, *id.*

summons, 706.

jury process, 781.

feri facias, 998, 9.

alias, and *pluries*, &c. 1023.

capias ad satisfaciendum, 1027, 9.

to charge bail, 1098.

commission, to find simple contract debts for the king, 1047.

of extent in chief, 1048, 9.

writ of *diem clausit extremum*, 1057, 8.

scire facias, 1122, 3; 1125, 1165, 6.

error;

writ of, 1141, 1143, 4.

execution in, 1186.

certiorari, 1170.

THANET, Isle of;

court of requests for, 957.

TIMBER;

justification under right of entry to cut down, 646.

TIME for Pleading. See tit. *Pleas and Pleading.*

TIPSTAFFS, 53, 4; 59.

fee of, for conducting prisoner from judges' chambers to King's Bench,

TITHES;

849.

lease of, how stated in pleading, 442. (*b.*)

amendment of recovery of, 704.

action for not setting out;

declaration in, must state that they have been yielded and paid, &c.

920.

TITHES, continued.

action for not setting out, *continued.*

bringing money into court in, admission of plaintiff's title, 625.

writ of inquiry in, 573.

amendment of inquisition on, 902. (*d.*)

absence of special jury in, a sufficient reason for declining to try on
peremptory undertaking, 769.

treble value of, must be found by jury, 894.

defect in finding single value only, not amendable, 902.

costs in, 946.

bail in error in, 1152.

justification under right of entry, to fetch away, 646.

prohibition for, in ecclesiastical court, 948.

action for retention of, within stat. 39 & 40 Geo. III. c. civ. p. 955.

ejectment for, 1192.

TITLE,

of affidavits, 180, 81; 492, 3.

ambiguity in, 492.

summons to deliver attorney's bill, 335.

declaration, 425, &c. 720.

in *ejectment*, 1204.

amendment of, in penal action, refused, 711, 12.

transcript, allowed after error, 714, 15.

in *scire facias*, 1128.

rule to plead several matters, in C. P., 658.

issue, 719, 722.

to real property;

when specially shown in pleading, 442, &c.

how set forth, *id.*

pleas in bar under, 645.

less than freehold, plea of, *id.*

may be given in evidence, under general issue, in trespass, 652.

conveyance of, when necessary to be shown, in award, 835.

defectively set forth, aided by verdict, 919.

aliter, of defective title, *id.*

necessary to support *ejectment*, 1189, 1193, 4.

TOLL;

disturbance of, 444. (*b.*)

TOLL GATE KEEPER;

form of notice of action against, 33.

TORTS, 4, 5; 171, 2; 896, (b.) 1183; and see tit. *Wrongs.***TOWER HAMLETS;**

court of requests for, 957.

TOWER of LONDON;

fort major of, not privileged from arrest, 190.

arrest in, not allowed, without leave from governor, 219.

TRADERS;

having privilege of parliament, proceedings against, on stat. 6 Geo. IV.
c. 16, pp. 116, &c.

acts of bankruptcy by, 116, 17.

real estates of, assets in equity for payment of debts, 937.

TRANSCRIPT, 1158, &c.

in what cases amendable, 714, 15.

diminution contrary to, not allowed, 1167. (*d.*)

TRANSCRIPT MONEY, 1160.

TRAVERSE; See tit. *Pleas and Pleading*.

of office. See tit. *Extents and Offices*.

TREASON;

persons attainted of, disqualified from serving on juries, 788.

TREASURY;

clerk of, in K. B., 43.

C. P., 45, 52.

inner and upper clerk of, 43.

outer, clerk of, *id.*

commissioners of, authorized to purchase offices of sealer of writs, and
custos brevium, in C. P. 54.

reference to solicitor of, on outlawry, 138.

report thereon, *id.*

TREASURY RULES, in C. P., 482, &c. 485, (*m.*) 485, 6, (*y.*) 498.

TREBLE COSTS. See tit. *Costs*.

TREBLE DAMAGES. See tit. *Damages*.

TRESPASS,

action of;

when it lies:

in general, 5.

for arresting defendant by wrong name, 447.

by feme covert, in her husband's name, 529, 30.

sheriff, for goods taken in execution, 1005, 1013.

when not:

against constables, &c. without demanding copy of warrant, 34.

by sheriff. See tit. *Actions*, and *Sheriff*.

against sheriff. Same titles.

after setting aside judgment and execution, 568, 1032.

limitation of, 15.

arrest in, not allowed without special order, 172.

declaration in, 457.

venue, 430, 31.

beginning of, 433.

joining different counts, or causes of action, 4, (*d.*) 10, &c.

what damages may be laid in, 441.

to personal property, 444.

staying proceedings in, 528, 9, 30; 544.

after recovery in *replevin*, 528.

pleas in;

to persons, 645.

personal property, *id.*

real property, *id.* 646.

of justification under *erroneous* and *irregular* judgment, 1032.

returnable process, without stating return
of it, *id.* 1033.

when to be delivered, 671.

issues in, on *son assault*, by whom made up, 717.

evidence in, 859.

TRESPASS, continued.

action of, *continued.*

evidence in, *continued.*

of writ being sued out in time, 132, 8.

by bankrupt, against his assignees, 670.

on general issue, and plea of clandestine removal of goods, to avoid distress, 859.

verdict in, on several counts, 895.

damages in. See tit. *Damages.*

judgment in, 931.

of *non pros*, by one of two defendants, who has pleaded separately, 676, 7; 727, 8.

costs in. See tit. *Costs.*

on several counts, 971, 973.

double pleading, 659, &c.

execution in, 993.

TRIAL,

by the record. See tit. *Nul tiel Record.*

by the country:

at bar, 747, 751, 1080.

history of, 747.

in what cases granted, and in what not, id. 748, &c.

London, 749.

county palatine, id.

motion for, when made, 487, 489, 749.

upon what terms granted, 749, 50.

in *ejectment*, 1237.

notice of trial, in K. B., 750.

to prothonotary, or secondary, in C. P., id.

entering cause, id.

copies of issue, id.

jury special, id. 787, 8.

of what county, 750.

notice to, id. 751.

process, id.

tales, 751.

duty of officers of court on, in K. B., id.

secondaries, in C. P., id.

new trial after, id. 905.

costs of, when plaintiff is poor, 749, 50.

at *nisi prius*, 747, 751, 2, 8; 1081.

of several issues in same cause, 717.

writ of right, 747.

ejectment, 1237.

on stat. 1 Geo. IV. c. 87, § 2, pp. 1244, 5.

in what county, 723, 4; 751.

when impartial trial cannot be had, 487, 489, 605, 6; 723, 751.

when venue is laid in county of city or town corporate, 724, 5.

in *Middlesex*, 751, 2.

at any time during vacation, 752.

in Exchequer, id. (b.)

London, 752, 3.

TRIAL, continued.

at *nisi prius*, continued.

in *London*, continued.

and *Westminster*, of several causes, before different judges,
at same time, 752, 8.

days appointed for, in K. B. and C. P. 753.

Exchequer, id.

of issues directed by court of Chancery, id.

from Exchequer, id.

losing, what is meant by, and effect of, 299, 300, 303, 4; 316, 17.

in country causes, 303. (l.)

notice of, 753, &c. 1237.

where given, 97.

to whom, id. 753, 4.

attorney or agent, in country causes, id.

entry and service of, in Exchequer, 754.

upon paper book, when it shall serve for general issue, in K. B., id.

back of plaintiff's pleading, in C. P., id.

delivering replication, &c. in Exchequer, id.

in what manner given;

when there are several defendants, &c. id.

time allowed for;

in *London* and *Middlesex*, 304, 754, 5.

for adjournment day, 755.

country causes, id. 756.

how reckoned, 755. (e.)

when defendant changes his residence, 755.

resides abroad, id.

on old issue, 756.

term's notice. See tit. *Term's Notice*.

in *ejectment*, 1236.

on extents, 1080.

short notice, 472, 756, 7.

what, in town causes, 472, 757.

country causes, in K. B., 472, 756, 7.

C. P., 472, 757.

when defendant is not obliged to take it, 757.

countermand of, in K. B., 97, 757.

C. P., id.

Exchequer, 757.

continuance, 757, 8.

of void notice, may operate as a new one, in C. P., 754.

new notice, when necessary, and when not, 757, 8; 917.

costs for not proceeding to, 484, 5; 758, 9, 60.

rule for, in C. P., 484.

in *ejectment*, 1236.

attachment for non-payment of, 1242.

by *proviso*;

when it may be had:

in civil cases, in K. B., 760, 61, 1236.

C. P., 761.

on feigned issues, 760. (i.)

criminal cases, 761.

TRIAL, *continued.*by the country, at *nisi prius*, *continued.*by *proviso*, *continued.*

when not:

on information, in Exchequer, *id.*rule for, in K. B., *id.*not necessary, in C. P., *id.*

notice of, 756, 761.

jury process on, 781, 1236.

nonsuit on, 762.

in error, 1175.

putting off, for absence of witnesses, 770, &c. 1236.

other causes, 770, 71; 773, 4; 811.

not allowed, for plaintiff, 771.

after sham plea, &c. 770.

plea in abatement, unless strong case be
made out, *id.*pending petition against commission of bank-
rupt, 774.suit in spiritual court, *id.*

of informations, in Exchequer, 771.

in *scire facias*, on extent, 1092. (*m.*)

motion for, when and how made, in K. B., 488, 771, 2.

C. P., 772.

at *nisi prius*, *id.*when not allowed, in C. P.,
id. 819.

notice of, 772.

affidavit for, *id.* 773.

when money must be brought into court on, 770, 773.

entering cause for;

in King's Bench:

in *London* and *Middlesex*, 816.

by special jury, 817.

at the assizes, 818.

Common Pleas:

in *London* and *Middlesex*, 817.by special jury, *id.*

at the assizes, 818.

Exchequer, 817.

order of, 818.

of cause out of its turn, *id.* 819, 906.

special, as common jury cause, 795.

indictments for misdemeanors, 819.

motion to regulate, must be made at *nisi prius*, 795, 818.

going into new case at, 859.

acquittal of one of several defendants at, 861.

saving point at, 900.

effect of, *id.* 904, 910.*remanets*, 818.

special jury causes, 816, 17.

cannot be tried in term, 794, 5.

TRIAL, continued.

by the country, at *nisi prius*, *continued.*

special jury causes, *continued.*

of persons, for offences in India, 813, 14. (*g.*)

in wrong county, when cured, and when not, 925, 6.

on extents, 1080.

of issues of fact in error, 1175.

TRIERS, 853.**TROVER,**

action, 5, 10, 337, 44, 1011.

for books of account, 5. (*b.*)

limitation of, 15, 21.

declaration in, 444.

variance between, and evidence, when not material, 434, 5. (*f.*)

arrest in, 171, 2; 187.

affidavit to hold to bail in, 171, 186.

staying proceedings, 545.

inspection of lists of sales in, 592.

pleas in, 651.

evidence in, 803.

interest on bills allowed in, on error in Exchequer Chamber, 1183.

damages in, 873.

costs in, 945, 963, 971, 979, 986.

maintainable by sheriff, for goods taken in execution, 1013.

against sheriff, for selling goods, after notice of act of
bankruptcy, 1009.

TRUSTEES,

of friendly societies, actions by, 8.

and commissioners of turnpike roads, actions by, 8, 9.

set-off in actions by or against, 666.

not personally liable, on submission to arbitration, 886.

judgments and executions affecting, or not, 935, 1010, 1035, 6.

TRUST PROPERTY,

not extendible, on *capias utlagatum*, 137. (*e.*)

TRUSTS;

ecclesiastical court has no jurisdiction over, 373. (*c.*)

TURBARY;

justification under right of common of, 646.

TURNPIKE ACTS;

limitation of actions, for things done in pursuance of, 21.

staying proceedings on, 519.

bringing money into court under, 621. (*h.*)

TURNPIKE ROADS;

actions by trustees and commissioners of, 8, 9.

V.**VACANT POSSESSION;**

ejectment on, 1198, 1201, 2; 1204.

method of proceeding on, 1201, 2; and see tit. *Ejectment.*

VACATION;

sitting of judges in, 39, 40.

serjeant may be called in, 42.

VACATION, *continued*.

- putting in and justifying bail in, 278, 9.
- rules drawn up in, 486.

VARIANCE,

- of bail bond, from writ, 225, 6.
- writ, from affidavit to hold to bail, 188, 294.
- plaint, no objection to removal of cause by *pone*, or *recordari*, &c. 416.
- declaration from process, when material, and when not ;
 - respecting the parties, 446, 7.
 - christian and surnames, 433, 447, 8.
 - character in which they sue, or are sued, 450.
 - cause of action, 294, 450, 51.
 - venue, 154, 294, 432.
 - from evidence, 434, 5. (*f.*)
 - and pleadings, from deed or record, &c. 225, 229, 434, 5; 589, 650, 1127.
- may be rectified, by stat. 9 Geo. IV. c. 15, 697, 712, 900.
- record of *nisi prius*, from issue or paper book, 906.
- writ of error, from record, 1137.
- in what cases amendable, 1161, 2.

plea in abatement of, 450, 51; 636.

VENDITIONI EXPONAS;

- on *capias utlagatum*, 137.
- feri facias*, 1018, 1020, 21, 2.
- extent, 1068, 1072.
- returns to, 1020, 21.
- amendment of, 999, 1020, 21.

VENIRE FACIAS; See tit. *Jury Process*.

- in Exchequer ;
- ad respondendum*, 92, 155.
- of privilege, 92.

ad triandum ;

- award of; See tit. *Issue*.
- in Exchequer, 777.

de novo, 904, 922, 8.

- at common law, 779.
- by stat. 7 & 8 W. III. c. 32, § 1, pp. 780, 922, 3.
- not grantable in criminal cases, 780. (*b.*)
- on bill of exceptions, 865, 923.
- demurrer to evidence, 866, 923.
- for disallowing challenge, 854, 906.
- erroneous or defective finding ;
 - in action of waste, 575.
 - of general damages, 894, 922.
 - on special verdict, 897, 922.
- in other cases, 574, 5; 921, 2, 3.
- by court of error, 923.
- costs on, *id.*

tam ad triandum, quàm ad inquirendum, 721, 2; 894, 5.

VENUE, 425.

- local or transitory, 427, 8.

VENUE, *continued*.

- with regard to matters arising abroad, 428, 9; 603, 611, 12.
- on foreign bill of exchange, 429.
- in action on lease, for rent, &c. *id.*
- debt*, for use and occupation, *id.*
- when local, by act of parliament, *id.* 430, 31.
- in actions by or against attorneys, &c. 80, 602, 3; 606, 7.
- or informations, on penal statutes, 429, 30, 31.
- against justices, &c. 430, 31.
- officers of excise, or customs, 431.
- army, navy, or marines, *id.*
- persons exercising public employments, *id.*
- on 1 & 2 Ph. & M. c. 12, p. 430.
- 3 Geo. II. c. 26, *id.*
- 43 Geo. III. c. 99, p. 431.
- 7 & 8 Geo. IV. c. 29, § 75, and c. 30, § 41, *id.*
- for non-residence, 430.
- usury, *id.*
- by original, 432.
- in Common Pleas, *id.*
- in margin will help, but not hurt, *id.*
- when necessary, or not, to be alleged in pleading, 428, (b.) 636, 1115, 1175.
- how stated, 432.
- defect of, when aided, 924.
- on removal of cause, by *habeas corpus*, 413.
- reversal of outlawry, 423.
- in *ejectment*, 1205.
- scire facias*, 1122.
- history of changing, 601, 2.
- in what cases it may be changed;
 - in action against several defendants, 602, 607.
 - by plaintiff, 602, 3.
 - defendant:
 - generally, 603.
 - in action for assault, *id.*
 - crim. con., 604.
 - libels, 605.
 - overturning plaintiff, in stage coach, 604.
 - penal action, *id.*
 - on special ground, 606. (*f.*)
 - motion for, 613.
 - affidavit in support of, *id.*
 - when made, *id.* 614.
 - when impartial trial cannot be had, 605, 6.
 - by consent, 606.
 - into *Wales*, 607.
 - county palatine, 105, 607.
 - some of defendants only, 602.
 - when view is proper to be had, 604.
- in what cases it cannot be changed;
 - when cause of action arises out-of the realm, 603, 612.

VENUE, *continued.*

- in what cases it cannot be changed, *continued.*
 - when cause of action arises in two counties, 603, 4.
 - in debt on bond, or other specialty, id.
 - covenant, on lease, 604.
 - assumpsit*, on award, or charter party, 603, 4.
 - action on promissory note, or bill of exchange, 604.
 - for *scandalum magnatum*, 605.
 - libel, published in several counties, id.
 - escape, or false return, id.
 - infringing patent, 603.
 - against carrier, or lighterman, 605.
 - scire facias*, to repeal patent, 603.
- after plea in abatement, 608.
- when impartial trial cannot be had, 605, 6.
- by reason of plaintiff's privilege, 606, 7.
- into city of *Bristol*, &c. previous to *Lent Assizes*, 606.
- county palatine, 607.
- Berwick upon Tweed*, 429, 607, 8.

changing ;

in King's Bench :

- motion for, 484, 486.
- when made, 608, 9.
- affidavit in support of, 609.
- rule for, 484, 609.
- absolute in first instance, 609, 10.
- drawn up, on reading declaration, 609.
- motion for discharging, 610.
- when made, id.

Common Pleas :

- motion for, 487, 8 ; 608, 9.
- when made, 498, 9 ; 608, 9.
- cannot in general be made on last day of term, id.
- affidavit in support of, 609.
- rule for, 488, 9.
- to show cause, id. 609, 611.
- making absolute, 611.
- discharging, id. 612.
- grounds for, 611.
- on undertaking to give material evidence, id.
- in the alternative, id.
- when dispensed with, 609.
- what evidence is material, 612, 13.

Exchequer, 601.

- discharging rule for, 612.
- vacation, 486, 609, 10.
- judge's order for, id.
- bringing back, in King's Bench ;
 - motion for, 610, 11.
 - when made, 487, 610.
 - grounds of, 610, 11.
 - for irregularity, 487, 610, 11.

VENUE, continued.changing, *continued.*bringing back, in King's Bench, for irregularity, *continued.*

when affidavit for changing it is defective, 610.

when regularly changed, id. 611.

on undertaking to give material evidence, 611.

when cause of action arises in different counties,
id. 612.

abroad, 612.

what evidence is material, id. 613.

when laid in county of city or town corporate, 728, 4.

want of right one cured, after verdict, 925, 6.

VERDICTS,

general, 869.

for plaintiff or defendant, wholly or in part, id.

defendant on plea of non-joinder in abatement, 686.

entering on particular counts, 869, (*d.*) 961.

when plaintiff must elect on what count to enter it, 869.

in *replevin*, id.

leave to enter, on nonsuit, in undefended cause, 868, 904.

special, 896, 7.

origin of, id.

how drawn, 897, 8; 1238, 9.

construed, 897.

nothing in general to be intended on, id.

collateral matter supplied in, id.

what the court will doubt on, and what not, id.

drawing conclusions from, id.

when defective, consequences of, id. 922.

moving for judgment, and arguing, in K. B., 898.

C. P., id.

copies of, for judges, in C. P., id.

rule for delivery of *postea* on, 486.

on point reserved, 900, 904, 910.

trial by *proviso*, 868.

extents, 1081.

motion to set aside, 488.

void, and set aside, on what grounds, 641, 904, 926.

in *ejectment*, 1238, 9.

on stat. 1 Geo. IV. c. 87, § 2, p. 1239.

amendment of, 713, 897, 901, 919.

in *trespass*, on several counts, 895.

contrary or concurring, new trials after, 905.

to stand as security, on new trial for excessive damages, 909.

what defects are aided by, at common law, 451, 919, &c.

will aid title defectively set out, but not defective title, 919, 20.

death of parties after, when aided, 983, 4.

costs on setting aside, 914, &c.

after verdict for defendant, 977, 8; 980, 81.

VICE CHANCELLOR,salary of, 39. (*g.*)

T

VIEW,

- in actions of waste, &c. 795.
- when and how formerly granted, 796.
- in criminal case, id.
- in what cases and how grantable, by stat. 6 Geo. IV. c. 50, § 23, id. 797.
- motion for, in K. B., and when of course, or not, 485, 510, 797.
- C. P., 510, 797.
- Exchequer, 798.
- rule for, in K. B., 485, id. (f.) 510, 797, 8.
- C. P., 510, 797, 8.
- Exchequer, 798. (d.)
- proceedings on, 798.
- judge's order for, in vacation, 797, 8.
- shewers, 798.
- evidence on, id.
- changing venue, on account of, 604.
- no ground for allowing costs, in *trespass*, 965.

VIEWERS,

- in case of appearance, to be first sworn on jury, 856.
 - when two sets of jurors, judge to appoint trial during attendance of, id.
- VOIRE DIRE, 853.

U.

UMPIRAGE, 827, 8.

UMPIRE, 825, 6.

UNDER-SHERIFF,

- cannot discharge person arrested, when attending execution of inquiry, 198.
- his duty, 229, &c.
- cannot act as attorney, 84, but see 906.
- punishable for misbehaviour, 58, 9.
- rule for attachment against, on death of sheriff, during his office, 314.

UNDERTAKING,

- to sign bail bond, not within statute of frauds, 227.
- appear, 241. (b.)
- generally, does not oblige attorney to put in special bail, 241.
- put in bail, &c. 98, 224, 227.
- pay costs, on taxation, 335.
- by third person, must be in writing, 325.
- attorney binding, though his client die, 540.
- costs, &c. on setting aside regular judgment, 567.
- money, on compounding *qui tam* action, 557, 8.
- debt of third person, delivering copy of, 591.
- give material evidence, 610, &c.
- when dispensed with, in C. P., 611, 12.
- what evidence is material on, 612, 13.
- judgment of preceding term in ejectment, on stat. 1 Geo. IV. c. 87, § 1, p. 1221, 2.
- proceed to trial, peremptorily. See tit. *Judgment as in case of Non-suit*.
- not to assign for error the want of original, 105, 607, 8.

UNDERWOOD,

ejectment lies for, 1190.

UNDERWRITERS. See tit. *Policy of Insurance*.

UNICA TAXATIO, 722.

UNIVERSITIES,

persons taking degrees in, becoming attorneys, 63.

claim of conusance by, 631, &c.

USE and OCCUPATION,

affidavit of debt for, 183.

debt for, not local, 429.

writ of inquiry necessary in, 573.

description of premises, in declaration for, 435.

effect of judgment by default, in action for, 581.

action for, excepted out of *London* court of conscience act, 958.

USURY,

will avoid warrant of attorney, 547.

terms of setting aside judgment for, id.

statute of, plea of, 643.

when pleaded, or given in evidence, 650, 51.

action for,

venue in, 430.

amendment of declaration in, 711.

judgment as in case of nonsuit in, 766.

W.

WAGER of LAW, 649.

still exists, though disused, id.

number of compurgators on, id.

WAGES;

affidavit of debt for, 183.

of labourers;

distress for, 528. (*f.*)

WAIVER, of Irregularity. See tit. *Irregularity*.

Women, 131, 135, 143.

WAIVING, or Withdrawing, general issue. See tits. *Demurrers, Ex-*
tents, and Pleas & Pleading.

judgments by default. See tit. *Judgments.*

WALES; See tit. *Great Sessions.*

process into, 151.

arrest in, 171.

stamp duty, formerly required on affidavits in, 496.

now repealed, id.

venue, 320, 969, 70.

changing to, 607.

removal of causes from. See tit. *Great Sessions.*

ejectment in, on stat. 1 Geo. IV. c. 87, pp. 1209, 1221, 2.

not to be removed, without order of court, for trial in *English* county,
pleading to the jurisdiction, 630. 899.

award of jury process, 724, 5.

next *English* county to *South Wales*, 751.

trial, id.

inquiry into, 573.

WALES, continued.

- jurors in;
 - qualification of, 782, 787. See tit. *Jury*.
 - mode of returning, and impanelling. *Same title*.
- witnesses, bringing up when in custody, 810.
- nonsuit, on *Welch* judicature act, 320, 486, 969, 70.
 - suggestion for, *id*.
- judgments, 938. (*f*.)
- costs, 952, 3; 963.
 - taxing, 329.
 - on *Welch* judicature act, 151, 320, 486, 969, 70.
- execution, 401, 995, 1022.
- error from, 1022, 1188.
 - bail in, 1149, 50.
 - alleging diminution in, 1167.
- statute of jeofails extended to, 298.

WARDEN of Fleet Prison;

- office of, 52, 3, 4.
- officers appointed by, 58.
- bill against, could not formerly have been filed in vacation, 324.
 - beginning of, *id*. (*c*.)
- proceedings against for escape, on stat. 59 Geo. III. c. 64, pp. 324, 5.
- refusing to show prisoner, deemed an escape, 366.
 - give note of his being a prisoner or not, *id*. 367.

WARRANT,

- of justices;
 - demand of perusal and copy of, 33, &c.
 - evidence of, 593.
- to arrest;
 - when and how made out, filled up, and executed, 217.
 - indorsement on, of time of signing, 158.
 - attorney's name, 159, 60.
 - for sitting of judges in bank, out of term, 39, 40.
 - writ of error in parliament, 1141.

WARRANT of ATTORNEY,

- to prosecute or defend;
 - in writing, or by *parol*, 93.
 - by corporation, 92. (*p*.)
 - effect of appearance, without, 93.
 - how long it continues in force, *id*. 94, 5.
 - of filing and entering it, 95.
 - rules respecting it, in C. P., *id*. 96.
 - memorandum* or minute of, 96, 149, 238, 240, 251.
 - when formerly necessary to be filed, 96.
 - effect of not filing it, 339.
 - not necessary to be filed, on changing venue, 94.
 - no longer necessary, 96.
 - on proceeding to outlawry, in C. P., 132.
 - need not be paid for, on delivering declaration, in K. B., 95, 452.
 - how much was formerly paid for it, in C. P., 452.
 - made out, on entering issue, in C. P., 734.

WARRANT OF ATTORNEY, *continued.*

to prosecute or defend, *continued.*

must be filed, on signing all judgments, except on *postea*s, or writs of inquiry, and *non-prosses*, in C. P., 569.

for suffering recovery, not amendable, 702, 3.

new one required, in *scire facias*, 94, 1990.

error, 94, 1141.

entry of, on issue roll, in K. B., 95, 734.

distinct rolls, in C. P., 95.

want of, or misprision in, aided after verdict, 923, 4; 1174.

certiorari for, 1110, 1172.

how directed, 1170. (*i.*)

proceedings on, 1170, 71.

claim conusance, 633.

confess judgment;

what, 545, 6.

when considered as a continuing security, 546.

need not be by deed, *id.*

does not require attesting witness, *id.*

not waived, by subsequent assignment of goods, 547, 8.

defeazance on, 545, 6.

must be written on same paper or parchment, before filing, *id.*
555, 6.

need not notice collateral securities, 546.

state consideration, *id.*

consequence of not inserting it, *id.*

stamp duty on, *id.* 547.

may be stamped at any time, on payment of penalty, 547.

in what cases ordered to be delivered up, 547, 8; 551.

given by infant, 548.

and another person, *id.*

executor, *id.* 552.

one of several partners, 548.

feme covert, 194, 548.

prisoner, 548, 9.

in what cases attorney's presence is necessary, and in
what not, 548, &c.

insolvent debtor, to be filed with clerk of dockets, &c.,
555, 561.

when not to be acted upon, against goods of insolvent, 396.

for amount of debts in schedule, on insolvent act, 395.

proceedings on, 396.

cancelling, when debts are satisfied, *id.* (*a.*)

for corrupt and usurious consideration, 547.

gaming debt, 548.

must be read over to party executing it, in C. P., 549.

not revocable by party, 550, 51.

when countermanded by death, 551.

marriage, *id.* 552.

must be strictly pursued, 552.

delivered to, and filed with clerk of the dockets, &c. on
signing judgment, 555.

WARRANT OF ATTORNEY, *continued.*

to confess judgment, *continued.*

or copy, and affidavit, &c. must be filed in twenty-one days, with clerk of dockets, in K. B., 555.

consequence of not filing them, in case of bankruptcy or insolvency, id.

entry of satisfaction on, id. 556, 1041. (*d.*)

judgment on, 556.

how signed, 555.

when and how entered, in K. B., 485, 6; (*y.*) 552, 3.

C. P., 485, 6; (*y.*) 553.

after death of either party, 932, 3.

when not allowed to be entered, 548.

not within stat. 8 & 9 W. III. c. 11, § 8, pp. 585, 1108.

against insolvent debtor, 1112.

motion for, when necessary, and how made, 485, 552, 3.

rule for, on old warrant of attorney, in C. P., 484, 5, 6; (*y.*) 486.

affidavit for, 553, 4, 5.

how entitled, 493, 553.

before whom sworn, 553, 4.

at what time defendant should appear to have been alive, in K. B., 554.

in C. P., id. 555.

setting aside, 547.

for debt and costs, exceeding 20*l.* takes case out of stat. 48 Geo. III. c. 123, 387, 8.

charge for, in attorney's bill, subjects it to taxation, 328.

to acknowledge satisfaction, 1041.

WARRANTY,

action on, 3, 10. (*a.*)

WARREN,

justification under right of, 646.

WASTE,

justification under right of entry to view, id.

damages in, 878.

costs in, 946.

security not to commit, on stat. 1 Geo. IV. c. 87, pp. 1245, 1253.

action of;

damages in, 870.

costs in, 946.

venire de novo awarded in, for defective finding of jury, 575.

WATER COURSE,

damages in action for diverting, 885.

ejectment does not lie for, 1191.

WAY,

action for not repairing, 445.

right of, how stated in pleading, 444. (*b.*)

justification under, 646.

WAY-GOING CROP,

justification under right of entry to take, id.

WELCH JUDICATURE ACT, 969, 70.**WEST INDIA DOCK COMPANY,**

actions by, or against, 8.

WEST INDIA DOCK COMPANY, continued.

limitation of action against, 20.

notice of action to, 31, 2.

WESTMINSTER,

court of requests for, 957, &c.

WILFUL TRESPASSES,

costs in actions for, 968.

WITHDRAWING JUROR. See tit. Jury.

costs on, 862.

after paying money into court, 627, 862.

no bar to future action, 862.

WITHDRAWING PLEAS. See tit. Pleas and Pleading.

on confessing action, 559.

WITHDRAWING RECORD, 851.

when not a cause for judgment as in case of nonsuit, 763.

WITNESSES,

privilege of, from arrest, 195, 6, 7, 8; 807.

when attending arbitrators, 197.

commissioners of bankrupt, id. 198.

courts martial, 198.

not allowed, as against bill, on return from giving evidence,
197.

after absconding from their bail, id.

on execution of inquiry, in action against hundredors, 127.

on *capias ultagatum*, 137.

christian names of, must be inserted in memorial of annuity, 526.

to execution of warrants of attorney, affidavits by, 552, 3, 4.

residence of considered, in changing venue, 605.

absence of, good cause against judgment as in case of nonsuit, 766, 768.

putting off trial for, 770, 71.

arrest of, in coming to attend trial, 196, 7, 8.

bringing before commissioners of bankrupt, when in custody, 202, 809.(g.)

expenses of, when subpoena'd, 806, 7.

in what cases allowed, and in what not, 814.

summoned before commissioners of bankrupt, 807.

quære, if allowed on discontinuance, after countermand
of notice of trial, 680, id. (b.)

coming from abroad, 814.

mandamus for examining, in *India*, 813, 14.

how sworn, on arbitration, 825.

must not be interested in event of suit, 799.

objections to credit or competency of, id. 907.

being bail, how restored to competency, 258, 9.

mode of procuring their attendance;

by *subpœna ad testificandum*, 805, &c. 1236.

on trial, id.

inquiry, 137, 580.

extent, 1050.

what, and how many may be put in one writ, and at what time,
805.

præcipe for, id.

resealing, and serving, id. 806.

WITNESSES, *continued.*

mode of procuring their attendance, *continued.*

by *subpœna ad testificandum*, *continued.*

with a *duces tecum*, 806.

regular process of the courts, *id.*

of compulsory obligation, *id.*

what must be produced on, *id.*

service of copy of *subpœna*, and payment of expenses, *id.* 807.

on officer of court, *id.*

to attend commissioners of bankrupt, 807.

when residing out of jurisdiction of Great Sessions, 806. (*f.*)

to give evidence, in criminal prosecutions, 806, (*k.*) 810. (*a.*)

by *habeas corpus ad testificandum*, 809.

when it lies, or not, *id.*

generally, *id.*

on stat. 43 Geo. III. c. 140, *id.*

44 Geo. III. c. 102, *id.* 810.

3 Geo. IV. c. 13, § 28, p. 807.

mode of obtaining, and executing writ, 809, 10.

cross-examination of, 804.

on interrogatories, 811, 12.

examination of, on arbitration, 843, 4.

proceedings against, for not attending, 808, 9.

by attachment, *id.*

when summoned on courts martial, 807.

in C. P., 479, 808, 9.

against attorney, or peer, 807.

affidavit for, *id.*

special action on the case, *id.*

action on stat. 5 Eliz. c. 9, § 12, 807.

guilty of contempt in not attending, though cause not called on for trial, 808.

not called on *subpœna*, *id.*

when and how examined on interrogatories, 485, 810, &c.

before judge in town, 810.

commissioners in the country, or abroad, 770, 71; 810, &c.

rule or order for examining them, 485. (*g.*)

when and how obtained, 810, 11.

can only be by consent, 485, (*g.*) 810, 11.

proceedings thereon, 811, 12.

depositions on, 810, &c.

evidence of, 811, 12.

translating into *English*, 811.

suppressing, when illegally or irregularly taken, 812.

costs of examination, 813.

for co-defendants, on acquittal, 861.

after judgment by default, *id.*

falsifying testimony of, by affidavit, 907.

rejected, when no ground for new trial, *id.*

costs of, 680, 760, 806, 7; 811, (*c.*) 814, 15.

compensation for loss of time of, 815.

WITNESSES, *continued*.

expense of experiments, plans, and searches by, 815.

WOODLAND,

ejectment lies for, 1190.

WORDS,

action for, 4.

limitation of, 15.

declaration in, 441, 2; 445.

pleas in, 645, 651, 2.

evidence in, 582, 651, 2; 682.

damages in, 882, 3.

verdict and judgment in, 1236, 7.

arrest of judgment in, 922.

costs in, 962, 969, 70.

WORK AND LABOUR,

action for;

affidavit of debt in, 183, 4.

striking out counts in, 617.

interest not recoverable in, 871, 2.

WRECK,

justification by lord of manor, to take, 646.

WRITS,

original;

pone, recordari facias loquelam and *accedas ad curiam*, 397, 414,
15, 16.

of entry. See tit. *Entry*.

de executione judicii, 1159, 60.

amendment of, 109, 713.

mesne: See tit. *Process*.

direction of. See same title.

ac etiam in. See tit. *Ac etiam*.

teste and return of. See tit. *Teste and Return*.

signer of, 43, 4.

not to be sealed in blank, 54.

indorsements on, 158, 9, 60.

costs of, deposit to answer, 227, &c.

entry of on roll, in K. B., 162.

C. P., *id*.

returns to. See tit. *Returns*.

amendment of, 130, 148, 150, 154, 5; 161, 448, 712.

quashing, 160, 61; 167, 176, 7; 488.

motion for, 488.

pleas in abatement to. See tit. *Pleas and Pleading*.

of inquiry. See tit. *Inquiry*.

final: See tit. *Process*.

amendment of, 712, 13, 14; 999, 1020, 1028.

indorsement on, by *custos brevium*, 308.

for removal of causes from inferior courts:

certiorari, 397, &c.

habeas corpus, 397, 404, &c.

sealing bill of exceptions, 864.

WRITS, continued.judicial, *continued.*

to confess or deny seal, 865.

of *scire facias*. See tit. *Scire Facias*.error: See tit. *Error*.*certiorari* in. See tit. *Certiorari*.**WRONGS,**

action for, 4, 5.

by and against whom brought, 9.

limitation of, 15.

immediate, or consequential, 440, 41.

how stated in declaration. See tit. *Declaration*.**Y.****YARMOUTH;**

court of requests for, 957.

YEAR,for *scire facias*, how computed, 1103.





